



**Annulment of Arbitral Awards under the Federal UAE
Arbitration Law**

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

by

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of the requirements for the degree of
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Abstract:

Federal Law number 6 of 2018 is the New UAE Arbitration law – it is composed of 61 articles that control the practice of arbitration in the UAE. The UAE Federal Arbitration Law sets out the grounds for annulment of arbitral awards under article 53 thereof. The grounds set out under article 53 – as well as other articles related to annulment – is analyzed to understand how the UAE courts might determine a challenge for the annulment of an arbitral award. This analysis is supplemented national and international court judgements dealing with arbitrations and arbitral awards. The grounds for annulment of an arbitral award are broken down in this paper into the following categories: invalidity in the arbitration agreement, constitution of the arbitral tribunal, conduct of the arbitral process, the form and content of an arbitral award, and for matters of arbitrability and public policy.

نبذة:

القانون الاتحادي رقم 6 لعام 2018 هو قانون التحكيم الجديد لدولة الإمارات العربية المتحدة - ويتألف من 61 مادة تحكم ممارسة التحكيم في الإمارات العربية المتحدة. يحدد قانون التحكيم الاتحادي لدولة الإمارات العربية المتحدة أسس إلغاء قرارات التحكيم بموجب المادة 53 منه. يتم تحليل الأسباب المنصوص عليها في المادة 53 - وكذلك المواد الأخرى المتعلقة بالإبطال - لفهم كيف يمكن للمحاكم الإماراتية تحديد الطعن في قرار التحكيم. ويكمل هذا التحليل أحكام المحاكم الوطنية والدولية التي تتناول التحكيم وقرارات التحكيم. يتم تقسيم أسباب إلغاء قرار التحكيم في هذه الورقة إلى الفئات التالية: البطلان في اتفاق التحكيم ، ودستور هيئة التحكيم ، وإجراء عملية التحكيم ، وشكل ومضمون قرار التحكيم ، ولأموال التعسف والسياسة العامة.

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Introduction

Arbitration legislation in the UAE has recently been revised with the release of the UAE Federal Arbitration Law – by decree of His Highness Sheikh Khalifa bin Zayed Al Nahyan, the President of the United Arab Emirates, the UAE Federal Law Number 6 of 2018¹ was issued on the 15th of May 2018². The New UAE Arbitration Law has since superseded the majority of the previous provisions of the UAE Arbitration legislation, which were part of the UAE Law of Civil Procedures³ – UAE Federal Law Number 11 of 1992 (from article 203 to article 218)^{4 5}. However, not all the old arbitration provisions have been repealed - the New Law does not repeal articles 235 to 238 of Federal Law Number 11 of 1992 which relate to enforcement of foreign arbitral awards.

The New UAE Arbitration Law has effect on all arbitrations in progress after the New Law was enforced, even if such proceedings were based on arbitration agreements entered into prior to the New Law coming into force⁶. Furthermore, the New Law shall apply by default to any arbitration conducted in the UAE. The New Law shall also apply to international commercial arbitrations upon the agreement of the parties. Parties within the UAE can also agree out of the Arbitration Law⁷ - parties are free to agree on the arbitration law of their choice, provided that this is not

¹ henceforth referred to as the “New UAE Arbitration Law” or the “New Law” for ease of reference.

² The Law has taken effect 1 month from its release in the UAE Federal Official Gazette no. 630 on the 15th of May 2018.

³ Prior to the promulgation of the Federal Arbitration Law, there was no independent law governing arbitration in the country.

⁴ henceforth referred to as the “Old UAE Arbitration Law” or the “Old Law” for ease of reference.

⁵ Article 60.1 of the New UAE Arbitration Law repeals these provisions – article 60.1 states that “provided that the proceedings carried out in accordance therewith shall remain valid”; referring to the validity of arbitration proceedings conducted based on the procedural provisions of the Old Law, prior to the release of the New Law.

⁶ It seems that in order to preserve the validity of any arbitration procedure in progress prior to the enforcement of the New Law, article 59 of the New Law states that arbitrations conducted based on the procedural provisions of the Old Law shall not be invalidated. However, moving forward, any new or in progress arbitration proceedings will have to comply with the procedural provisions of the New Law.

⁷ As stated in Article 2.1 of the New Law.

against the public policy of the UAE. Finally, article 2(3) of the New Law states that the Law applies to any dispute arising out of a legal relationship (whether contractual or non-contractual) governed by the Laws of the UAE; except where a special provision of the UAE Law excludes settlement by arbitration – such disputes are in effect within the exclusive jurisdiction of the courts or other dispute resolution tribunal set by the legislator⁸.

The New UAE Arbitration Law is broadly based on/ conforms to the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006^{9 10 11}. The UNCITRAL Model Law has become a widely used standard form of arbitration law adopted (to varying degrees) by many arbitration friendly/ forward jurisdictions¹². The UNCITRAL Model Law aims to achieve harmony between the different jurisdictions that adopt its provisions, as well as compliance to the New York Arbitration Convention¹³. The UAE, by broadly adopting the UNCITRAL Model Law, has now become closer to achieving harmony and compliance with the international community - the main advantage to this is to give more efficacy to international commercial arbitrations¹⁴, as well as promote arbitration friendly principles that are commensurate

⁸ Such as in the case of disputes relating to UAE employment law, Agency law (if the agency is registered at the Ministry of Economy), ownership of real property, family and estate laws and criminal laws – Nassif BouMalhab, 'The UAE'S New Arbitration Law' <https://www.clydeco.com/insight/article/the-uaes-new-arbitration-law>, (accessed 13 January 2019).

⁹ Nassif BouMalhab, 'The UAE'S New Arbitration Law' <https://www.clydeco.com/insight/article/the-uaes-new-arbitration-law>, (accessed 13 January 2019).

¹⁰ 'UNCITRAL Model Law on International Commercial Arbitration (1985), With Amendments As Adopted In 2006 | United Nations Commission On International Trade Law' (Uncitral.un.org, 2018) https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, (accessed 13 January 2019).

¹¹ henceforth referred to as the “UNCITRAL Model Law” for ease of reference.

¹² The UNCITRAL Model Law has been fully adopted by 111 jurisdictions - 'Status: UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006 | United Nations Commission On International Trade Law' (Uncitral.un.org, 2019), https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, (accessed 13 January 2019).

¹³ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); referred to as the “New York Arbitration Convention” for ease of reference).

¹⁴ the more similar the arbitration legislation of different jurisdictions is, the easier it is to conduct international commercial arbitrations, and the enforcement of their arbitral awards.

with the commercial practices of the time. Thus, the New Law is expected to help the UAE to become a more attractive arbitration forum, as well as to increase foreign investor confidence in the legal business environment of the UAE¹⁵.

