

Nullification of Arbitral Award Under UAE Law

**إلغاء قرارات التحكيم بموجب قانون التحكيم الاتحادي لدولة الامارات العربية
المتحدة**

by

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ABSTRACT

The UAE Arbitration community has welcomed the new UAE Arbitration Law enacted on 2018 which adds popularity to UAE as an internationally recognised environment for Arbitration as parties normally elect to opt out from Courts and choose Arbitration to resolve their disputes mainly due to its fast decisions and procedures' flexibility compared to Court litigations, however for the Arbitral Awards to be executable, it must be enforced by recourse to the Courts who has the power to affirm, annul or grant leave for correction of Arbitral Awards based on certain grounds set out by the Law and the Courts interpretation thereto. There is little researches on the subject following the enactment, but was not supported and enriched with Court cases dealing with the new Law and its effect mainly on nullification and enforcement of the Arbitral Awards the issue that this study, which concentrate on all nullifications' triggers during all the stages of the Arbitration process from signing the Arbitration agreement until obtaining the Arbitral Awards, aims to analyse it and how UAE Courts are dealing with nullification of Awards based on the New Law to help the Arbitration community understand and avoid any trivial or major mistakes that probably will lead to annulment of their Arbitral awards by analysing all possible triggers that may lead to the same and the methods to avoid them, all through excessive Court cases review and analysis for the past (4) years since the New Law came into force. As of date of writing this paper, the Courts have shown great appetite on avoidance of nullification of the Arbitral Awards and settled important principles on their interpretation and decisions worth considering, albeit with some unfavourable judgments to the Arbitration Community as it the case with any other litigation matters.

Keywords: nullification of arbitral awards, nullifications grounds, arbitrator's challenge, public policy, arbitral tribunal challenge, invalidity of arbitration agreement, awards issued in defaults, multiple defendants, joint liability

نبذة

رحب مجتمع التحكيم في الإمارات العربية المتحدة بقانون التحكيم الإماراتي الجديد الصادر في 2018 والذي يضيف شعبية كبيرة إلى الإمارات العربية المتحدة كبيئة معترف بها دوليًا للتحكيم حيث تختار الأطراف عادة الانسحاب من المحاكم واختيار التحكيم لحل نزاعاتهم ويرجع ذلك أساسًا إلى القرارات والإجراءات السريعة والمرونة مقارنة بدعاوى المحاكم ، ولكن لكي تكون قرارات التحكيم قابلة للتنفيذ ، يجب أن يتم إنفاذها عن طريق اللجوء إلى المحاكم التي لديها سلطة تأكيد أو إلغاء أو منح الإذن لتصحيح قرارات التحكيم بناءً على أسس معينة ينص عليها القانون وكيفية تفسير المحاكم لها. هناك القليل من الأبحاث حول هذا الموضوع بعد التشريع الجديد ، ولكن لم يتم دعمها وإثرائها بقضايا المحاكم التي تتناول القانون الجديد وأثره بشكل أساسي على إلغاء وإنفاذ قرارات التحكيم خلال جميع مراحل عملية التحكيم من توقيع اتفاقية التحكيم وحتى الحصول على قرارات التحكيم ، الشيء الذي تهدف هذه الدراسة إلى تحليله وفهم كيفية تعامل محاكم الإمارات العربية المتحدة مع إبطال القرارات بناءً على القانون الجديد لمساعدة مجتمع التحكيم على فهم وتجنب أي أخطاء صغيرة أو كبيرة والتي من المحتمل أن تؤدي إلى إلغاء قرارات التحكيم الخاصة بهم ، وذلك من خلال تحليل جميع الأسباب المحتملة التي قد تؤدي إلى حدوثها وطرق تجنبها ، كل ذلك من خلال مراجعة وتحليل قضايا المحاكم في هذا الموضوع على مدى السنوات (4) الماضية منذ دخول القانون الجديد حيز التنفيذ وحتى تاريخ كتابة هذه الورقة ، حيث أبدت المحاكم اهتمامًا كبيرًا بتجنب إبطال قرارات التحكيم واستقرت على مبادئ مهمة بشأن تفسيرها وقراراتها التي تستحق النظر والدراسة ، وإن كان ذلك مع وجود بعض الأحكام غير المحببة لمجتمع التحكيم. .

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Chapter 1: Introduction

1.1 The United Arab Emirates New Federal Arbitration Law – (FAL 2018)¹

Prior to the New Law, the Arbitration in the UAE was regulated and governed through Articles 203 to 218 of the UAE Civil Procedural Law (the "CPL")² and there was unclarity and some surprising judgments based on the previous Law due to lack of comprehensive separate legislation, the issue that was discouraging parties from recourse to Arbitration. However, these Articles of the CPL, which have been in force since 1992, have now been repealed with the new Federal Law No. 6 of 2018 Concerning Arbitration (the "New Law" or **FAL**, *called henceforth*) which came into force on 16 June 2018 that largely incorporates the UNCITRAL Model Law (2006)³ (the "UNCITRAL Model"), the widely regarded as an international benchmark against which Arbitration Laws can be compared. The scope of application of **FAL 2018**, as defined in Article (2) unless parties agreed on another Arbitration Law “*provided that it is not contrary to the public order and public morality of the State*”,⁴ applies to all Arbitrations seated in the UAE excluding the Dubai International Financial Center (**DIFC**) and Abu Dhabi International Financial Center (**ADGM**) as they have their own Arbitration Laws). It will also apply to International Commercial Arbitration that agreed to be submitted to it and to Arbitrations arising from

¹ UAE Federal Law No. 6 Issued on 03/05/2018 Corresponding to 17 Shaaban 1439 H. on Arbitration

² Articles 203-218 of the “Old Law” [UAE Federal Law No. 11 of 1992 - Civil Procedural Law], repealed by the Federal Decree-Law No.42 of 2022 concerning the new UAE Civil Procedures Law (the “New Law”) , came into effect 2 January 2023

³ UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006

⁴ Article (2)(1) of FAL 2018, Article 2 defines the scope of Law as: “*The provisions of the present Law shall apply to:*

1- *Any Arbitration which is carried out in the State, unless the Parties agree on the application of the provisions of another Arbitration Law, provided that it is not contrary to the public order and public morality of the State.*

2- *Any International Commercial Arbitration which is carried out outside the State, and which is subject to the provisions of the present Law upon the agreement of the Parties.*

3- *Any Arbitration arising from a dispute on a contractual or non-contractual legal relationship organised by the Laws in force in the State; unless whatever is excluded by a special provision.”*

legal relationship whether contractual or non-contractual regulated by the State Laws unless excluded by special provisions.

1.2 Foreign Awards

These awards are governed by Conventions and treaties signed between UAE and other countries in relation to judgment of foreign awards and foreign judgments, UAE is signatory of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

According to Article 85 and Article 86 of the executive regulations (*Cabinet Resolution No. 57 of 2018*) of the Civil Procedure Law, which took effect on 17 February 2019 and regulate the enforcement of foreign arbitral awards in the UAE,⁵ foreign seated arbitral awards can be enforced in the UAE provided that the Arbitrators' Award shall be issued in a matter in respect of which Arbitration is permissible pursuant to the Law of the State and enforceable in the country in which it was issued and It is important to note that if a foreign Award has been or under set-aside action at the arbitral seat, the same will not be enforced or annulled by onshore and offshore UAE Courts until such a decision has been taken on the set-aside action or the time limit has expired of the application. If an award has been annulled or set-aside as a result of such an action, then UAE Courts will not recognize or enforce it by any means.⁶

1.3 Type of Arbitral Awards

Arbitration Tribunal can issue several types of Awards during Arbitration procedure, include provisional Awards, interlocutory orders, partial and summary Awards as the case

⁵ Cabinet Decision No. 57 Issued On 09/12/2018 Corresponding To 2 Rabi' Al-Akhar 1440h. On The Implementing Regulation Of Federal Law No. 11 Of 1992 On The Civil Procedure Law

⁶ Muhammad Naseer, 'Challenging and Enforcing Arbitration Awards: United Arab Emirates' (Global Arbitration review, 4 February 2022) <<https://globalArbitrationreview.com/insight/know-how/challenging-and-enforcing-Arbitration-awards/report/united-arab-emirates>> accessed 16 September 2022

may require and the final Award disposing final decision over all claims and disputes of the parties. The latter Awards are to be enforced by an order on petition before the Courts. These powers are legislated under the new FAL in Article 39,⁷ which states that “*The Arbitral Tribunal may issue interim awards or awards in part of the claims, before the issuance of the award terminating the dispute*” and that “*The interim awards of the Arbitral Tribunal shall be enforceable before the Courts by an order on petition issued by the president of the Court or his delegate.*“, the power that the old Law provision was lacking.

1.4 Enforceability of the Arbitral Award

Article 52 of FAL states : “*The arbitral award issued according to the provisions of the present Law shall be binding to the Parties and have the force of res judicata and same enforceability as if it is a Court judgment, provided that a decision recognized by the Court is obtained for its enforcement.*“,⁸ affirming that Arbitral Award has the force of **res judicata** and the same enforceability as if it were a Court judgment, provided that a decision to ratify the award is obtained from the Court, a decision that can be challenged and either be enforced or annulled, which is the subject of this paper.

1.5 Objection to the Arbitral Award - Law provisions

FAL 2018 has set limited grounds upon which the Awards can be annulled as included in Article 53,⁹ the conclusiveness of these grounds is regularly commented by Courts in their judgments, that legislator has allowed very limited grounds for nullification of Arbitral Award, however according to Courts interpretation , it is found that these limited grounds has wide application especially when it comes to public policy related issue as the

⁷ UAE Arbitration Law (FAL), Articles 39(1) and 39(2)

⁸ UAE Arbitration Law (FAL), Articles 52

⁹ UAE Arbitration Law (FAL), Articles 53

latter is broad in interpretation by the Courts. As such, in this paper, the requisites and general requirements for nullification action will be briefed first, summarizing the requirements, rights, time limits and the legal consequences of such an action to have better understanding when initiating nullification. These general requirements will be followed by general overview of how UAE Courts deal with such matters and their common principles. The following chapters, the core of the paper, will discuss and cover in details based on several issued judgments, the Nullifications' various triggering matters which have been divided into three pillars that first include issues related to Arbitration agreement itself, secondly issues related to conduct of the Arbitration procedure and finally issues connected to the Arbitral Award itself mentioning different and similar issues that may apply to each pillar in a different way according to the pillar nature and the stage of the Arbitration process.

Chapter 2: Nullification Requisites, Rights and Time Limits

For a successful nullification or defense action, there is a certain requirement and pre-requisites to be considered when applying for nullification action before the Courts, and certain rights for parties as inferred by the Law, and awareness of new laws came into effect amending some vital Courts proceedings issues, which may have an effect on all cases raised before the UAE Courts.

2.1 Competent Courts

As said, the action for ratification or annulment has to be submitted to the competent Court, which is defined as per the FAL Article 1, that the Court is “*the federal or local Court of appeal which is agreed by the parties or within the jurisdiction of which Arbitration falls*”,¹⁰ and to reach which Courts is intended for this action, we have to refer to the applicable procedural laws in the State as in FAL Article 18(1).¹¹ The latter meant to refer to the UAE Civil Procedures Law which includes detailed definition of Courts in Article 31 “*The Courts’ Territorial Jurisdiction*”¹² upon which the competent Court will hear the case, depending, *inter alia*, on jurisdiction of the emirate where the contract is partially or fully executed or shall be executed and the resident or domicile of the defendant as confirmed in several Court cases.¹³ However, parties may agree on the competent Court except for certain matters stipulated by the latter Law in Articles 32,34 and other provisions, which includes Real Estate and possessory actions to be where property is located and inheritance matters to be where exists the domicile of the deceased. If in the state there exists offshore and onshore Courts like DIFC, the jurisdiction

¹⁰ UAE Arbitration Law (FAL), Articles 1

¹¹ UAE Arbitration Law (FAL), Articles 18(1), which states : “*The jurisdiction to examine the arbitration matters referred by the present Law to the competent Court shall be according to the applicable procedural laws in the State, and they shall, solely, have the power until all arbitration proceedings are terminated.*”

¹² UAE Civil Procedural Law, the (“Old Law”), [Federal Law No. 11 of 1992] as repealed by the [Federal Law No. 42 of 2022] (the “New Law”) on Civil Procedural Law

¹³ See for example Dubai Court of Appeal, Case No. 272/2013

will confer where contract is executed as aforesaid, as confirmed in a recent case where a party for an Arbitration seated in DIFC attempt to recourse to Dubai Courts to set aside the awards , where recourse has been dismissed and the Court of cassation ruled that Dubai Courts have no jurisdiction over any matters for contracts executed in whole or partially in DIFC.¹⁴ Same principle has been applied in a case concerning DIFC-LICIA award , where the claimant based his claim on that DIFC is a local Court and FAL is a federal Law which shall prevail over any other Laws, the argument which has been strictly rejected by Dubai Cassation Court and ruled that there is no conflict and that the special Laws will apply here due to that Contract was executed in DIFC which has its own rules and judications over all matters executed within it.¹⁵

2.1.1 Foreign Awards Competent Courts

A foreign Arbitration award that does not fall within the scope of the Arbitration Law may be ratified in accordance with Cabinet Resolution no. 57 of 2018, concerning the Civil Procedure Law before the Enforcement Judge (Execution Court), otherwise it will be annulled.¹⁶

2.1.2 Special Committees

Special committees may be constituted by UAE Legislator and empowered to exercise Court power and capacities of President of the Appeal Court upon which purpose they have been constituted thereto (*for example Resolution 15 of 2019 which established a Special Judicial Committee concerning Meydan and its subsidiaries matters*

¹⁴ Dubai Court of Cassation, Case No. 243 for 2021 dated 22/06/2022 (*Real Estate*)

¹⁵ Dubai Court of Cassation, Civil Case No. 477 for 2021 dated 03/02/2022 (*Civil*), See also Dubai Court of Cassation, Case No. 404/2022 dated 30/11/2022 concerning also DIFC-LICIA Annulment request which has been dismissed due to non-jurisdiction of Dubai Courts

¹⁶ See for example, Dubai Court of Cassation, Case No. 3 for 2020 dated 16/02/2021

adjudications), in which case any award concerning a party subject to this committee has to be ratified or challenged before it.¹⁷

2.2 Rights to Initiate Nullity Action and to Appeal

Having obtained a decision rendered by the competent Court, it is considered final, however parties to the agreement have the right to appeal against the judgment to the Court of cassation whether in rejecting or ordering the ratification or annulment action after notification has been served of the Court decision as prescribed by the Law, as stated in FAL Article 54 “*An action in nullity of the arbitral award*”, which states : “*The award issued by the Court regarding the action in nullity shall be final and may only be subject to appeal by cassation.*”,¹⁸ and Article 57: “*Recourse against the enforcement of the arbitral award* “ which states : “*A grievance may be filed against the decision of the Court ordering or denying the enforcement of the arbitral award with the competent appeal Court, within thirty (30) days from the next day of notification.*“.¹⁹

2.3 State Authorities/Committees Intervention – Third Party Implied Power

If a third party is affected by the ratification order and attempt to initiate nullity action where both claimant and defendant are supervised under some authority or committee, that has the legal power to issue decisions affecting both parties, and where one party has arbitrated the former, it has been observed that such decisions may affect the non-participating party who have no power to raise nullity action against such decision, as the award will be enforced upon them despite that they were not party to the proceedings. This principle has been ruled in in a case concerning two handball clubs on which one club

¹⁷ Ammar Haykal, ‘Ratification of an arbitral award by a special judicial committee’ (*Tamimi.com*, 2019) <<https://www.tamimi.com/law-update-articles/ratification-of-an-arbitral-award-by-a-special-judicial-committee/>> accessed 12 December 2021

¹⁸ UAE Arbitration Law (FAL), Articles 54(1)

¹⁹ UAE Arbitration Law (FAL), Articles 57

arbitrated the UAE Handball Federation to consider him as a winner where they succeeded in their dispute and enforcing the related award before Dubai Courts, despite the annulment action raised by the third-party contesting that they were not informed and did not participated in the proceedings.²⁰

2.4 Assignee or Successor right to raise nullity action

An assignee of a successful party, even who was not a party in the arbitration proceedings, has the right to request enforcement as ruled in a case concerning annulment of an Arbitration award issued in ICC International Chamber of Commerce and enforced before Dubai Courts.²¹

2.5 Time Limits to institute Annulment action

Having received Arbitral Award notification, a party wishing to challenge it has a 30 days following the former as per FAL Article 54(2), which states: *“The action in nullity of the arbitral award shall not be heard after thirty (30) days have elapsed following the date of notification of the arbitral award to the applicant requesting the nullification”*.²²

Nevertheless, another time limit is linked in response to instating the action for ratification by opponent party if the applicant has not raised nullity action as prescribed in the latter Law provision, which will be 30 days following the notice served upon him by the ratification judgment outcome as per Article 57 *“Recourse against the enforcement of the arbitral award”*. However, if such challenge was in regard to arbitral proceeding or the arbitration agreement in the compliance with their agreement and the Law, it must be raised prior commencement of the arbitration proceedings upon or within (7) days of the notice of arbitration commencement and not from the date of Tribunal constitution, as

²⁰ Dubai Court of Cassation, Case No. 346/2021 Dated 25/11/2022 (Civil)

²¹ Dubai Court of Cassation, Case No. 428/2021 Dated 30/12/2021 (Civil)

²² UAE Arbitration Law (FAL), Articles 54(2)

confirmed in a recent case by Abu Dhabi Cassation, where a pre-maturity of an arbitration agreement was not executed that contains a tiered dispute resolution provision, the issue that would have been succeeded had the claimant raised this ground for challenge in the prescribed seven days above.²³

2.6 Waiver of right to nullification

Although it is rare a party may waive such a vital right, the FAL in Article 54.1 sought to protect the plaintiff as his case will be heard and decided even if they have waived their legal right to file the nullity action before arbitral award have been issued. Such a right presumably concerns the adhesion contracts or contracts where there is inequality in bargaining power between parties, and not the implied waiver when the time barred for raising certain challenges as explained in Section 2.5 above.

2.7 Suspension Request – Stay of Enforcement

It should be noted that raising a nullity action of an Arbitral Award will not stay or affect its enforcement as set out in FAL Article 56, however, have the losing party serious grounds, it can request for staying the enforcement by submitting a request to the Court who shall decide within (15) days from the first hearing date and may order a financial guarantee accordingly and it has to decide on the core nullity action within (60) days from the date of the suspension request has it been accepted by the Court.

2.8 Arbitral Award Severability

As per FAL Article 54.3, a nullity may render whole or part of an Arbitral Award has the latter being a distinguishable part of the award, as stated in the former Article: “*The*

²³ Abu Dhabi Cassation Court Case No. 492 of 2022 dated 07/07/2022, cited by: Jennifer Paterson, Mohammad Rwashdeh, ‘Litigation and Dispute Resolution Alert’ (*klgates.com*, 11 October 2022) <<https://www.klgates.com/Abu-Dhabi-Court-of-Cassation-Confirms-Seven-Day-Time-Limit-to-Raise-Objections-to-the-Commencement-of-Arbitration-Proceedings-10-11-2022>> accessed 19 November 2022

*nullification of the arbitral award shall result in the termination of the award in whole or in part, according to whether full or partial nullification is rendered. If decision for the interpretation of the annulled part is issued, then such decision shall accordingly be terminated.”.*²⁴ The Court exercised and settled this principle in the old Law and the new FAL in plenty of judgments contravening a public policy and for out of jurisdictional issues. The settled principle is that *“if the nullity related to an ancillary part of the Arbitral Award, then it may be severed to maintain the integrity of the award. However, if the nullity falls in the main part of the award, then severance would be an almost impossible task, and the Court would most likely not take such action ”.*²⁵

2.9 Staying Nullification - Granting leave for correction

If the arbitral award can be corrected from the reasons lead to its nullity without affecting its content, the new FAL as per Article 54.6, upon request of a party, empowered the Arbitral Tribunal by means of granting leave to make such correction and the Court will stay the nullity proceeding for (60) days as it sees appropriate, the issue that strengthen the Arbitration friendly environment in UAE. The former Article 54.6 states that, *“The Court requested to nullify the arbitral award may stay the nullification procedures for a period not exceeding sixty (60) days, as it may deem appropriate, at the request of a party, in order to grant the Arbitral Tribunal an opportunity to make any procedure or amendment to the form of the award in a way that may remove the reasons for nullification without affecting the contents of the award.”.*²⁶

²⁴ UAE Arbitration Law (FAL), Articles 54(3)

²⁵ *See for example*, Dubai Court of Cassation Case No. 329/2013, cited by, Abdelrahman Al Ani, 'Annulment of Arbitral Awards under the Federal UAE Arbitration Law' (Dissertation, British University in Dubai 2019)

²⁶ UAE Arbitration Law (FAL), Articles 54(6)

2.10 Survival of Arbitration agreement following Nullification

FAL Article 54.4 states: *“Unless otherwise agreed by the Parties, the Arbitration Agreement shall remain effective according to the provisions of the present Law after the nullification of the arbitral award, unless such nullification is based on that the agreement itself does not exist, or upon the forfeiture of its term, or its nullity, that it is incapable of being performed.”*,²⁷ affirming that the successful set-aside action will not invalidate the Arbitration Agreement itself unless the nullity is based on one of the reasons lead to invalidate the Arbitration agreement itself rendering it void or incapable of being performed, unless parties agreed otherwise in compliance with general principle of the party’s autonomy of Contract Law.²⁸

2.11 New UAE Laws and Amendments Possible Effect

The UAE Legislator has made major changes to several Laws in 2022, from which the essential one that have to be considered is the Federal Law No.42 of 2022 concerning the new UAE Civil Procedures Law (the **“New Law”**), came into effect 2 January 2023, which has repealed Federal Law no.11 of 1992 of the Civil Procedures and all its amendments and executive regulations (the **“Old Law”**).²⁹ As to the Arbitration Law (FAL), there is no changes, however some proceedings in nullification claims has to comply with such Procedural Law, amongst which is the general time limits for appealing judgments to the Cassation Court which have been changed to (30) days instead of (60) days previously, so if a party wishes to challenge The Appeal Court decision, he has now shorter period to raise his case. The other notable change, is that, in certain cases, the English can be the

²⁷ UAE Arbitration Law (FAL), Articles 54(4)

²⁸ See Chapter-3 - Arbitration Agreements Nullification Ground, which clarifies in details various issues that can lead to invalidation of the Arbitration Agreement itself

²⁹ Mohamed Abdelrehim, ‘New UAE Civil Procedures Law No.42 Of 2022: Highlights and Explanations’ (theuaejurist.com, 28 December 2022) <<https://theuaejurist.com/new-uae-civil-procedures-law/>> accessed 12 January 2023

language for all proceedings, decisions, written defenses statements, and also hearing witnesses through an interpreter. The most extreme amendment is that the Cassation Court now can rescind their judgments in certain cases include if there was a procedural error, or if decision was made on a revoked Law upon which application of the new law will change the decision, or if the decision made contradicts any established principle or precedent set by the Cassation Court.³⁰ The latter may probably affect the decision on the nullification of arbitral awards as the court has set many principles being followed in these cases, the issue that may cause uncertainty and seriously affect the res judicata principle, albeit not clear yet in the arbitration related decisions and the underlying FAL law.