Arbitration is a method of dispute resolution that is alternative to dispute resolution through the court system. Parties to an arbitration agree that a future or specific dispute be referred for settlement to an arbitral tribunal chosen by the parties; this agreement (along with the provisions of the applicable law) allows the arbitral tribunal, to make a determination in the form of an arbitral award that is final and binding on the parties (comparative to a court award)¹⁶. However, to enforce the losing party to execute the award¹⁷, the award must be ratified or enforced (and subsequently executed) by the competent court in the jurisdiction where the arbitration is undertaken. Upon the issuance by the arbitral tribunal of the arbitral award, the losing party can take one of three actions; either honor the decision of the arbitral tribunal and abide by the arbitral award, refuse to follow the arbitral award and wait for the winning party to commence proceedings in the competent court for ratification and enforcement of the arbitral award then raise a challenge for the annulment of the arbitral award¹⁸ or to preempt the winning party and apply to the competent court to have the court declare that the arbitral award annulled for some recognized ground.

Effectively there are four grounds under the New Law based on which an arbitral award may be annulled¹⁹; these grounds are as follows: an issue with the validity/ existence of an arbitration

¹⁵ The UAE is already a hub for arbitration in the Middle East - 'Dubai: The Heart of Arbitration In The Middle East' (Herbert Smith Freehills | Global law firm, 2018) <https://www.herbertsmithfreehills.com/lang-ja/latest-thinking/dubai-the-heart-of-arbitration-in-the-middle-east>, (accessed 13 January 2019).

¹⁶ The Dubai Court of Cassation case 220/ 2004(38) confirmed that this is a well-established principle in the UAE.

¹⁷ In case the losing party chooses not to honor the arbitral award – as is the case in many arbitrations.

¹⁸ In international arbitration, the losing party would have at least two opportunities to do so, as the arbitral award must be ratified or enforced by the competent court in two or more jurisdictions – starting with the jurisdiction which is the seat of the arbitration.

¹⁹ Either by the losing party or by the Competent Court.

agreement²⁰, deviation in the composition of the arbitral tribunal or the arbitral proceedings from the agreement of the parties²¹ (or the mandatory laws relating thereto) and violation of the arbitral award or the arbitral proceedings of a matter considered to be of public policy²²; it is only grounds related to public policy that can be initiated by the Court, all other grounds must be raised by the objecting party²³.

This paper shall focus on the grounds for annulment of an arbitral award under the New UAE Arbitration Law; considering the internationally accepted principles adopted in the New Law, and the attitude of the UAE courts towards arbitration²⁴. The importance of this topic lies in the fact that if an award is set aside, the parties' time, money and efforts – spent in arbitration – become wasted. So far, there has not been an academic paper that has discussed the annulment of arbitral awards under the New Law. This paper shall obtain its research by the doctrinal method. The paper shall mainly revolve around the New Law, and where appropriate comparing this with the Old Law. Court judgements of jurisdictions adopting the UNCITRAL Model Law shall also be looked at in an attempt at extrapolate possible interpretations the UAE courts might conclude under the New Law.

The paper shall begin with the identification of some important features of an arbitral award under the New UAE Arbitration Law; namely the types/ categories of arbitral awards, the notification of

²⁰ and the jurisdiction it endows upon the arbitral tribunal – including arbitrability of the dispute.

²¹ Including failure of the arbitral tribunal to apply the law agreed upon by the parties.

²² Mistake in the correct application of the law by the tribunal is not a ground for the annulment of an arbitral award under the New Law.

²³This is the case in most arbitration friendly jurisdictions - Jenkins J, *International Construction Arbitration Law* (Kluwer Law International 2006), page 288.

²⁴ Unfortunately, there are no court cases considering the New Law as at the time of preparation of this paper; hence, analysis of court cases at the time of relevance of the Old UAE Arbitration Law will be undertaken; in an attempt to give the New Law a practical context useful in interpreting its provisions. Furthermore, court decisions from jurisdictions adopting the UNCITRAL Model Law will also be referenced to give some insight into how the UAE courts might deal with certain issues (which might not have been included in the Old Law).

the arbitral award and the correction and interpretation of an arbitral award. Secondly, the paper shall describe the procedural aspects for the nullification of an arbitral award (time limit for application for nullification, competent court, etc.). Subsequently, entering the main body of the paper, the grounds for annulment an arbitral award shall be divided into those grounds that must be invoked by the parties, and those grounds that may be raised by the court on its own initiative. The grounds that may be raised by the parties are the non-existence, invalidity or expiration of the arbitration agreement, the inability of a party to present his defense, failure to apply the agreed substantive law, improper constitution of the arbitral tribunal, nullity in the arbitral proceedings and ruling on matters out of the arbitrator's jurisdiction. The grounds that may be raised by the court on its own initiative are matters relating to public policy and matters not subject to settlement by arbitration (non-arbitrability).

Chapter 1 – Arbitral Awards

This chapter shall discuss some of the pertinent provisions of the New UAE Arbitration Law relating to arbitral awards²⁵.

1.1 Types/ Categories of Arbitral Awards

Under the New UAE Arbitration Law, arbitral awards are categorized as either interim²⁶, partial or the final arbitral award^{27 28}; while interim and partial awards deal with part(s) of the dispute, the final arbitral award deals with all²⁹ matters raised for settlement under arbitration (the entirety of the dispute³⁰). Furthermore, the new Law, under article 21, also recognizes the power of the arbitral tribunal to issue precautionary measures or orders. Under this provision, the arbitral tribunal may order the parties to take some interim action to aid in the disposition of justice or the efficacy of the arbitration³¹ - Article 18 of the new Law states that such orders may be enforced by the court. Finally, under article 36 of the new Law, the arbitral tribunal is given authority to seek the aid of

²⁵ Types/ Categories of Arbitral Awards, Notification of an arbitral award & Correction and Interpretation of Arbitral Awards and Additional Awards.

²⁶ It is submitted that only decisions that are final and binding on the parties are 'awards'; interim decisions do not fall under this definition as they are inherently temporary. However, no such distinction is made under the New Law.

²⁷ Authority for issuance of interim and/ or partial awards is given under article 39 of the New Law. Authority bestowed upon the arbitral tribunal to issue partial awards is also given in article 19 of the new Law – specifically on jurisdictional related disputes/ challenges

²⁸ As for the types of awards, there are also consent awards, where the arbitral tribunal gives effect to the settlement reached by the parties while an arbitration is under process; where such settlement is turned into an arbitral award. However, for the purpose of this section, a consent award is considered a type of final award. Article 40 of the New Law provides for a consent award.

²⁹ Or any remaining matters – as some matters may be dealt with prior to the issuance of the final award, in the form of partial awards.

³⁰ Theoretically this is the case; refer to the “Correction and Interpretation of Arbitral Awards and Additional Awards” discussed in this chapter for how a remedy for an incomplete final arbitral award is dealt with under the New Law.