Overview of General UAE Courts Principles for Nullification grounds under FAL

The Courts has shown their well settled principle and supervisory role that generally only procedural errors and not errors of assessment can form a successful ground for nullification, as being stated by Dubai Cassation Court in several judgments that *“it is determined - according to the ruling of this court - that the case for the nullity of the arbitral award is directed to the arbitral award as a legal act and focuses on the error in the procedures rather than the error in the assessment. The errors that the plaintiff of nullity may plead have been stated exclusively so that the interpretation thereof may not be expanded and they may not be used as standards, and they are all related to the arbitration agreement or the arbitration dispute.”*³¹ Such grounds are meant to be strictly limited to those listed under **FAL Article 53 “Objection to the arbitral award”** to be raised by the challenging party which are procedural in nature going either to the form of the underlying

³⁰ Madelaine Power, ‘Reforms to UAE’s civil procedure law take effect’ (OUT-LAW News, 16 January 2023) <<https://www.pinsentmasons.com/out-law/news/reforms-to-uaes-civil-procedure-law-take-effect>> accessed 16 January 2023

³¹ Dubai Court of Cassation, Case No. 684/2021 dated 31/03/2022

agreement regarding its validity and existence or the Arbitration procedure conduct and in all cases does not discuss or open the substantive matter of the dispute and must be interpreted narrowly and not expanded by analogical reasoning. However, matters related to public policy and in-arbitrable matters set by the Law of the state are available to the Court to be invoked at its own initiative at any time during the nullity proceedings as set out in FAL Article 53.2. The Article 53, the subject of nullification, states:

1- An objection against an arbitral award may not be accepted unless by lodging an action in nullity with the Court or during the examination of the request for recognition of the award, and the applicant for annulment shall provide a proof that:

a- There was no Arbitration Agreement, or such agreement was null and void, or forfeited pursuant to the Law chosen by the Parties, or according to the present Law if no reference is made to a certain law.

b- A party was, at the time of conclusion the Arbitration Agreement, incapacitated or lacking capacity according to the Law governing his legal capacity.

c- A party has no legal capacity to act in the disputed right, according to the law governing his legal capacity, set out in Article 4 of the present Law.

d- A party to the arbitration was unable to submit his statement of defense due to that he was not given a proper notice of the appointment of an arbitrator or of the arbitration proceedings, or due to the failure of the Arbitral Tribunal to comply with the principles of litigation or for any other reason beyond his will.

e- The arbitral award has not applied the law agreed by the Parties to cover to the subject-matter of the dispute.

f- The composition of the Arbitral Tribunal or appointment of an arbitrator has been made contrary to the provisions of the present Law or the agreement of the Parties.

g- The arbitration proceedings are void in such a way that has influenced the award, or if the arbitral award was issued after the termination of its specified period.

h- The arbitral award has decided on matters not covered by the Arbitration Agreement or falling beyond the scope of said arbitration. Nevertheless, if the decision on matters submitted to arbitration can be separated from those not so submitted, then only the last said parts of the award may be deemed null and void.

2- The Court shall, on its own initiative, nullify the arbitral award, if it finds any of the following:

a- That the subject-matter of the dispute is not capable of settlement by arbitration.

b- That the arbitral award is in conflict with the public order and the public morality of the State.

To understand how UAE Courts, imply the Law provisions and principles and deal with nullification claims in light of new **FAL** in practice and from series of judgments, we can divide nullification triggers into three categories, as first issues related to Arbitration Agreement, followed by the issues related to Arbitration process (*serious irregularities*) and finally issues related to Arbitral Award Form and content, which will be discussed in details the next chapters.

Chapter 3: Arbitration Agreements Nullification Grounds

These issues are related to arbitration agreement requirement, its execution, recognition and the extrinsic issues that may affect its enforcement and existence as detailed below.

3.1 Arbitration Agreement's Invalidity

The arbitration agreement may be invalid by virtue of Law if does not comply with certain requirements or contradict certain issues as per the new FAL 2018. Below are the main issues that may render the invalidity of the agreement of not complied with or followed.

3.1.1 Writing Requirements

Article 7(1) of FAL requires agreement to be writing “*The Arbitration Agreement shall be in writing; otherwise it shall be void*”.³² However, the writing requirement has a distinct interpretation by the Court which is widened in scope contrary to the previous repealed Arbitration's provisions contained under CPL.

3.1.1.1 Valid “in writing” Methods

Generally, what constitutes “in writing” is explained in Article (7)(2) FAL, which now includes letters or correspondences exchanges, emails, or clear reference from standard contracts or if agreed during litigation before the Courts or if it is exchanged during arbitral proceedings or recognized by Courts where one-party requests referral to Arbitration and the other party does not object.

If there are appendices or addendums to the contract and those addendums or appendices include the Arbitration clause, these appendices must be signed by the legal person or stamped and signed, otherwise Arbitration won't be enforced by the Courts. The former principle is affirmed as ruled in a case where a purchase orders containing Arbitration clause that was not signed or stamped has not been enforced by the Dubai Courts.³³ In

³² UAE Arbitration Law (FAL), Articles 7(1)

³³ Dubai Court of Cassation, Case No. 1357/2022 dated 03/01/2023 (*Commercial*)

another case concerning a dispute in a construction subcontract agreement, the Arbitration clause page in main contract was stamped by both parties but lacks signature, the Courts has exercised jurisdiction and considered the Arbitration clause null and void.³⁴ In another case of subcontract the main contract was not signed by subcontractor, but the letter to proceed was signed which include the Arbitration clause, the subcontractor intention to escape the Arbitration procedure failed before Dubai Courts who found that as long as there is an agreement in any form signed which contains the Arbitration regardless of the main contract signed or not, that will be a binding Arbitration agreement.³⁵

3.1.1.2 Special attention to Incorporation by Reference

Some contracts make mere general reference to apply standard form of contracts, for example the FIDIC forms of contracts which include standard Arbitration clause, the issue found not to be enforced by UAE Courts. The referral, to be binding, shall be clear and explicit in adopting the Arbitration clause to be considered. In a case concerning a construction contract where reference is made to apply the FIDIC general conditions in the letter of acceptance, the Arbitration clause was not mentioned expressly in the latter and there was no other particular conditions mentioned the same, the claimant contested that, such referral is ambiguous and parties intention cannot be inferred to have accepted the Arbitration clause contained in the FIDIC or not, the contestation that the Appeal Court has rejected and accepted the reference to Arbitration and consider it is binding as per parties intention, however the argument succeeded in the Dubai Cassation Courts who overturned the Appeal Court decision and affirmed that the reference is not clear as contested.³⁶ In contrary, the Union Supreme Court in Case No. 252/2019 has overturned the Appeal Court decision, where a party sought to ratify an arbitral award issued by Sharjah Centre for

³⁴ Dubai Court of Cassation, Case No. 1077/2022 dated 20/12/2022 (*Commercial*)

³⁵ Dubai Court of Cassation, Case No. 1678/2022 dated 29/08/2022 (*Commercial*), where the Courts overturned Appeal Court ruling in favor of enforcing

³⁶ Dubai Court of Cassation, Case No. 1308/2020 dated 03/03/2021 (*Commercial*)

International where the Appeal Court ruled in favor of non-existence of the Arbitration agreement, the Supreme Court enforced the arbitration clause and commented that the issues contested is valid and was not properly investigated by the Trial Court.³⁷

One should not rely only in investigating appendices or correspondences issued by the parties themselves as an extrinsic evidence may have effect on nullifying an otherwise valid agreement clause as ruled in a case where in an agreement containing an Arbitration clause with defaulted developer where the project and in turn all agreements has been transferred to a new developer by a letter from Dubai land Department authorizing the new developer to complete the project, a buyer sued for damages to delay in handing over, but the new developer tried to invoke non-jurisdiction of Dubai Courts due to existence of the Arbitration clause, the issue has been declined by Dubai Cassation Courts which reasoned that the letter from DLD lacks any reference to Arbitration clause.³⁸

3.1.2 Legal Capacity of parties

As the case with many Contracts, the party entering into any agreement must possess the legal capacity inferred upon him by the applicable Law, albeit when it comes to Arbitration, it has special considerations by UAE Courts in accordance with FAL provisions and the related Laws of the state where the arbitration is subject to. Particular considerations for the arbitration agreement to properly be recognized and valid before the Courts are explained out below as set out in FAL Article 53 as “*b- A party was, at the time of conclusion the Arbitration Agreement, incapacitated or lacking capacity according to the Law governing his legal capacity.*

*c- A party has no legal capacity to act in the disputed right, according to the law governing his legal capacity, set out in Article 4 of the present Law.”*³⁹

³⁷ Abu Dhabi Cassation Court, Appeal by Cassation No. 252 of 2019 Civil, Session 9/9/2019

³⁸ Dubai Court of Cassation, Case No. 603/2021 Dated 25/01/2022 (*Real Estate*)

³⁹ UAE Arbitration Law (FAL), Articles 53(b)(c)

3.1.2.1 Individual Capacity

Generally, in compliance with Law of Contract, the natural person exercising the agreement must not have incapacity, incompetent or under some incapacity under the Law governing his capacity (age restrictions, state of mind ...etc.) as per the Law governing this capacity.⁴⁰

3.1.2.2 Special Power of Attorney

As per Article 4.1 FAL, specific authority to arbitrate on behalf of a juridical person is required. Article 58(2) of the Civil Procedure Law states that “*It is not valid, without a special authorization, to declare a right of the defendant, disclaim it, reconcile or arbitrate therein.*”.⁴¹ Accordingly, agents like directors and managers for them to bind their companies for arbitration, must have a special, rather than a general power of attorney or proper authorization to exercise such an action as ruled in several cases from which is Abu Dhabi Court of Cassation in Case No. 922 of 2020 and DCC Case No. 236/2020.⁴² It is worth mentioning that, if a party wishes to raise enforcement or annulment action, as the jurisdiction lies, before offshore Courts (the DIFC and ADGM), he does have to comply with this requirements as the former Courts have their own Arbitration Laws which do not have this specific authority requirement.⁴³

3.1.2.3 General Attorney

General attorney for someone authorizing him “*to act on behalf of the company*” will not be accepted under UAE Courts as the agreement to arbitrate is a separate agreement to the

⁴⁰ ibid

⁴¹ UAE Civil Procedural Code, Article 58(2)

⁴² B Gary and A Matteo, ‘The Abu Dhabi Court Considers Special Authority is Required to Conclude an Arbitration Agreement by Power of Attorney’ (Kluwer Arbitration, 9 June 2021) <<https://arbitrationblog.kluwerarbitration.com/2021/06/09/the-abu-dhabi-court-considers-special-authority-is-required-to-conclude-an-Arbitration-agreement-by-power-of-attorney/>> accessed 23 August 2021

⁴³ ibid

agreement in which it is contained.⁴⁴ However, the UAE Courts consider the General Manager of Limited Liability Company to have the power to arbitrate provided that company's MOU doesn't restricts him. In a case before Dubai Court of Cassation, a DIAC (*Dubai International Arbitration Center*) award has been annulled due to that agreement containing Arbitration clause that was signed by Executive Director and not the General Manager.⁴⁵

3.1.2.4 Apparent Authority Doctrine and Related Estoppel Principle

The general good faith requirement in performing Contracts, particularly that a party's resultant obligation not to resile from its (contractual) commitments as set in Article 70 of UAE Civil Code, constitutes a base for application of the apparent authority doctrine to the formation of Arbitration agreements as confirmed in a number of rulings, the thing has been welcomed by Arbitrating community.⁴⁶ The Courts settled the principle that if the legal person name is mentioned in the Contract without the name and capacity of its legal representative, and there is illegible signature from which it is not inferred its owner, incapacity defense will fail and the Courts will assume that this refer to the authorized persons and the agreement will be binding.⁴⁷ The defense will only succeed if the contract was signed by a readable signature of another person other than authorized person.⁴⁸ If the company stamp is not accompanied with any person name, it shall be deemed to have been signed by authorized person and the Arbitration will be enforced, as has been ruled in a

⁴⁴ As recently rules also by Dubai Cassation Court, See North Rose Fulbright, Beware – 'authority (or maybe not) to arbitrate!' (Middle East Publication, July 2019) <<https://www.nortonrosefulbright.com/en/knowledge/publications/fd3ab3e9/beware-authority-or-maybe-not-to-arbitrate>> accessed 22 December 2021

⁴⁵ Dubai Court of Cassation, Case No. 167/2021 dated 01/07/2021

⁴⁶ Gordon Blanke, 'Apparent authority under UAE Federal Arbitration Law: from mirage to reality' (Practical Law, 4 January 2021) <<http://arbitrationblog.practicallaw.com/apparent-authority-under-uae-federal-arbitration-law-from-mirage-to-reality/>> accessed 17 July 2021

⁴⁷ See Dubai Court of Cassation, Case No. 167/2021 dated 1-7-2021, Case No. 409/2018 and Case No. 89/2019

⁴⁸ Dubai Court of Cassation, Case No. 1225/2018

recent case where a party attempt to escape Arbitration because of that it is not signed by any authorized person and only stamped by the company.⁴⁹

The Doctrine of estoppel in the apparent authority may also apply, which is laid in Article 70 of Civil Transaction Law (CTL) and states that “*He who challenges what has been done from his part his attempt shall turn against him*”.⁵⁰ This Law principle has been seen to be invoked by UAE Courts as in one case , a subcontractor seeking unsuccessful invalidation of Arbitration agreement, had entered into other contracts with opponent party in the past signed by the same signatory for the main contractor, which had not been challenged or denied by the parties.⁵¹

3.1.3 Joint Ventures and Consortiums and Related Estoppel Principle

In a recent judgment, a Joint venture of Consultants seeks to enforce DIAC award in UAE seek to enforce the award under their names. The losing party’s (Subconsultant) seeks annulment based on, *inter alia*, incapacity of the Joint venture name which has failed. The Court affirmed that joining the name of two companies does not make them one company and does not create someone else and does not affect their respective right to litigation and this union is only meant to participate in obligations and liabilities and the arbitrator already defined their names in the award.⁵² The Court also in the latter case refers to doctrine of Estoppel, as the respondent was under no doubt or confusion as to the identity of the applicant in the Arbitration where in the answer and counterclaim served by the respondent, the respondent referred to the applicant as the “Consortium” without any complaint as to its legal identity.⁵³ Moreover, in connection with the former case, the same award was sought to be annulled in Hong Kong, where the Judge, albeit admitted that there

⁴⁹ Dubai Court of Cassation, Case No. 11793/2021 Dated 14/02/2022 (*Commercial*)

⁵⁰ UAE Civil Transaction Law [Federal Law No. 5 of 1985], Article 70

⁵¹ See Case No. 95 of 2021 (Foreign Courts Chamber, Abu Dhabi Commercial Court), the Abu Dhabi Court of First Instance

⁵² Dubai Court of Cassation, Case No. 101/2021 dated 24/06/2021

⁵³ *ibid*

is no such legal entity by the Consortium name, has denied annulled based on estoppel and granted leave to join both TPL and ICB as additional applicants to the enforcement proceedings.⁵⁴

3.1.4 Existence of Pathological Clauses and Ambiguous Language

Agreements to arbitrate should not have ambiguous wording or provisions, otherwise it may be invalid. There are various triggers for such clause amongst which is the most important one, the permissive language, like using “*may*” instead of *shall or will* which may lead to invalidation of agreement for jurisdictional conflict, provided that this permissive language is contained in the parties’ intention to recourse to Arbitration and not in any other way, as it will be enforced by the Courts. as ruled in a case, where in an agreement between seller and a buyer of heavy construction equipment , the agreement was drafted in a way that gave permission to either party to write to the other the notice to arbitrate within certain period of disagreement. The defendant wanted to rely on this as permissive language for nullity, but it was rejected but the Court and settled that this permissive language is in the sending the notice and not in the core of the agreement itself.⁵⁵ A clause may also be drafted in a way leading to jurisdictional uncertainty or conflict as illustrated in a case concerning dispute over sales agreement, where the agreement was drafted as that “*if any dispute arise between the parties of this agreement, the Dubai Courts shall have exclusive jurisdiction after proceeding with a commercial Arbitrator*”.⁵⁶ The claimant sought to raise the prematurity of that Court jurisdiction is conditional after conducting Arbitration by a commercial Arbitrator, where the Courts rejected the statement and settled that it has the overall jurisdiction regardless of the condition set therein.⁵⁷

⁵⁴ *A Consortium Comprising TPL and ICB v. AE Limited* [2021] HKCFI 2341

⁵⁵ Decree No. (34) of 2021 Concerning the Dubai International Arbitration Centre

⁵⁶ Dubai Court of Cassation, Case No. 282/2022 Dated 31/08/2022 (*Commercial*)

⁵⁷ *ibid*

3.1.4.1 Incorrect reference to Arbitration Institute

A clause may refer to non-existing institution, or may use the wrong name for institution or rules, which will render the arbitration null and void. It is worth mentioning that now the famous DIFC-LCIA has been abolished and moves to revamp DIAC Arbitration as per Decree No. 34 of 2021, issued on 14 September 2021, came into force since 20-9-21,⁵⁸ so shall not be specified.

3.1.5 The agreement Timed Barred or forfeited

If the Agreement has lapsed or expired by virtue of the Law or forfeited as set in Article 53(1)(a), pursuant to the Law chosen by the Parties or the FAL if it is the governing Law, that will constitute a general ground for annulment.

3.1.6 Agreement violates a rule of Law related to public order

The Court on its own accord can set aside these agreements as per **Art. 53(2) FAL** at any time if it found that it contradicts with Public Policy which is very wide in scope. UAE public policy within the meaning of Art. 3 of the UAE Civil Transactions Code includes In-arbitrable matters⁵⁹ like personal status, criminal actions, registering off plan properties,⁶⁰ labor matters, registered commercial agency disputes, freedom of trade and the circulation of wealth ...etc.⁶¹ and other rules and foundations upon which society is based that do not violate the peremptory provisions and the basic principles of Islamic Law. Public policy are defined in Article (3) of the Federal Civil Transactions Law which states : *“Shall be considered of public policy, provisions relating to personal status, such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of*

⁵⁸ Dubai Court of Cassation, Case No. 1179/2021

⁵⁹ Ahmed Ghonaim, ‘Some Commercial and Civil Disputes That May Not Be Settled by Arbitration In the UAE’ (Judgments) <<https://www.tamimi.com/law-update-articles/commercial-civil-disputes-may-not-settled-arbitration-uae/>> accessed 30 July 2021

⁶⁰ See for example Dubai Court of Cassation, Case No. 535/2017 Dated 21/03/2018 (*Real Estate*)

⁶¹ See for example Dubai Court of Cassation, Case No. 285/2019, ruling of 25 July 2019 annulled DIAC Award on employment shares

*trade, circulation of wealth, private ownership and other rules and foundations on which the society is based, provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Shari'a."*⁶² In a case concerning investment of certain amount, the defendant alleged that the core agreement was considered as a loan which is contrary to public policy for that the respondent is not a financial institution, however the Courts rejected the annulment on this ground and set that the arbitrator has ruled within his jurisdiction in an investment matter and that the agreement clearly mentioned to invest and not to give a loan, in which case the annulment might have succeeded in this regard.⁶³

3.1.6.1 Insurance Arbitrations governed by Article 1028 of Civil Transactions Code (CTL)⁶⁴

The said Article 1028-d void certain condition if appeared in general condition of printed insurance policy, from which is the Arbitration condition, which will be void if as stated , the policy contained *"an Arbitration clause unless contained in a special agreement separate from the general printed conditions in the policy of insurance"*. However , in case before Abu Dhabi Cassation Court on which contestant relied , *inter alia*, on this Article to invalidate the Arbitration agreement contained in the policy signed with the respondent, the Cassation Court affirmed lower Courts decision on enforcing the agreement and set the principle that as per new Arbitration Law, which is applicable to this case there is no requirement to contain the Arbitration Clause in special agreement and as per Article 60-2 FAL which states clearly *"Any provision contrary to the provisions of this Law is hereby repealed."* which is considered as a repeal of the said Law provision.⁶⁵

⁶² UAE Civil Transaction Law [Federal Law No. 5 of 1985], Article 1028, Article 3

⁶³ Dubai Court of Cassation, Case No. 11623/2021 Dated 09/02/2022 (*Commercial*)

⁶⁴ n.62, Article 1028

⁶⁵ Abu Dhabi Cassation Court, Case No. 509/2019 session 12/11/2019 (*Commercial*)

3.1.7 Unilateral Option Clauses (UOC)

These clauses are drafted in a way that allow one party some element of choice whilst the other party is bound to resolve a dispute in a specific forum, which is generally enforced under Common Law. However, they are unlikely to be enforceable under UAE Laws due to that the mutuality of Arbitration agreements might qualify as a public policy under UAE Law, mainly the good faith requirement and equal treatment, and Courts hence require the existence of joint intention,⁶⁶ as commented by DCC in Case No. 220/2004 “*The Arbitration agreement can only be valid when it is proved that the parties had the joint intention to refer their dispute to Arbitration, which can be inferred from the existence of an Arbitration clause within the agreement or from both parties signing a subsequent Arbitration agreement.*”⁶⁷

3.2 Exercising Jurisdiction despite valid Arbitration agreement – Interest of Justice Doctrine

There are special conditions under which UAE Courts will exercise jurisdiction despite existence of a valid Arbitration agreement, where Courts see it necessary for interest of justice and to avoid contradictory judgments, mainly where disputes related to a transaction that was the subject of multiple but closely related contracts or matters related to the public policy as detailed herein after.