³¹ For example, to preserve the status quo or have the original position restored, etc. – see article 21(1) for the full list - Adrian Chadwick, 'The New Arbitration Law' <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law>, (accessed 13 January 2019)

the competent court to order production of evidence required for the adjudication of the case under arbitration.

It is important to note that, article 12 of the New UAE Arbitration Law, which states that any decision by the arbitral tribunal (including any partial awards and interim/ precautionary orders and request for production of evidence or witnesses) shall be taken by majority of the arbitral tribunal (unless otherwise agreed by the parties) – as is the case for the final award. This is with the exception that decisions on procedural matters are issued by the president or chairman of the arbitral tribunal (if so agreed by the parties or the other members of the arbitral tribunal)³².

Partial Arbitral Awards:

Arbitral awards can be related to jurisdictional, procedural, or substantive matters. An arbitral award on jurisdiction would consider matters of the competence or jurisdiction of the arbitral tribunal to settle the dispute in question³³. An award on procedural matters is one where the arbitral tribunal would determine a procedural issue to help move the arbitral proceeding along^{34 35}. Finally, there are awards on the substance of the dispute - which are the real sought-after outcomes

³² It is important to re-iterate that this exception is limited to procedural.

³³ Since an arbitral tribunal obtains its powers from the arbitration agreement and the law governing that agreement, then an award on jurisdiction would normally consider these matters.

³⁴ It is submitted that this should only be done in cases where neither agreement of the parties can be achieved nor are there any default provisions of the law governing the arbitration process that stipulate the solution to the specific procedural issue - this is so as not to give rise to any grounds for nullification of the arbitral award based on a procedural error.

³⁵ Furthermore, it is submitted that procedural matters may not warrant the issuance of an 'award' as such, as these do not deal with any substances relating to the dispute itself – hence, 'awards' on procedural matters are often referred to as 'procedural orders', unless specifically referred to as awards by the arbitral tribunal - Alan Redfern and others, Redfern And Hunter On International Arbitration (6th edn, Bath Press 2015). At page 503 - although no such distinction is made in the New UAE Arbitration Law.

of an arbitration. These awards are made by the arbitral tribunal and give resolution to the original matter under dispute.

As mentioned earlier in this paper, the New UAE Arbitration Law is broadly based on the UNCITRAL Model Law. However, it is interesting to note that the provision for partial awards found in the new Law has no counterpart in the UNCITRAL Model Law. It is submitted that partial awards are an implied authority given to the arbitral tribunal accepted by many jurisdictions adopting the UNCITRAL Model Law³⁶. Furthermore, it is also provided for in many of the more popular arbitration rules^{37 38}. Yet the UAE legislator must have found it necessary to expressly provide for partial awards in the New UAE Arbitration Law; this is perhaps due to the legislator fearing that an arbitral award may be declared invalid by the UAE courts³⁹ - whereby the issuance of a partial award causes the courts to wrongly decide that the final award is invalid for prior issuance of an arbitral award⁴⁰. Hence, the UAE legislator has now set the matter straight with how the courts are to deal with partial awards⁴¹.

It is noteworthy that article 39(2) of the New UAE Arbitration Law refers to awards issued prior to the final award as 'interim' and 'temporary' – it is unclear why these words are used here, as partial awards are meant to be finally conclusive with the issues they deal with – especially on jurisdictional or substantive matters (e.g. deciding competence of the arbitral tribunal, etc.). It is

³⁶ Alan Redfern and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015). At pages 508-509.

³⁷ Including the ICC and LCIA arbitration rules.

³⁸ This perhaps explains why the draftsman of the UNCITRAL Model Law did not make an explicit provision for partial awards in the UNCITRAL Model Law - Alan Redfern and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015). At pages 508-509.

³⁹ See Dubai Court of Cassation case no. 192/ 2007 for an instance of this occurrence.

⁴⁰ i.e. on the wrong assumption that the authority of the tribunal becomes *functus officio* after the issuance of the partial award, rendering the final award invalid - Dalal Al Houti, 'A Checklist For What You Need For An Enforceable UAE Arbitral Award' <https://www.tamimi.com/law-update-articles/a-checklist-for-what-you-need-for-an-enforceable-uae-arbitral-award/>, (accessed 13 January 2019).

⁴¹ Thus, arbitral tribunals are free to issue these awards without fear of invalidation of the final award.

submitted that the partial awards (which are of a conclusive nature) and precautionary orders/ measures (which are of an interim/ temporary nature) are categorized together. Furthermore, article 39(2) of the New Law states that interim/ temporary orders shall be enforced by the President of Court of Appeal⁴² or his delegate. It is submitted that the same is applicable to partial awards (even though partial awards are not expressly mentioned in article 39(2)) as they dispose of the matter they deal with in a manner similar to a final arbitral award^{43 44}. However, since only interim/ temporary awards is expressed in article 39(2), the status of partial awards in this matter remains to be subject to the courts' interpretation.

What essentially differentiates partial from final awards is the timing of their issuance; arbitral awards can be issued at different periods during the arbitral proceedings - the final award, as the name suggests, would finalize the arbitral procedure and thus is issued at the end of the procedure⁴⁵. The period of issuance of an award does not change the fact that these awards are final and binding upon the parties. It is submitted that, as both partial and final awards are final and binding upon the parties, there is no difference at the end of an arbitration between the two types of awards. However, on a practical level, the period or sequence in which awards are issued may be an important factor to the relative efficiency of an arbitration⁴⁶, and this brings us to the main advantage adding the provision for awarding partial award to an arbitral tribunal's arsenal. Partial awards may be used by the arbitral tribunal to save valuable resources by allowing the

⁴² As defined in the New UAE Arbitration Law under article 1; "The Court: the federal or local court of appeal which is agreed by the parties or within the jurisdiction of which arbitration falls."

⁴³ Adrian Chadwick, 'The New Arbitration Law' <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law>, (accessed 13 January 2019).

⁴⁴ It is submitted that this differentiation between what shall be enforced by the court is unintentional – evidenced by the grouping of partial awards and precautionary measures/ orders as interim and partial awards under article 39 – and that both partial awards, as well as precautionary measures/ orders are meant to be enforceable by the court.

⁴⁵ Therefore, a partial award can only be issued prior to, and not after, the issuance of a final arbitral award.

⁴⁶ Which cannot be overemphasized – especially with the notoriously expensive and time-consuming arbitrations of more complex cases.

tribunal to decide on matters capable of being determined at an early stage, and thus decide whether the claim being arbitrated has any merit or answer some other important question which could determine the direction the arbitration is heading in⁴⁷. Take the case of a jurisdictional matter - it may be considered more prudent by the arbitral tribunal that if a question of jurisdiction of the tribunal or the scope of the arbitration agreement were to arise, then a partial award be issued, deciding on the arbitral tribunal's competence prior to proceeding with the merits of the case. This is because the parties would run the risk of going through the whole process of arbitration, only for the tribunal to decide, at the end of the proceeding, that it never had the jurisdiction to arbitrate the case to begin with. Another example would be deciding the outcome of claims before determining the quantitative aspect of the award (e.g. deciding on the entitlement of the parties prior to calculating the damages) - again, this is so as not to go through the process of quantity determination, only for the tribunal to decide that the claim had failed. Real life arbitrations scenarios may not be as straight forward for such decisions to be simple to make. Furthermore, there are disadvantages for such awards, specifically that a partial award may cause the parties to change their strategies⁴⁸, making the arbitration even lengthier – not to mention that issuance of a partial award can be a lengthy process in and of itself⁴⁹. However, it is up to the expertise of the arbitral tribunal to decide such matters, which is more a reason why the parties must choose the members of the tribunal carefully⁵⁰.

⁴⁷ Alan Redfern and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015). At page 508.

⁴⁸ For example, if their entitlement failed, they would approach the claim from a different perspective.

⁴⁹ Alan Redfern and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015). At pages 510-511.

⁵⁰ With greater power given to the arbitral tribunal by legislation and the parties, there is more room for error and misjudgment by the arbitral tribunal – which puts more stress on the importance of choosing a high caliber of arbitrator.

Another useful provision of the New UAE Arbitration Law is that given under article 19⁵¹, which strikes a nice balance between enabling the arbitral tribunal to decide on its own jurisdiction in a partial award (theoretically, to improve the efficiency of the arbitration), and giving the objecting party the right to raise a challenge against that award to the competent court⁵². Subsequent to the issuance of a partial award regarding jurisdiction of the arbitral tribunal, if the matter was challenged by the objecting party to the competent court, then the arbitration shall be suspended until a determination is given by the competent court⁵³ (which is not subject to appeal), whether to uphold the arbitral tribunal's decision or not. However, at the request of the other party, the arbitral tribunal may decide to continue the arbitral proceedings; subject that in case the court determines that the arbitral tribunal in fact does not have jurisdiction, then the additional costs of continuation of the arbitration from the time the issue was raised for challenge to the competent court, shall be borne by the party which requested continuation of the arbitration. This provision upholds the efficiency of the arbitration, while protecting the objecting party from bearing the cost of proceeding in an arbitration where no jurisdiction exists.

Interim/ precautionary measures or orders and request for production of evidence and witnesses:

Further to partial awards, the New UAE Arbitration Law – under article 21 and 36 -also enables the arbitral tribunal to issue interim/ precautionary measures or orders as well as request the competent court for assistance in the production of evidence and witnesses. It is submitted that these provisions are essential tools for the arbitral tribunal to maintain a certain level of efficacy

⁵¹ This article shall be further discussed in Chapter 3 – under the “Arbitration Agreement” section

⁵² This is so that neither party is prejudiced to go through arbitration if there is true doubt to the matter of jurisdiction.

⁵³ Which must be given by the court within 30 days of the challenge being raised to the court.

to the arbitral proceedings that resembles that of court proceedings. The arbitral tribunal can ensure certain measures are taken that would preserve the integrity of the final award once issued (article 21)⁵⁴; the ambit of this provision includes preserving evidence and goods⁵⁵, as well as levying assets against which an award can be issued⁵⁶. An arbitral tribunal may issue such orders or measures upon its own accord, or at the request of one of the parties – subsequent to which (within 15 days⁵⁷) the party in whose favor the order or measure is issued may apply to the competent court of enforcement of the same. The arbitral tribunal⁵⁸, may order that the other party put up security to cover expenses and/ or obligate that party to bear the damage caused by the same in case it was later decided that the applicant was not entitled to such order or measure. Further to these orders or measures, the arbitral tribunal may also⁵⁹ order the production of evidence or witness testimony (article 36). Such order must be submitted to the president of the competent court who shall decide on the measures to be taken⁶⁰.

Further to the above, it must be noted that article 18 appoints a single court to supervise the whole of the arbitration – from commencement to issuance completion of the arbitral proceeding. This article also states that this means all supporting powers given to the arbitration must be obtained from this same court⁶¹. In addition to this, article 18 also states that court procedure for any order or measure issued by the arbitral tribunal shall not entail the suspension of the arbitral proceeding,

⁵⁴ Provided that enforcement of the same is granted by the competent court.

⁵⁵ Or value thereof – such as in case of perishables.

⁵⁶ Adrian Chadwick, 'The New Arbitration Law' <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law>, (accessed 13 January 2019).

⁵⁷ It is not clear what the effect of not submitting such order or measure to the competent court within the prescribed 15 days of issuance of the same (would it mean expiry of such order or measure?).

⁵⁸ So as not to prejudice the party against whom the order or measure was issued.

⁵⁹ On its own accord or at the request of one of the parties.

⁶⁰ Refer to article 36(2) for list of actions to be taken by the court.

⁶¹ Article 39(2) states that such orders or measures shall be enforced by the president of the court or his delegate under an enforcement order.

nor shall the same be deemed as a waiver of the arbitration agreement. Finally, article 18 states that orders or measures issued by the court shall not cease to have effect except by another decision issued by the court giving effect to the same⁶².

⁶² This is somewhat contradictory to article 21(3) which states that the arbitral tribunal may amend, suspend or repeal any order or measure issued – it is submitted that article 21(3) shall only take effect upon application of the same to the competent court.

Notification of an Arbitral Award

Upon the making of the award by the arbitral tribunal, it is imperative under the New UAE Arbitration Law (under article 44 thereof) that the parties are notified of the award – the notification should be made within 15 days of the rendering of the award by the arbitral tribunal in the form of the original or a signed copy of the arbitral award issued to the parties⁶³. In case the arbitral tribunal is comprised of more than one arbitrator, then this time period runs upon the signature of the last arbitrator of the arbitral award⁶⁴. The exception would be if the arbitral tribunal did not receive their fees and expenses (see article 47); in which case the arbitral tribunal may choose to refrain from delivering the arbitral award, until such claim is fulfilled.

The consequences of delaying the notification of the final award by the arbitral tribunal by more than 15 days are not entirely clear. However, Article 54 of the New UAE Arbitration law⁶⁵ states that the period by which the appealing party may apply for annulment of an arbitral award is 30 days from the date of notification of the final arbitral award to the parties – as such, it is clear that notification of the award does have an effect on how much time the losing party would have to apply for nullification of the award⁶⁶. This has a logical justification, in that it would be unjust if the arbitral tribunal were to make an award, and then fail to notify the losing party of the award in a timely manner – leaving the losing party with less or no time for application for annulment of the award⁶⁷. By extrapolation of this logic, similar to the losing party being unable to raise an

⁶³ Adrian Chadwick, 'The New Arbitration Law' <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law>, (accessed 14 January 2019).

⁶⁴ Ibid.

⁶⁵ Titled “ACTION FOR THE ANNULMENT OF THE ARBITRAL AWARD”. This article shall be explained in more details in the next chapter.