3.2.1.1 Joint Liability

When Court proceedings are filed against a number of defendants for Joint Liability resulting from different contract one of them does not containing Arbitration agreement, the Courts will exercise jurisdiction over the matter. In a DCC case , a developer sued both

⁶⁶ Richard Ashmore, ‘Unilateral Option to Arbitrate: Valid in the UAE?’ (Kluwer Arbitration, 4 March 2015) <<https://arbitrationblog.kluwerarbitration.com/2015/03/04/unilateral-option-to-arbitrate-valid-in-the-uae/>> accessed 13 October 2021

⁶⁷ Dubai Court of Cassation, Case No. 220/2004

contractor and Consultant for defective enabling works, where the lower Court dismissed the case against Consultant due to existence of Arbitration agreement, however its ruling has been overturned by CA and affirmed by DCC commenting that these disputes should not be divided and determined separately.⁶⁸ This standing is criticized due to that in many such disputed liability can be apportioned if properly examined, and this also seriously curtails the freedom of contracts as Law of the parties and Article 8(1) in FAL Law itself.⁶⁹

3.2.1.2 Decennial Liability

In cases concern Decennial Liability matters, the Courts is seen also to have exercised jurisdiction rendering that these claims are linked in a manner that requires that they all be heard by the same forum to ensure the proper administration, as ruled in one case appealed by a consultant that concerning insurer filing proceedings against six defendants to recuperate the amounts paid to the developer resulting from fire after completion, where one party's contract was not containing arbitration agreement and Court states that "*the courts would have jurisdiction in the circumstance where only some of the parties have concluded arbitration agreements while the others have not*".⁷⁰

3.2.1.3 Multiple defendants

Courts may also exercise jurisdiction in case of multiple defendants involved in a dispute of which only one had signed the Arbitration clause. This principle has led Courts to nullify an entire award in a case filed by a contractor against villa owners, whom their father only has signed the agreement, on the basis that it was issued against a number of defendants and not against one member who is the signatory of the agreement, furthermore the Court refused to sever the award against some defendant under the severability

⁶⁸ Dubai Court of Cassation, Case No. 209/2012 dated 21/04/2012

⁶⁹ Nayiri Boghossian, 'Exercising Jurisdiction in Spite of an Arbitration Clause: UAE Courts' Practice' (Kluwer Arbitration, 16 November 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/11/16/exercising-jurisdiction-in-spite-of-an-arbitration-clause-uae-courts-practice/>> accessed 12 December 2021

⁷⁰ Dubai Court of Cassation, Case No. 1270/2020 dated 17/02/2021 (*Commercial*)

doctrine.⁷¹ The only exception in case of multiple defendants will be when the defendant should not have been a party to the proceedings in the first place.⁷²

3.2.1.4 Heirs of a person signed an agreement

In a case concerning dispute of remaining dues of purchasing a plot, the claimant sued defendants who are heirs of a legal person of his free zone company in Sharjah, tried to enforce an Arbitration agreement in sale agreement which has been rejected by Dubai Courts overturned lower Court's decision and rules that the Arbitration agreement applies only to the Legal entity name and not to the persons and his heirs.⁷³

3.2.1.5 Conditional or Agreement not broad for all disputes

An agreement that does not stipulates that all disputes to be referred to Arbitration or base the Arbitration on occurrence of some incident will be confronted by jurisdiction of the Courts in any matter that it sees not falling within that agreement, as ruled in an insurance case where the agreement mentioned that *“if any disagreement about an accident value that have been admitted by claimant, it should be referred to Arbitration”*, the Court found that the dispute is on the core of the responsibility about the accident admission and not about the value dispute and accordingly exercised jurisdiction over the matter.⁷⁴

Surprisingly, and on Contrary, in a similar case of insurance, in an agreement containing similar condition, albeit not including responsibility's admission part, the condition state that *“if any disagreement about any damages value it should be referred to the Arbitrator”*, the Court dismissed the case and arbitration agreement was enforced upon the

⁷¹ See Dubai Court of Cassation, Case No. 153/2019 dated 28/04/2019 (*Commercial*), Also Dubai Court of Cassation, Case No. 1112/2018 dated 17/02/2019

⁷² Dubai Court of Cassation, Case No. 300/2019 dated 13/02/2020 (*Real Estate*)

⁷³ Dubai Court of Cassation, Case No. 606/2021 Dated 04/01/2022 (*Real Estate*), see also *Chapter 3.1.1.2*, Special attention to Incorporation by Reference where extrinsic evidence was considered by the Court as overwriting the arbitration agreement clause signed between parties in their main contract due to interference of authorities

⁷⁴ Dubai Court of Cassation, Case No. 212/2019 Dated 18/07/2019 (*Civil*)

contestant party who tried to narrow the scope of the dispute to only matters related to value disagreement similar to the former case.⁷⁵

3.2.1.6 Implied Consent to Courts Jurisdictions

If there is a valid Arbitration agreement, but either party proceeded with filing a case before the Courts, the second party has to show his objection before raising any defense or requests in the subject matter at any time (*previously was only in the first session*),⁷⁶ otherwise the Courts will consider his action as an implied consent to give recourse to Courts and in turn the agreement will not be enforced for the dispute and the Court will have jurisdiction over the subject matter of the dispute.⁷⁷ However, if a different dispute not similar in nature and conditions arises, the agreement can be invoked for that different matter and parties recourse to Arbitration (*see Chapter 5.1 for conflict judgments*).

⁷⁵ Dubai Court of Cassation, Case No. 521/2019 Dated 30/01/2020 (*Civil*)

⁷⁶ See Dubai Court of Cassation, Case No. 310/2022 Dated 01/06/2022 (*Commercial*)

⁷⁷ See for Example Dubai Court of Cassation, Case No. 266/2022 Dated 09/11/2022 (*Commercial*)

Chapter 4: Arbitration Process Nullification Grounds - Serious Irregularities

The nullity action can be based on some precedent conditions prior commencing arbitration process or be based on some serious irregularity marring the arbitration procedures either during constituting the Tribunal or commencing the arbitration process or during the conduct of the arbitration process, as set in FAL Article 53(g). These serious irregularities and pre-arbitration triggers are outlined below.

4.1 Pre-Arbitration dispute methods - Contracts Multi-Tier Dispute Mechanism

Some Standard Contracts Forms contain Multi-tiered dispute resolution clauses (*for example FIDIC 1987 clause 67 and clause 20 of FIDIC Rainbow Suite of Contracts 1999 Edition*), that parties shall exhaust prior to proceeding to Arbitration. From plenty of judgments, such clauses are found to be enforceable in UAE, albeit with some exception by a way of estoppel principle, as a matter of party autonomy and freedom of Contracts, provided that they are not contravening with a public policy matter as Courts has settled that “*it is established in this court that according to the general principles of contracts; the parties to it may stipulate any condition that they find appropriate as far as it is not against public policy. The parties may agree conditions precedent that must be followed before recourse to arbitration. If the condition precedent is not satisfied the request for arbitration should be inadmissible.*”⁷⁸ However, the nullity action based on this ground shall be raised earlier during arbitration proceedings within the prescribed time limits and not after the final award has been issued.⁷⁹

⁷⁸ Dubai Court of Cassation, Case No. 124/2008 (*Commercial*), further reading Ahmed Ibrahim, ‘Multi-tiered dispute resolution clauses in the UAE’ (Research & Insights Annual Review) <<https://www.fenwickelliott.com/research-insight/annual-review/2019/multi-tiered-dispute-resolution-clauses-uae>> accessed 21 October 2021

⁷⁹ See Chapter 2.5 and 2.6 for time limits concerning subject grounds

4.1.1 Estoppel Doctrine on Multi-Tier Mechanism

The UAE Courts, in certain circumstances, has invoked the estoppel principle to invalidate such mechanism exhaustion as a condition precedent. In a DIAC Award on January 28, 2021, the Contractor is awarded termination of contract and compensation thereto (FIDIC 1999 based contract). The Employer seeks annulment before Dubai Courts alleging that, *inter alia*, the conditions precedent are not met, the statement that has been denied by the Court due to that The Employer itself has already in old case *no 2143/2014* objected jurisdiction of Dubai Courts due to existence of Arbitration agreement from one arbitrator in DIAC which they succeed in, and so waived their right to pre-Arbitration process and cannot invoke it again for the same contract.⁸⁰ The issue has also been affirmed in a case where the claimant had itself initiated the Arbitration without exhausting the former mechanism in its capacity as claimant.⁸¹

4.2 Oath-taking

Where an award is rendered based on a decisive testimony, the Oath taking was expressly required as per the old Arbitration provisions in Civil Procedural Code, and Courts has nullified several awards accordingly, as the old Law (Article 211) was expressly stating that “*The arbitrators shall cause the witnesses to take oath*”.⁸² Albeit, there is no express provision corresponding to the same requirement in the new FAL Law, it can be implied from FAL Article 33(7) which states “*Unless otherwise agreed by the Parties, the statements of the witnesses including experts may be heard according to the applicable laws in the State.*”⁸³ that may invoke the mandatory UAE Evidence Law requirements as seen from recent judgments that onshore Courts still nullifying the awards based on these

⁸⁰ See Dubai Court of Cassation, Case No. 261/2021 dated 07/10/2021

⁸¹ Dubai Court of Cassation, Case No. 504/2018 dated 03/04/2019

⁸² UAE Civil Procedural Code, Article 211

⁸³ UAE Arbitration Law (FAL), Articles 33(7)

requirements. In a recent case the Dubai Court of Cassation, removed the uncertainty as to this matter, by invalidating an award where it was made on the basis of witness evidence that was not given under oath.⁸⁴

4.3 Arbitral Tribunal and Arbitrators Appointment

Parties shall adhere to the procedure of appointment of Arbitrators and constitution of the Arbitral Tribunal, according to their own agreement, if they agreed to formation or according to the rules of the chosen center, absent which, in accordance with the FAL Law provisions. An arbitral award issued by the arbitrators who were not appointed in accordance with the Law, may be invalidated if challenged based on this ground.