⁶⁶ i.e. the countdown of 30 days would not start until the challenging party receives notice of the award. It is also submitted that the losing party may not apply for nullification of the arbitral award until they validly receive a notification of the arbitral award.

⁶⁷ Alan Redfern and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015). At page 558.

application for annulment of an award, so must a notification of the award to all the parties be necessary for raising an application for the enforcement of the award – this is because the losing party would be prejudiced in not having the opportunity to preempt the winning party in applying for the annulment of the award⁶⁸. However, this is not explicitly mentioned in the New Law; therefore, the outcome of an untimely notice on the enforcement of an award (or no notice at all) will have to be gleaned from arbitration cases in the courts of the UAE. It is submitted that it would seem like a long stretch to expect that an untimely notice of an arbitral award would be valid grounds for annulment an arbitral award under the new Law (no such grounds is implied in article 53)⁶⁹.

⁶⁸ i.e. applying for annulment of the award before the winning party applies for the enforcement of the award.

⁶⁹ In several Spanish cases, an application was raised to the court to set aside the arbitral award for lack of proper notification of the arbitral award; this reason was approved in several consumers cases, but was rejected in a commercial case - 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html At page 159. (accessed 14 January 2019).

Correction and Interpretation of Arbitral Awards and Additional Awards

Once a final arbitral award has been issued by the arbitral tribunal, the authority of the arbitral tribunal is deemed *functus officio*⁷⁰, and the effect of the award on the claim in question is that it becomes *res judicata*⁷¹. However, in exceptional cases, the New Law provides that the arbitral tribunal may render supplementary awards subsequent to the issuance of the final arbitral award. Under articles 49 to 51 of the New Law, the arbitral tribunal is given the authority to issue interpretations, corrections and additional awards to the final arbitral award. It is submitted that these provisions have been adopted in the New Law to enhance the efficacy of arbitrations – in specific, they are meant to improve the chances an arbitral award settles the dispute in question (both by promoting the validity and completeness of the award).

Article 49 of the New UAE Arbitration Law states that after the issuance of the final award, the arbitral tribunal, at the request of either party, may give an interpretation on any ambiguity in the dispositive part of the award. Upon accepting this request, the arbitral tribunal has 30 days to issue such interpretation, from the date of submission of said request – the arbitral tribunal may extend this time limit by 15 days, if it deems necessary. Article 50 allows for the correction of a final arbitral award in case there is an error that is purely material⁷² – correction of a final award may be done at the arbitral tribunal's own initiative, or upon the request of either party. As with the provision for interpretation of the final arbitral award, the arbitral tribunal has 30 days for the issuance of correction of the award⁷³ and may extend that time limit by 15 days if it deems

⁷⁰ Alan Redfern and others, Redfern And Hunter On International Arbitration (6th edn, Bath Press 2015). At page 507.

⁷¹ As stated in article 52 of the New UAE Arbitration Law.

⁷² e.g. quantitative, as in typographic or arithmetic; this excludes correction to the logic of the case or the outcome of the question of entitlement of the parties - See Abu Dhabi Court of Cassation case 290/2012(77) for further explanation on what constitutes a correction of an arbitral award.

⁷³ If such request is accepted by the arbitral tribunal to begin with.

necessary. Finally, in cases where the final award fails to adequately deal with a matter validly raised for determination during the arbitral process⁷⁴, article 51 allows for the arbitral tribunal to issue an additional award on such matters - an additional award may only be rendered upon the request of either of the parties. The arbitral tribunal, upon accepting such request, has 60 days from receipt of that request to issue the additional award – with the power to extend this time limit by 30 days if it determines this necessary. The parties have 30 days from the receipt of the final arbitral award within which it may petition the arbitral tribunal to render an additional award. It is submitted that these 30 days run from the receipt of the notification of the final arbitral award⁷⁵.

It is worth re-iterating that the arbitral tribunal is not entitled to issue interpretations under article 49 or additional awards under article 51 on its own accord, while it has authority to do so under article 50 for correction of the final arbitral award. Furthermore, it is the arbitral tribunal's prerogative, as stated in these articles, to choose whether to admit requests made by a party for these supplementary awards or not. However, Article 51 of the New UAE Arbitration Law states that upon refusal of the arbitral tribunal to issue an interpretation, correction or an additional award to the final arbitral award (in accordance with articles 49 to 51 of the same), then either of the parties may request the court to do the same. Further to these provisions for supplementary awards, article 54.6 of the New Law provides for remittance of the arbitral award to the arbitral tribunal upon the request of either of the parties during application for annulment (or during challenge against the enforcement of the arbitral award) of the arbitral award⁷⁶ - a party's application for remittance may be rejected by the court if deemed inappropriate.

⁷⁴ Such a matter must be within the jurisdiction of the arbitral tribunal.

⁷⁵ This is not explicitly stated; but it is a logical assumption, as it would not be fair for either of the parties to miss this right given under the new Law due to untimely notification.

⁷⁶ This article shall be further explained in chapter 2.

Chapter 2 - Procedural Aspects of the Nullification Case:

Further to the introduction on some of the pertinent provisions related to arbitral awards given above; the procedural aspects of the annulment of an arbitral award under the New UAE Arbitration Law shall be detailed hereunder - connecting the previous arbitral awards introduction to the topic of this paper, which is the annulment of arbitral awards under the New UAE Arbitration Law.

Time Limit

Once the final arbitral award is issued by the arbitral tribunal (and the notification of the award by the tribunal to the parties), the losing party may apply to the competent Court for application for the annulment of the arbitral award. Article 54(2) of the New UAE Arbitration Law states that the challenging party must apply to the Court with an action for the annulment of the arbitral award within a time limit of 30 days from the notification of the award to the parties, otherwise the losing party loses the right to raise such an action⁷⁷.

On the other hand, the New Law, under article 55, states that the arbitral award must be submitted to the competent court for the ratification and enforcement of the award (i.e. the award is only recognized and enforceable by the court after the winning party has raised and won an action for the ratification and enforcement of the award by the competent court). Once the award is submitted by the winning party⁷⁸, the President of the competent court of appeal must ratify and enforce the award within 60 days from the date of submission of the same⁷⁹. As stated above, the losing party has a time limit of 30 days for application for the annulment of the arbitral award. However, no such time limit applies to the challenge of the ratification and enforcement of an arbitral award. Hence, if the time limit in article 54(2) expires, then the losing party can still challenge the ratification and enforcement of the arbitral award – which, it is submitted, has the same effect as annulment of an arbitral award⁸⁰.

⁷⁷ In fact, the article states that the time limit begins to run from the date of receipt of notification by the challenging party (as opposed to the parties).

⁷⁸ Along with all required documents – as specified under article 55.

⁷⁹ This is unless reason for annulment of the award is found and accepted by the court.

⁸⁰ Article 53 of the New UAE Arbitration Law states that an award may be challenged by an action for annulment or during the ratification of the award.

Competent Court

The proceedings for annulment⁸¹ of the arbitral award must be filed in the court having jurisdiction to determine the action. Under the New UAE Arbitration Law, the definition for a ‘court’ is given as “the federal or local court of appeal which is agreed by the parties or within the jurisdiction of which arbitration falls”⁸².

According to article 18 of the New Law, article 31 of the UAE Law of Civil Procedures (Federal Law no. 11 of 1992) is the reference for determining to which court jurisdiction in a case would lie⁸³. According to the article, specifically in paragraph 3, an action involving an arbitration would be in the jurisdiction of the Emirate where the prosecuted resident exists or where the agreement was executed (in total or in part). This was confirmed in Dubai Court of Appeal judgement (case no. 272/ 2013), which held that in a case where the arbitral award was sought to be enforced in the Dubai court, the defendant raised the defense that the jurisdiction lied with the Abu Dhabi court as the defendant’s residence and the execution of the contract was in Abu Dhabi, and the defense was upheld and the case for the enforcement of the arbitral award was thus rejected⁸⁴. However, it is not clear where the jurisdiction would lie if the defendant’s residence was in one emirate and the contract was executed in another (i.e. which would take precedence, residence of defendant or place of execution of agreement). Neither is the case clear where the contract is executed in one emirate and the arbitration agreement in another. It is submitted that this is a matter for the court to decide, based on the facts of the case. Finally, it is stated under paragraph 5 of the same article

⁸¹ As well as ratification/ enforcement proceedings.

⁸² All UAE legislation quoted herein are from unofficial English translations of the original Arabic text of the law.

⁸³ Ahmad Ghoneim, 'Where Should You Go To Enforce Arbitration Awards Issued In UAE?' <https://www.tamimi.com/law-update-articles/where-should-you-go-to-enforce-arbitration-awards-issued-in-uae/>, (accessed 13 January).

⁸⁴ Ibid.

that the parties may agree on the competent court, which is advisable to avoid uncertainty (with exception to matters that fall under articles 32 and 34 to 39 of the Civil Procedures Law, where such agreement would be invalid).

Remittance of an Arbitral Award

The New UAE Arbitration Law allows for an arbitral award to be sent back to the arbitral tribunal by the court during hearing for nullification of the award. Article 54.6 of the Law states that, at the request of one of the parties, the court may remit the arbitral award to the arbitral tribunal to take an action or rectify the form of an arbitral award in order to remove the cause for annulment – without changing the content of the award. Hence, the court would only remit an arbitral award to the arbitral tribunal if the cause for annulment of the arbitral award is one that can be fixed. Under this article, the court would give the arbitral tribunal a period of up to 60 days, where it would suspend the action for the annulment of the award, to rectify the arbitral award. Remittance of the award to the arbitral tribunal would be undertaken by the courts only at the request of one of the parties, and only upon the court's acceptance of the request. This provision is meant for a proceeding for annulment of an arbitral award, but it is submitted that this would also be applicable in a proceeding for ratification/ enforcement of an arbitral award, where a challenge to the ratification/ enforcement of the arbitral award is raised.

Appeal against the Court's judgment

Upon the court's determination of an application for the annulment of an arbitral award, the determination is final. However, the parties may appeal against the determination to the court of cassation - this is stated in article 54.1 of the New UAE Arbitration Law.

It is worth noting here that under the Old UAE Arbitration Law, an action for the annulment of an arbitral award would automatically cause the arbitral award (i.e. enforcement thereof) to be suspended⁸⁵ - this would occur if an action for the annulment of an arbitral award is submitted while the arbitral award is being tried for enforcement by the court of execution. However, this is not the case under the New UAE Arbitration Law, whereby article 56 states that the losing party must request for the suspension of the arbitral award during an action for annulment of an arbitral award – the court would then decide on the same within 15 days⁸⁶. If such a request is accepted by the court⁸⁷, then it would have to decide on the matter of annulment of an arbitral award within 60 days from the date of ordering the suspension of the arbitral award⁸⁸.

⁸⁵ Michael Turrini, 'The New UAE Arbitration Law: An Incremental Shift Towards International Norms' <https://www.whitecase.com/publications/alert/new-uae-arbitration-law-incremental-shift-towards-international-norms>, (accessed 13 January 2019).

⁸⁶ “from the date of the first hearing scheduled for considering such request.”

⁸⁷ Upon finding serious grounds for so doing.

⁸⁸ As mentioned earlier, the court has the power to remit the arbitral award to the arbitral tribunal (under article 54.6 of the new Law), if it finds it appropriate to do so at the request of one of the parties.

The effect of nullification on the Arbitration Agreement

It is stated in article 54.4 of the New UAE Arbitration Law that in case an arbitral award is set aside by the competent court, this shall not invalidate the arbitration agreement⁸⁹. The exception to this being that if the arbitral award was set aside for invalidity of some sort of the arbitration agreement, then this shall in effect be a judgement declaring that the arbitration agreement is not enforceable. Therefore, it is possible for parties to utilize the arbitration agreement even if an arbitral award under the same agreement is set aside by the court. However, it is not entirely clear, whether the same dispute can be arbitrated under the same arbitration agreement to one that was used to issue an arbitral award that was set aside by the court⁹⁰.

⁸⁹ Unless otherwise agreed by the parties.

⁹⁰ This was not allowed under the Old UAE Arbitration Law.

Severability of an Arbitral Award

In an action for the annulment of an arbitral award, if the court decides to set aside the arbitral award, it may do so to the whole of the arbitral award, or part thereof. Under article 54.4 of the New UAE Arbitration Law⁹¹, an arbitral award may be severed if nullification of the award relates only to distinguishable parts of the award⁹².

Before the New UAE Arbitration Law, there were no provisions in the legislation for the severability of an arbitral award. However, it was stated in many court cases, that this was an acceptable principle and a matter of settled law⁹³. On numerous occasions, the court severed parts of the arbitral award that contravened with public policy or went beyond the scope of the arbitration or the jurisdiction of the arbitral tribunal – thereby maintaining the integrity of the arbitral award. Furthermore, in a Dubai Court of Cassation Property Appeal case no. 329/ 2013, it was explained that if the nullity related to an ancillary part of the arbitral award⁹⁴, 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 action⁹⁵. This approach will seem to continue to be the case under the new Law – probably with the courts being more willing to use severability to save an arbitral award, as it is now explicitly provided for in the arbitration legislation.

⁹¹ It is also stated in article 53(1.h) in relation to matters in the award falling outside the scope of the arbitration.

⁹² i.e. if the part of the award that is causing the nullity can be disentangled from the other – valid – parts of the award, then the court shall sever the award and ratify/ enforce the valid portion of the award.

⁹³ See for example Union Supreme Court case no. 9/ 2000 where the court states this.