4.4 Invalid Procedures, Fair Grounds of Litigation and Party notification

These grounds fall under the invalid procedures in the Arbitration that affected the award as stated in FAL Article (53)(1)(g)). The arbitral Tribunal shall strictly adhere to the fairground of litigation by a way of maintaining the due process and serving the proper timely notices, in the registered addresses of the parties, for appointments of the Arbitrators and the arbitral proceedings, otherwise the arbitral award may likely be challenged based on this ground whose burden of proof will be upon the claimant. An unsuccessful annulment action in a case concerning cancelation of a sole DIAC Arbitral award was sought to be relied on this ground by a grieving party who contested that she was not properly notified in the email used for correspondences, which is different than the registered one with the arbitrators whom used it for notifications, where the Courts dismissed the case and affirmed the enforcement of the arbitral award and stated “*It is also*

⁸⁴ Dubai Court of Cassation, Case No. 78/2022 and Case No. 96/2022, *See also* Case No. 364/2019 dated 19/05/2021, cited by Jonathan H. Sutcliffe, Mohammad Rwashdeh and Thomas Parkin, ‘Swearing An Oath Remains A Requirement For Witnesses In Onshore UAE Arbitration’ (Latest Thinking, 22 November 2022) <<https://www.klgates.com/Swearing-an-Oath-Remains-a-Requirement-for-Witnesses-in-Onshore-UAE-Arbitration-11-22-2022>> accessed 05 January 2023

*determined, in accordance with the ruling of this court, that the litigation procedures are originally observed and whoever claims that it has been violated must establish evidence for what he claims, and the burden of proof falls on the litigant who insists on the nullity of the arbitral award because the principle of confrontation between the litigants has not been fulfilled”.*⁸⁵

4.5 Arbitrator’s Challenge

Nullity Triggers for this ground include the reasons to challenge the arbitrator themselves as laid down in the FAL Article 10 “*The requirements to be met by the arbitrator*” and in addition, the compliance with general requirement of the Law specially the conflict of interest as per Article 10(4), which states: “*Any person who is notified of his possible appointment as an arbitrator, shall declare, in writing, all circumstances that are likely to give rise to doubts as to his impartiality or independence, and he, as from the date of his appointment and throughout the arbitration proceedings, shall, without delay, notify the Parties and other arbitrators of any such circumstances that may arise and which may give rise to doubts as to his impartiality or independence, unless they have already been informed of such circumstance*”.⁸⁶ In a case, where an arbitrator found to have previously worked with the claimant Law firm as representative, the issue that has not been declared by him prior his selection in submitting the statement of acceptance, impartiality and independence, the respondent claimed that the arbitrator violated FAL Article 10(4) by such non-disclosure that likely may lead to lack of his impartiality and independency and requested revoking his mandate and Consequently, set-aside the award which has been issued by him. Both Appeal Court and the Abu Dhabi Court of Cassation has accepted the

⁸⁵ Dubai Court of Cassation, Case No. 247/2022 Dated 28/06/2022 (*Real Estate*)

⁸⁶ UAE Arbitration Law (FAL), Articles 10(4)

argument and set-aside the award and affirmed the importance of the compliance with the requirements that the arbitrator has to meet as per the new FAL.⁸⁷

⁸⁷ Abu Dhabi Court of Cassation, a Judgment issued on January/2022, cited by Marc Massihi, Imad Kassir and Samer Abou Said, ‘Abu Dhabi Courts Set Aside an Arbitration Award For Failure Of Arbitrator To Disclose Potential Conflict of Interest’ (Conflict of Interest, 15 June 2022) <<https://www.thefirmdubai.com/the-nullification-of-an-arbitral-award-by-abu-dhabi-courts-recent-judgments-of-abu-dhabi-cassation-court-and-abu-dhabi-appeal-court-2>> accessed 09 January 2023

Chapter 5: Arbitral Award Form and Content Nullification Grounds

Absent any other ground for nullity, an award issued may have violated certain requirements or principles of the Law to be observed, either in its form from a procedural manner or in its content, whether contravenes any mandatory Laws thereto as outlined below.

5.1 Judgment Conflicts with Courts

The Arbitral Award should be absent of any conflict with a previous Court ruling involving the same parties provided that the subject matter of the disputes is same in both judgment or, if the disputed matter concerns any other right, the validity or non-existence of which depends on this basic issue previously decided between them and that the Court has decided on such matter or mentioned it in the reasoning, as commented by DCC in several judgments.⁸⁸ The principle concerning conflicting judgment as per Article 49 of the UAE Federal Evidence Law will be applied by the Courts in this case to decide whether there is a conflict or not. The former Article states: “1- *Judicial judgments and decisions terminating the dispute and performance orders that have acquired the force of res judicata shall have a binding force as to matters adjudicated, and no proof shall be admitted disproving the presumption resulting therefrom. However, judgments or judicial decisions terminating the dispute or performance orders shall not have this force except in a dispute between the litigants themselves acting in the same capacities and relating to the same subject matter and cause.*

2- *The court shall, sua sponte, rule this res judicata*”.⁸⁹

⁸⁸ See for example Court settled principle of how judgment will conflict as set out in Dubai Court of Cassation, Case No. 354/2022 dated 29/11/2022

⁸⁹ The UAE Evidence Law [Federal Law No. 10 of 1992], Article 49

In a case concerning nullifying of a Dubai International Arbitration Center's Arbitral Award concerning loss of profit and accordingly termination of contract due to delays in handing the unit, the arbitrator awarded termination of contract and rules compensation to the buyer, so the disputed matter was to return the paid amount and terminate the contract mainly due to delays. However, the same claimant has previously issued proceeding before Dubai Courts concerning the same unit, but the matter was to cancel the contract based on the difference in the units' areas as the project has been assigned to another developer whom re-signed new contract with the claimant, on which the Court has dismissed the case.⁹⁰ The respondent succeed in first judgment by Cassation Court to return the case to Appeal Court , who dismissed the case first based on that Courts will not open the substantive matter and considered all the raised defense by the claimant is falling within the jurisdiction of the arbitrator. The claimant based its defense on error in Law by ignorance of its defense based on above previous judgements which he alleged concerning the same matter and same litigants,⁹¹ however the Appeal Court after remitting the case back to them again dismissed the case based on different reason which is that the two subject matter are different between the cases and there is no conflict as the previous judgment was based on termination of Contract due to area mismatch which they have dismissed ,while the subject of the Arbitral Awards is compensation for delays and loss of profit, the Cassation Court affirmed Appeal Court decision that there is no conflict and the subject matter is different between the cases and hence dismissed the appeal to annul the Award.⁹² In another case in a dispute over performance order, the contractor initiated Court proceeding against the claimant for payment, however the Court has not admitted the case as, reasoning that it has not been filed in the way drawn by Law. Subsequently, when the

⁹⁰ Dubai Court of Cassation, Case No. 630/2015 (*Commercial*)

⁹¹ Dubai Court of Cassation, Case No. 165/2022 Dated 21/03/2022 (*Commercial*)

⁹² Dubai Court of Cassation, Case No. 1020/2022 Dated 22/08/2022 (*Commercial*)

case has been filed the right way, the respondent raised the jurisdictional issue that the Dubai Court has no jurisdiction over the matter due to existence of an Arbitration Agreement, the issue that has been dismissed by the Appeal Court, without investigating any defenses raised, by basing the Court decision on having a previous conflicting Judgment in the same case. The Cassation Court overturned the Appeal Court latter decision and illustrated that in the previous judgement the claimant has raised his ant-jurisdiction issue but that was not investigated or mentioned in the Court reasoning and the Appeal Court judgment was based only on that the case was not filed in accordance with the law, where the right to challenge jurisdiction raised has not been investigated, confirmed, commented or annulled in the previous judgment, so the defense is still valid and there is no conflicting judgment in this case.⁹³

5.2 Incompetent Court Ratification

For an award to be properly recognized and enforceable, it has to be ratified in the correct competent court, as discussed in Chapter (2.1). However, there is special provisions governing ratification of foreign awards and awards falling under jurisdiction of certain committees empowered by the Law which has to be known to the party seeking ratification, otherwise the award may be annulled.

5.3 Award Exceeded Jurisdiction

The arbitral award may be annulled if it has decided on issues not falling under its scope as defined in the underlying arbitration agreement, or has exceeded the limits of the latter for matters not falling within it. Nevertheless, if the decisions on matters submitted to Arbitration can be severed or separated from those not so submitted, only that latter part of

⁹³ Dubai Court of Cassation, Case No. 3990/2022 Dated 13/06/2022 (*Commercial*)

the award containing such decisions may be set aside.⁹⁴ In raising an action based on this ground and as per Article 20(1) which states “*the plea must be filed no later than the hearing following the hearing in which the plea is filed, that the tribunal does not have jurisdiction was submitted, otherwise, the right to file such plea shall lapse*”, it should be noted that, unless justified, there is a time limit to raise such jurisdiction’s exceeding challenge, otherwise the Courts will not accept nullification based on this reason, even if the claim was valid, as ruled in an insurance case concerning matters ruled by arbitrator, where there was no objection during arbitral proceeding by the contestant who has signed the matters referred to the arbitrator and has shown his defense previously and did not challenge this jurisdictional issue within the prescribed time frame.⁹⁵

5.3.1 Competence-Competence Challenge – Arbitration Tribunal ruling on its own Jurisdiction

It is also very important to note that, if the annulment action is based on the arbitral tribunal jurisdictional matter including the matters that the new FAL Law empowered the tribunal to decide on it, like existence of the Arbitration agreement or exceeding jurisdiction, there is a time limit and Court restriction or the challenge will fail as per Articles 19.⁹⁶ and Article 19.2⁹⁷ which set out that, if the tribunal ruled on its own jurisdiction either as in a preliminary award or a final award, either parties has the option

⁹⁴ See for example Dubai Court of Cassation, Case No. 94/2019 Dated 21/04/2019 (Civil), Chapter (2.3) for severability of the award, further reading See Muhammad Naseer, ‘Challenging and Enforcing Arbitration Awards: United Arab Emirates’ (Global Arbitration review, 4 February 2022) <<https://globalArbitrationreview.com/insight/know-how/challenging-and-enforcing-Arbitration-awards/report/united-arab-emirates>> accessed 16 September 2022

⁹⁵ See for example Dubai Court of Cassation, Case No. 438/2022 Dated 22/12/2022 (Civil)

⁹⁶ FAL Article 19.1 states: “*The Arbitral Tribunal shall decide on any plea to the jurisdiction, including the plea claiming the non-existence or the invalidity of the Arbitration Agreement, or that it does not cover the subject matter of the dispute. The Arbitral Tribunal may decide on the same either in a preliminary decision or in the final Arbitral Award issued on the subject matter of the dispute.*”

⁹⁷ FAL Article 19.2 stipulated “*If the Arbitral Tribunal decides in a preliminary decision that it is competent, any of the parties may, within thirty (15) days from the date of being aware of that decision, request the Court to rule on that matter. The Court shall decide on the request within (30) thirty days from the date of its submission at the Court, and its decision shall not be subject to appeal by any means. The arbitral proceedings shall be suspended until the Court decides on the request unless the Arbitral Tribunal decides to continue with the proceedings at the request of one of the parties.*”

to recourse to the Court of Appeal to challenge such jurisdictional matter within 15 days from the tribunal ruling on it, and the Court will issue its decision within 30 days which is not subject to appeal, non-compliance of which may like invalidate an otherwise valid claim. The former principle is affirmed in a recent case, before the Dubai Cassation Court, concerning annulment of DIAC Award, where the Court dismissed an appeal, in which the claimant challenged Tribunal decision on dismissing its claim on the invalidity of the Arbitration agreement for incapacity of the party signing the agreement, that the Tribunal has decided invalidity of it and issued the award. The Court ruled that, regardless of the validity of the claim, such claim has time lapsed and contestant therefore can no longer raise this defense or objection.⁹⁸

5.4 Applicable Arbitration Law (Old vs New) Effect

The retrospective effect of applying FAL 2018 to some arbitral awards, have been seen to be eliminated if an event giving rise to a dispute lead to Arbitration occurred before the new **FAL** came into force, as the Courts has ruled that the old repealed CPC provisions will apply in this case, as ruled in a judgment granting annulment of DIAC award on the 26th of December 2018 based on Articles 216(a) and 216(c) of the Old UAE Civil Procedural Code, where Courts found that the arbitrator acted beyond his mandate by involving sons of father in a villa contract signed by father, a judgment which claimed to be the first annulment case post FAL enforcement.⁹⁹ The Courts on reaching to its decision commented that: “Article (59) UFAL 2018, states that the provisions of this law apply to