⁹⁴ One that can be easily severed – such as in Dubai Court of Cassation Property Appeal case no. 282/ 2012 where the court severed the unauthorized award of legal costs of the arbitration.

⁹⁵ As was the case in the Dubai Court of Cassation Property Appeal case no. 320/ 2012 and Union Supreme Court case no. 57/ 2006 - Hassan Arab, 'Dubai Court Judgment Concerning Severability And Public Policy In Arbitral Awards' <https://www.tamimi.com/law-update-articles/dubai-court-judgment-concerning-severability-and-public-policy-in-arbitral-awards/>, (accessed 13 January 2019).

Chapter 3 – Grounds for Annulment of Arbitral Awards: Grounds that must be invoked by the parties

The grounds for annulment of an arbitral award under the New UAE Arbitration Law can be categorized under two headings; the first would be the grounds that should be Invoked by the Parties, and the second would be the grounds that can be raised by the court on its own initiative. The first type of grounds shall be discussed in this chapter (the second category shall be discussed in the subsequent chapter - chapter 4).

Arbitration Agreement

Jurisdiction over settlement of disputes in the UAE is given, in principle, to the courts of the UAE. Hence, to overcome the natural jurisdiction of the courts, in accordance with the New UAE Arbitration Law, the parties wishing to submit a future or crystalized dispute to arbitration must agree to do so in what is known as an arbitration agreement⁹⁶. The invalidity of such an agreement⁹⁷, is one of the main type of defense that can be raised to challenge an arbitral award. The provisions of article 53.1 of the New Law relating to grounds for annulment of an arbitral award based on some default in the arbitration agreement (non-existence, invalidity or expiration thereof) are laid out below:

“1. Arbitral awards shall not be challenged except by instituting an action for annulment or during the consideration of the confirmation decision. The party requesting the annulment of the arbitral award shall prove the existence of any of the following reasons:

a. Absence of an Arbitration Agreement, or the Agreement is void, or terminated due to expiry of its term in accordance with the law to which the Agreement is subject by the parties or in accordance with this Law if there is no reference to a specific law;

b. One of the parties, at the time of enforcement thereof, lacks capacity or of diminished capacity in accordance with the law which governs its capacity;

c. The person lacked the legal capacity to take any action regarding the right, the subject matter of dispute, in accordance with the law governing his capacity, which is stipulated in Article (4) of this Law;

...

h. If the arbitral award deals with matters not falling within the scope of the Arbitration Agreement or exceeding the limits of this agreement. Nevertheless, when matters falling within the scope of the Arbitration can be separated from the parts of the award which contains matters not included within the scope of the Arbitration, the nullity affects exclusively the latter parts only.”

Violation of any of the following conditions may be used to prove the invalidity or ineffectiveness of the arbitration agreement; the arbitration agreement must be in writing⁹⁸, the agreement must be executed by someone with the required legal capacity to do so⁹⁹, the matter being settled must be capable of being arbitrated and the dispute submitted to and determination made by the arbitral tribunal must be within the ambit of the arbitration agreement¹⁰⁰. However, in spite of the above, article 20(1) of the New Law, if implemented strictly by the courts of the UAE, would trump most challenges to the invalidity of the arbitration agreement or lack of jurisdiction of the arbitral tribunal as a ground for annulment of an arbitral award.

Arbitration Agreement writing requirement:

The New UAE Arbitration Law, in article 7, requires that an arbitration agreement be made in writing - otherwise the agreement is void. Article 7 explains that there are a number of acceptable methods of meeting the writing requirement of an arbitration agreement. The first is in an instrument signed by the parties or in correspondence between them; this includes correspondence by electronic means¹⁰¹. The second possible way is by reference - either to an arbitration clause in a model contract, an international agreement or other similar documents; this provision is subject to compliance with article 5(3) of the New Law¹⁰². The third possible scenario is by an agreement reached between the parties that the dispute should be settled by arbitration while the parties are conducting a court proceeding. This needs to be evidenced by a court decision confirming that the

⁹⁸ As provided in article 7 of the new Law.

⁹⁹ As provided in article 4 of the new Law.

¹⁰⁰ i.e. the arbitral tribunal must not overreach its jurisdiction.

¹⁰¹ Notably, this includes emails. However, electronic communications must comply with the laws regulating electronic transactions in the jurisdiction.

¹⁰² Which relates to clear reference to the arbitration agreement.

arbitration agreement has been formed, and that the action raised in front of the court is rejected for the existence of an arbitration agreement. Finally, there can be an arbitration agreement by implication; whereby if one of the parties commences an arbitration¹⁰³, and the other party participates in the proceeding¹⁰⁴ without objecting to the arbitration, then there forms an agreement to arbitrate between those parties by implication¹⁰⁵. The same can be implied if an arbitration agreement is recognized by one of the parties before the court, and the other party does not object to/ deny the existence of the agreement.

Many of the ways that an arbitration agreement can meet the writing requirement¹⁰⁶ predated the New Law in some UAE court judgments under the Old UAE Arbitration Law dealing with this matter. In a Dubai Court of Cassation decision¹⁰⁷, it was held that an arbitration agreement can be evidenced through written correspondence between the parties¹⁰⁸. Even the seemingly unconventional¹⁰⁹ provision of article 7, that proclaims that exchange of pleadings between the parties, which constitutes an offer and an acceptance of an arbitration agreement, will in fact form

¹⁰³ Submitting a statement of claim to the tribunal.

¹⁰⁴ e.g. submitting its statement of defense.

¹⁰⁵ i.e. if a party were to participate in an arbitration without denying the existence of an arbitration agreement, then this defense may not later be used as it has impliedly consented to the arbitration agreement.

¹⁰⁶ Which are new in the sense that they are now expressly provided for the arbitration Law.

¹⁰⁷ Case no. 73/ 2010

¹⁰⁸ 'Assessing The Impact Of The New UAE Arbitration Law' http://afridi-angell.com/items/limg/c_324Assessing_the_Impact_of_the_New_UAE_Arbitration_Law_1532604463.pdf, (accessed 13 January 2019).

¹⁰⁹ In the sense that it goes against the principle that since arbitration is a deviation from the constitutional rights of the parties to refer a dispute to the courts, then an arbitration agreement must be clearly evidenced in writing (as per article 203 of the Old UAE Arbitration Law).

a binding arbitration agreement¹¹⁰, was implemented in a Dubai Court of Cassation case under the Old Law¹¹¹.