⁹⁸ Dubai Court of Cassation, Case No. 670/2022 dated 17/08/2022 (*Commercial*). See also Dubai Court of Cassation, Case No. 354/2022 dated 29/11/2022 where Arbitral Tribunal ruled on its jurisdiction that was affirmed by the Courts

⁹⁹ See Taha Sharaf, ‘First Nullification of a Domestic Arbitration award under the umbrella of the new Federal Arbitration Law No 6 of 2018’ (mahmoodhussain.net, 15 June 2019) <<https://mahmoodhussain.net/articles/first-nullification-of-a-domestic-arbitration-award-under-the-umbrella-of-the-new-federal-arbitration-law-no-6-of-2018-is-triggering-a-retroactive-principle-of-law-in-respect-of-the-previous-rules-of/>> accessed 11 April 2021

any arbitration existing at the time this law comes into existence, even if it was based on an earlier arbitration agreement. However, the provisions of any previous legislation shall be considered as correct. Therefore, the new UFAL 2018 may not be applied to the events that have occurred in the past on any legal relationship, legal status that arose prior to UFAL 2018 coming into force and the previous procedures that applied, based on an existing arbitration law at that time, (CPC articles 203-218).”¹⁰⁰

5.5 Miss-Applying Underlying or Substantive Agreement Law

Failure to apply the underlying Law or the Law agreed by the parties to govern the subject matter of the dispute, may lead to nullification of the award as set out in (Article 53(1)(e)). Nevertheless, it is worth mentioning that if the arbitrator has wrongly applied or interpreted the Law, this will not be taken as nullification reason as the Courts will consider the Law has been applied whether right or wrong according to the arbitrator’s point of view of understanding of the Law.¹⁰¹

5.6 Time to Issue the Award and Related Estoppel Principle

The Arbitral Award, to be considered valid, has to be issued within the agreed or prescribed time frame as per Article 42 of new FAL,¹⁰² which require parties to agree on such time-limit or absent such time limit, a method determining to issue the award and

¹⁰⁰ *ibid*

¹⁰¹ See for example Dubai Court of Cassation, Case No. 438/2022 Dated 22/12/2022 (Civil) concerning an insurance dispute, see also Dubai Court of Cassation, Case No. 142/2022 dated 06/07/2022 (Commercial)

¹⁰² FAL Article 42 states: “1- The Arbitral Tribunal shall give the award terminating the dispute, within the time limit agreed by the Parties. If there is no agreement on a specified time limit or a method to determine said date, the award shall be rendered within six months from the date of the first hearing of the arbitration proceedings. Moreover, the Arbitral Tribunal may decide to extend the period up to no more than six (6) additional months, unless otherwise agreed by the Parties.

2- The Arbitral Tribunal or any party may, in case of non-issuance of the Arbitral Award and after the termination of the period mentioned in Clause (1) of this Article, request the Court to issue a decision determining an additional period for rendering the Arbitral Award or ending the arbitration proceedings, if necessary, and it may extend said period according to the conditions that it may deem appropriate. Unless otherwise agreed by the Parties, its decision in this regard shall be deemed final.

3- If the Court renders a decision ending the arbitration proceedings, then any party may file his case with the competent Court of original jurisdiction.”

terminate the dispute. In lack of former time frames, the award should be issued within (6) months from the date of first session and Arbitral tribunal may extend for further (6) month unless parties agree for longer period. Have the latter period expired without issuing the award, the Arbitral Tribunal or one of the parties may request the Court to pass a judgment prescribing an additional period for rendering the Arbitral Award or terminate the proceedings, if necessary and the judgment shall be deemed final, unless the parties agree otherwise, in this regard. If there is unjustified delay by any party, they may be estopped from raising an action of nullity alleging non-compliance with time frame agreed, as per the requirements of good faith prevailing in UAE Contracts as enforced by the Law.¹⁰³ Furthermore, the rules of the arbitration center agreed by the parties may have different mechanism and power to the center, which will fall under the method to determine the time limit set by the FAL, as seen ruled in a case to annul a DIAC award, where the claimant tried to annul an award based on that it was not issued based on an extension awarded by Court as per the Law, the argument that the Court rejected as a valid ground for the annulment, and the Court commented that the DIAC executive committee is empowered to grant such an extension according to its rules of arbitration which has been the case in this award without any objection from the claimant.¹⁰⁴

5.7 Arbitral Awards Issued in Default

Awards issued in default, have often been an potential obstacles adds more difficulties to the recognition and enforcement of the foreign arbitral awards or judgments in the UAE.¹⁰⁵ Article 85 of Cabinet Resolution 57 of 2018 (as amended) dealing with such enforcement

¹⁰³ See for example Dubai Court of Cassation, Case No. 51/2020 Dated 14/05/2020 (*Real Estate*)

¹⁰⁴ Dubai Court of Cassation, Case No. 1149/2021 Dated 14/01/2022 (*Commercial*)

¹⁰⁵ Omar Al Heloo, Mohammed Abbas and Rashed Faidhallah, 'Enforceability Of Arbitration Agreements' (Hadeef in Courts, 14 September 2021) <<https://www.hadeefpartners.com/News/533/Hadeef-in-the-Courts--Enforceability-of-arbitration-agreements>> accessed 22 December 2022

issues requires that the parties of litigation “*were summoned and were duly represented*.”¹⁰⁶ However, if in accordance with the applicable law, the award issued in absentia based on an existence of a sound evidence that the defendant has been duly noticed and properly made aware of all the arbitral proceedings, the UAE Courts may grant enforcement of such an award.¹⁰⁷ The latter has been seen to be considered in a case concerning enforcement of where contract was based on standard terms including Arbitration clause without existence of signed agreement, albeit not appealed to higher Courts to be “standard practice”.¹⁰⁸

5.8 Award Issued Contradicts a Public Policy

As per FAL Article 53(2)(b), the arbitral award will be subject to annulment, on own Courts’ initiative, if found that it breaches the public order and public morals of the UAE. Public policy, as previously mentioned, is broad in scope and subject to Courts interpretation. One of the hottest matters that considered as public policy is the signing of the arbitral award as explained below.¹⁰⁹

5.8.1 Issuing and Signing of the Award

The arbitral award shall be issued and signed by permission and attendance of all arbitrators if there is more than one arbitrator involved, as an award issued by some of them without their permission to issue it in the absence of others, may be subject to nullity. As per UAE Court practice, it is required that the “*The arbitrator should sign both the reasoning and the dispositive part of the award*”,¹¹⁰ the issue that was strictly been adopted by the Court since the old Law. As per new FAL Article (41)(2)(3), the same principle is affirmed as it requires the award to be signed by the arbitrary or majority of

¹⁰⁶ Cabinet Resolution 57 of 2018, Article 85(c)

¹⁰⁷ n 105

¹⁰⁸ *ibid*

¹⁰⁹ See Gordon Blanke, ‘Your signature, please: recent developments under article 41(3) of FAL’ (Practical Law, 20 August 2020) <<http://arbitrationblog.practicallaw.com/your-signature-please-recent-developments-under-article-413-of-fal/>> accessed 19 September 2021

¹¹⁰ Dubai Court of Cassation, Case No. 1083/2019 dated 14/06/2020

arbitrators in constitutions consisting of more than one arbitrator, as laid in the former Article what states: “2- *The Arbitral Award shall be signed by the majority of all members if the Arbitral Tribunal is composed of more than one arbitrator. If the award is not signed by the majority of the arbitrators, then the president of the Arbitral Tribunal shall give the award unless otherwise agreed by the Parties. In this case, the dissenting reasons shall be written or attached, and shall be considered an integral part of the award.*

3- *The arbitrators shall sign the award, or otherwise the reason for any omitted signature shall be stated. The award shall be valid if signed by the majority of the arbitrators.*“.¹¹¹

However, following enactment of the new FAL Law, Courts has shown great flexibility by enabling remittance back the award subject the nullity, with the jurisprudence that the legislator intention to narrowing the reasons for nullification as well settled by the Court in its statement that “*it is determined according to ruling of this court and in accordance with the provision of Article (54/6) of Law No. (6) of 2018 concerning Arbitration that in the new Arbitration Law, the legislator tended to reduce the reasons for **nullification** by giving priority to the requirements of the validity of the procedural action over the reasons for its nullity or failure, by considering that the purpose of the action is to put it in the service of truth; therefore, it authorized in Article (54/6) the **arbitral** tribunal - at the request of the litigants - to correct the nullity in the form of the **award**, which is consistent with the general principles of procedural action, which stipulate that the nullity shall not be ruled when the invalid action has been corrected or its purpose has been achieved*” , the statement that issued in a recent judgment where the contestant, after the Appeal Court grant leave for correction for signature, argued, *inter alia*, that the award cannot be

¹¹¹ UAE Arbitration Law (FAL), Articles 41(2)(3)

attributed to the arbitrator, the statement that has been dismissed by Dubai Cassation Court.¹¹²

5.8.2 Non-UAE Domiciled Party with Assets in UAE

Successful party having an award against a non-domiciled UAE respondent with an asset in UAE, may not be able to enforce or execute such an award in UAE as a matter of public policy. In a recent case, the Dubai Court of Cassation has upheld a decision of the Appeal Court in refusing to enforce a foreign award issued in London Court of International Arbitration (LCIA) upon an award debtor who is not domiciled in UAE, but owns shares in a two UAE's domiciled and registered companies. The decision was challenged by award creditor based on Article III of the New York Convention, that requires contracting states to enforce such awards in accordance with their procedural rules and to ease enforcement in line with domestic awards. The Cassation Court rejected the defense and stated that "*it is established that matters of jurisdiction are considered matters of public policy and cannot be overlooked*" and emphasized that it did not have jurisdiction since the debtor is not domiciled in UAE and most important that, companies domiciled in Dubai on which claimant has shares, were not party to the Arbitration.¹¹³

¹¹² Dubai Court of Cassation, Case No. 545/2022 Dated 27/06/2022 (Civil), See Chapter 2.4 for more details of granting leave for correction, See also Dubai Court of Cassation, Case No. 1083/2019

¹¹³ See Jonathan H. Sutcliffe, Mohammad Rwashdeh and Thomas Parkin, 'Dubai Courts Refuse Enforcement Of An Arbitral Award Against A Foreign Party' (Latest Thinking, 19 December 2022) <<https://www.klgates.com/Dubai-Courts-Refuse-Enforcement-of-an-Arbitral-Award-Against-a-Foreign-Party-12-19-2022>> accessed 11 January 2023

Chapter 6: Conclusion

The essence of the Arbitration as an alternative and preferred way of litigation depends on its awards' recognition, enforcement and execution, under the related governing Law, being it local award or foreign, partial or final award. However, contrary results may lead to its nullification partially or entirely as the case may require. As such, legislators in different countries tries to set comprehensive Laws and regulation to reach the goal which in turn have an impact on the overall encouragement of the parties to elect Arbitration over the lengthy Courts proceedings as the case in the UAE. Having said that, UAE has enacted the new Federal Arbitration Law No. 6 of 2018 (FAL) issued on 03 June 2018 due to lacking of specific Laws governing the various aspects of the Arbitration process, which has addressed various issues that was not covered by the old Law provisions contained in the Civil Procedural Law. The most crucial part of the Arbitration process is the nullification of its award, which in UAE now governed by the former Law, specifically in the Article No. 53, as the legislator has set certain incidents upon which an action for nullity may be raised before the competent Courts. The aim of this study is to analyze these grounds and the Courts interpretation and dealing with them by concentrating on the core stages of the Arbitration and the grounds that can be avoided to have clear measures to be taken in each stage of Arbitration process to avoid annulment of an otherwise valid award probably sometimes for trivial mistakes since the early stages of the Arbitration. As such, nullification grounds triggers have been divided to cover pre-arbitration issues, arbitration process issues and post issuance of the final award covering which has been regulated by the new FAL. As first, there is general requirements and rights have to be considered when initiating nullification action, from which is the competent Courts where the case shall be lodges, which is set as the federal or local Appeal Court or within which the jurisdiction falls, noting the difference between onshore and offshore Courts as the case will fall where

the contract has been partially or totally performed. Appeal Courts power may be inferred in special committees constituted by the legislator, on what case the action shall be heard before that committee. Having resorted to the competent Court, parties have the right to Appeal the decision rendered thereto to the Court of Cassation whether in affirming or nullification of the award, a right that waiver of which cannot be enforced. The action of nullity can be raised by an assignee, but not a third party that was not party in the proceeding, even if the decision affects them if they were under supervision of some legislated authority that has the power to issue decision affecting all the parties (*like Dubai Land Department ...etc.*). The former recourse has to be in a timely manner, as it is set as (30) days from award notification, with exception to claims in respect of the Arbitration process itself, in which case the action has to be initiated within (7) days of the notice of arbitration commencement and prior constitution of the Tribunal. During nullity action, execution of the award will not be stayed, unless grieving party submit a request to the Court within (15) days from the first hearing date. The nullity decision by the Court may be partially or affect the whole award, as it may be severable if the nullity is on an ancillary part of the latter, and Courts may grant leave for correcting the reason lead to its nullity if it not affecting its content. Following nullification decision, parties may recourse again to arbitration in other matter if they wish as per their agreement and the former action will not invalidate the original arbitration agreement. Having considered requisites above, nullification grounds are classified into three pillars , those related to Arbitration agreement, and grounds related to Arbitration process and finally the ones related the arbitral award form and content.

Nullification grounds concerns the Arbitration Agreement that may invalidate it is linked to its requirement as per the Law, as it should be in writing, where within the meaning of what the Law consider in writing, include the physical and electronical methods like

emails, correspondences and letters or incorporation by clear unambiguous reference, or if the parties agreed during litigation before the Courts. If such an argument is contained in an addendum or appendices to the Contract, it should be duly signed by an authorized person. In case of reference is made to any other standard contract that contains Arbitration clause, that should explicitly be mentioned, otherwise it may not be enforced. The natural person exercising the Arbitration agreement must have the legal capacity as per the Law governing it, however for the juridical person a special power of attorney is required to bind such a person to the arbitration agreement, with exception to the directors or general managers of Limited Liability Companies, whom UAE Courts considers them have the implied capacity to bind their companies, unless expressly being restricted from such a right. In regard to the authority issues, the UAE Courts have implied the apparent authority doctrine and estoppel principle concerning inferring the authorization of the signatory of the agreement if there is uncertainty or ambiguity of the signature, based on the general principle of the good faith required in performing the Contracts. In a joint venture or consortium Contracts, either party can enforce the award on their single name as ruled by Dubai Courts. Having complied with signature requirements, to avoid nullification based on invalidity or non-existence of the arbitration agreement, the latter's content should be drafted in a way removing the uncertainty or ambiguity confirming the true parties' intention to arbitrate by avoiding the pathological clauses, which include, but not limited to, using permissive language like "*may*", or using an incorrect or reference to or non-existent Arbitration Seat. The scope of the agreement should not include arbitrable matters like personal status, criminal actions, labors matters ...etc. etc. as per, and any issue that governed by the Law that classified under the public policy matter, as it is wide in scope as per UAE Laws. Unilateral option clauses, sometimes in standard contracts, are unlikely to be enforced in UAE due to requirement of the joint intention of the party and the general

good faith and equality requirement. Nevertheless, executing a valid agreement complying with the former requirements, does not preclude the UAE Courts to exercise jurisdiction in certain conditions as it sees fit for the interest of justice, the issue that being criticized as to curtailing the freedom of Contracts and party autonomy. Generally, these conditions are the disputes concerning multiple, but closely connected contacts or matters related to public policy. The latter, amongst others, include the joint liability disputes resulting from different contracts where one party has no arbitration agreement, but others have valid ones in place, and in cases of Decennial Liability disputes or in a case of multiple defendants in which only one signs an agreement, where they are all were participating in the arbitration proceedings. Heirs of a person signed a valid agreement on his capacity representing a legal entity of inherent company, may not be bound by such an agreement, as Arbitration applies only to the legal entity name as ruled by Dubai Courts. UAE Courts also may exercise Jurisdiction on some matters that it sees not covered under a valid agreement where an arbitration is conditional on occurrence of some incident or where the agreement is not sufficiently broad enough to cover all the disputes arising out or in connection with the underlying Contract, on which Courts may interpret whether the disputed action falls within the agreement or not. Finally, in connection with the former, parties themselves may lead the Court exercising jurisdiction where one-party proceeds with litigation before the Courts without objection from the opponent party, upon which it is an implied consent having withdrawn the Arbitration on the disputed matter.

Nullification grounds related to Arbitration process itself, may be triggered by matters prior conducting the arbitration or for issues during process where the latter are marred with some serious irregularities that may lead to nullification of the arbitral award. As for pre-arbitration grounds, for example, the underlying Contracts may include certain mechanism for dispute resolution to be exhausted prior conducting arbitration, such

clauses are likely to be enforced by UAE Courts, albeit with some exception by a way of estoppel if the invoking party has challenged the jurisdiction before for the same agreement. During an Arbitration that its outcome depends on a testimony decisive matter, the UAE Courts are found to require that oath-taking is executed as set by the Law, albeit FAL does not include express condition for the same compared to the old repealed Law. In constituting the Arbitral Tribunal, the agreement of parties shall be strictly followed, absent which the chosen center rules or procedure set in FAL absent the latter. Finally, regarding Arbitration proceeding triggers, the Arbitrators should adhere to the fairground of litigation principle, from proper noticing the parties of arbitral Tribunal constitution and proceedings, allowing sufficient time for hearing and maintain all the requirement of due process, and shall disclose any information as may raise doubt to their impartiality and independency, otherwise a party may have serious grounds to challenge the arbitrators and nullify awards issued by the Tribunal.

Being clear of any of the issues rendered above, the Arbitral Award may be nullified based on its form and content, that is, if there exists for example a judgment conflict in respect of disputed matter where the subject matter of new dispute is same in both judgments or being dependent on previously decided matter, or if the award ratification has been submitted to the incompetent Court, or if the award is found to have decided on, or exceeded, matters not falling within its scope (exceeding jurisdiction). In connection with latter jurisdictional matter, the arbitral Tribunal are empowered by new FAL to rule on its own jurisdiction (*Kompetenz-Kompetenz*) for matters related to existence of Arbitration agreement or exceeding jurisdiction, however, there is a time limit for raising such challenge before the Courts set as (15) days from ruling on the same by the Tribunal, otherwise the case will be dismissed by the Courts. In connection with the timing issues, the award itself must have been issued on time agreed by parties, absent which the award

must be rendered within (6) months from date of first session, and may be extended by further (6) months by the Tribunal as the case may require; and if latter time was not sufficient, an application to the Court by either party to grant additional extension may be required, unless otherwise agreed by parties or there is a rules for such extension in place by the chosen center including the power vested on it. The former nullity trigger may not be raised by a party who deliberately causes the delay of proceeding in compliance with the requirement of good faith.

If a party didn't participate in the proceedings despite being properly notified, and the award has been issued in default, the award may be enforced by UAE Courts are per a precedent ruling on the same, and this mostly applies to foreign award governed by UAE Cabinet resolution 57 of 2018.

Finally, there are some grounds considered as a public policy , related to Arbitral Award formalities or execution, from which is the requirement of the award to be signed in the reasoning and the dispositive part, the issue that previously was strictly been applied, however as per new FAL , Courts shown to be flexible in allowing the award to be remitted back for signing setting a precedent that had the invalid action been corrected, the nullity shall not be ruled, which is considered as a motivation toward a friendly arbitration environment. Public policy in respect of enforcement may also be invoked by UAE Courts, without the need of nullification claim by the losing party, as seen in a case where a losing debtor is not domiciled in UAE, but has some shares in a UAE registered and domiciled companies, due to non-domicile issue and that the later companies were not parties to the proceedings.

6.1 Study Limitations

This paper tries to gather all the grounds that may trigger nullity of the arbitral award, by discussing and including Court practice in light of the new Arbitration Law (FAL), to add

an in-depth knowledge of how Courts interpreted and apply the new Law to all the stages of the Arbitration process. However, there are many limitations of that, due to the recentness of enforcement of the new Law, there are few researches done on the subject and almost no comprehensive books as a reference on the subject, apart from occasional journals and online articles commenting on some judgments and interpreting the new FAL. As for cases study, one cannot investigate underlying referenced cases' documents, like contracts and proceedings hearing records and written defenses due to the confidentiality of the Arbitration process, as obtaining exact cases documentation may add more granularity to the essence of the various nullifications' triggering issues raised in this paper. The same is applicable to the Court cases, apart from it being in Arabic, where also examining underlying documents of the case may add additional analysis depending on the overall wording of these documents rather than the selective parts upon which Courts has based their reasoning and findings. The effect of recent changes to the Civil Procedural Code, which has made major amendment to the way Court of Cassation deal with its decisions in respect of the possibility of rescinding their judgments, especially if contradicting established rules , and the permission that now proceedings can be conducted in English in certain cases, is not clear how these procedural rules will have effect on the nullification cases, as the new law has just come into force on 2 January 2023.

6.2 Recommendations

Nonetheless it has been seen from the various judgments in the past years, that the UAE Courts in their application of the nullifications grounds set by the new Federal Arbitration Law No. (6) of 2018, after almost (5) years from implementing it in the judgments, has shown great flexibility and seen inclined to invalidate various awards, than previously was the case when the arbitration was subject to the old provisions; that said, in most of the judgment passed for nullity claims, UAE Courts has always emphasized that the grounds

for annulment as per the new Law are strictly limited to those listed therein and must be interpreted narrowly and must not be expanded by analogical reasoning, and limits Courts scope to be a supervisory in nature concentrated only in the form and content requirements of the awards, its compliance with public policy and arbitration process and basic principle of litigation, albeit with some surprising judgments related to the public policy matters which is broad in its scope, the UAE Courts and legislators may take a more friendly approach specially in the matters of public policy. The new FAL may needs to be more comprehensive and clear on matters related to corresponding requirements of the former polices by analyzing and including Courts practice of settled precedents to remove ambiguity and uncertainty to avoid surprising judgments, and including more sections explaining and ad more awareness about correspondent Laws that have seen to regularly be invoked in some Courts' judgments, for example the Competent Court issue, and finally dealing with the foreign awards matters may be summed and united with the current law rather than being in a separate legislation (the Cabinet Resolution no. 57 of 2018) governing it and be legislated and included in FAL 2018, so litigants can have a quick reference and awareness for all matters concerning arbitration, being it domestic award or foreign one.

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