It is important to note here that an arbitration agreement can only be formed by implication if the person taking the action giving rise to the implication is authorized to deal with the dispute¹¹². Furthermore, as for the incorporation of an arbitration agreement into a contract by reference; such reference must make it clear that the arbitration agreement in the referenced document is an integral part of the contract. Otherwise, an unspecific reference to a standard contract form which contains an arbitration clause may not be enough to incorporate an arbitration clause¹¹³. If the arbitration clause is not properly incorporated, then this may invalidate the existence of an arbitration agreement and may be used as a defense raised to stop the arbitration proceedings or annul an arbitral award, for want of a valid arbitration agreement¹¹⁴. This ground was raised under the Old UAE Arbitration Law to invalidate an arbitral award, where the Dubai Court of Cassation¹¹⁵ ruled that incorporation of an arbitration agreement by reference in the contract is only valid if the reference makes explicit mention of the arbitration agreement, and not, for

¹¹⁰ Antonios Dimitracopoulos, 'The New UAE Arbitration Law: It Is Not What It Says But How You Read It' <https://bsabh.com/the-new-uae-arbitration-law-it-is-not-what-it-says-but-how-you-read-it/>, (accessed 13 January 2019).

¹¹¹ Hussain Eisa Al Shiri, 'UAE: Ratification Of A Domestic Arbitral Award And The Issue Of Arbitration Clauses Incorporated By Reference' <https://www.tamimi.com/law-update-articles/uae-ratification-of-a-domestic-arbitral-award-and-the-issue-of-arbitration-clauses-incorporated-by-r/>, (accessed January 2019).

¹¹² i.e. has the specific/ special authority to dispense with the dispute by arbitration – see below section on legal capacity required to enter into an arbitration agreement - Antonios Dimitracopoulos, 'The New UAE Arbitration Law: It Is Not What It Says But How You Read It' <https://bsabh.com/the-new-uae-arbitration-law-it-is-not-what-it-says-but-how-you-read-it/>, (accessed 13 January 2019).

¹¹³ This is provided for in article 5(3) of the New UAE Arbitration Law.

¹¹⁴ As provided for in article 53(1.a).

¹¹⁵ Dubai Court of Cassation real estate appeal 153 of 2011 (dated 19th of February 2012)

example, in reference to a standard contract in general^{116 117}. The matter of explicit reference is somewhat controversial between jurisdictions that have adopted the UNCITRAL Model law – some courts have stated that explicit reference to the arbitration clause is necessary, while others have stated that a general reference is enough¹¹⁸.

Thus, the requirement for an arbitration agreement being in writing is still maintained under the New UAE Arbitration Law; yet the New Law has given more clarity to the requirement of writing and even given arbitration in the UAE a push towards a more progressive interpretation of the requirement¹¹⁹. Granted, the court of cassation under the Old UAE Arbitration Law had promulgated all of the ways to meet the writing requirement newly stated in the New Law in numerous cases¹²⁰; however, it is beneficial to have these codified in the New Law.

Capacity to execute an arbitration agreement:

Under the New UAE Arbitration Law, for an arbitration agreement to be valid and binding on the parties, it must be executed by persons with the adequate legal capacity to do so¹²¹. Broadly speaking, capacity to enter into an arbitration agreement is similar to that of entering into an ordinary contract agreement in the jurisdiction governing the arbitration agreement¹²² – this is with

¹¹⁶ Mohammad Al Muhtaseb, 'When Can An Arbitration Clause Be Incorporated By Reference In The UAE?' <https://www.tamimi.com/law-update-articles/when-can-an-arbitration-clause-be-incorporated-by-reference-in-the-uae/>, (accessed 13 January 2019).

¹¹⁷ also see Abu Dhabi Court of Cassation Case No. 214/ 2014

¹¹⁸ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html, page 30.

¹¹⁹ Both in terms of electronic communication and implied agreements and giving more clarity to meeting the requirement of writing.

¹²⁰ Bill Smith, 'The Impact Of The UAE's New Federal Arbitration Law' https://www.pinsentmasons.com/Global/UAE_Arbitration_law_update.pdf, (accessed 13 January 2019).

¹²¹ As provided in article 4 of the new Law.

¹²² Alan Redfern and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015). At page 5.

respect to age restriction, state of mind of signatory, etc. However, capacity required to enter into an arbitration agreement under the New Law is one requiring special/ specific authority¹²³. A special/ specific power of attorney is required in case of a representative of a party executing an arbitration agreement on behalf of his/ her client¹²⁴. As for a manager of an entity, their needs to be some legislative allowance for entering into an arbitration agreement either in the entity's articles of association giving such power to certain individuals/ designations, or a provision allowing certain individuals/ designations in the law regulating these entities' capacities¹²⁵ ¹²⁶. Due to this requirement, it may be the case that a person has the capacity to execute a principle contract but not the arbitration agreement incorporated therein¹²⁷. Article 4 of the New Law states that unless the arbitration agreement is entered into by a person with adequate capacity, then that arbitration agreement shall be null and void. Hence, if the arbitration agreement is not executed by a person with the right capacity, then an application to the court may be made by the appealing party to either stop the arbitration for invalidity of the arbitration agreement (if raised during the arbitration process), or an arbitral award may be challenged by the losing party for lack of a valid arbitration agreement.

¹²³ Zafer Oghli, 'Apparent Authority When Signing Arbitration Agreements' <https://www.tamimi.com/law-update-articles/apparent-authority-when-signing-arbitration-agreements/>, (accessed 13 January 2019).

¹²⁴ Special/ specific in the sense that it specifically states that the representative is authorized by the represented to enter into an arbitration agreement on their behalf.

¹²⁵ Article 53(1.b) states – “One of the parties, at the time of enforcement thereof, lacks capacity or of diminished capacity in accordance with the law which governs its capacity;”. This means that for foreign companies, their own law determining their capacity would dictate this qualification.

¹²⁶ Such as the UAE Commercial Companies Law – Federal Law No. 2 of 2015 – and Law No. 6 of 1997 on Contracts of Governmental Departments in the Emirate of Dubai; e.g. a Limited Liability Company's director is by default authorized to enter into an arbitration agreement on behalf of his/ her company, unless otherwise provided for in the company's articles of association – this was confirmed in Dubai Court of Cassation case no. 164/ 2008. There are other restrictions to arbitration agreements with governmental entities in the UAE. For example, article 36 of the Dubai Law no. 6 of 1997 governing governmental contracts prohibit the seat of the arbitration being outside Dubai in an arbitration with the Dubai government.

¹²⁷ Since a special/ specific authority is needed to execute an arbitration agreement, while perhaps a less strict delegation of authority may be needed for execution of the principle contract.

Further to article 4 of the New UAE Arbitration Law, the requirement for capacity to enter into a valid arbitration agreement is also promulgated in article 58(2) of the Civil Procedure Law¹²⁸. The position of the UAE courts under the Old UAE Arbitration Law¹²⁹ regarding the invalidity of an arbitration agreement due to inadequate capacity of the signatory was not straight forward, and an investigation of the facts was often necessary. In some cases, the courts would accept an implied authority of an agent/ representative to enter into arbitration agreement¹³⁰; it was explained in a Dubai Court of Cassation case¹³¹ that implication of capacity/ authority was sometimes allowed for in order to preserve commercial certainty and the continuance of good faith (provided sufficient evidence of implication is available)¹³². In other cases, arbitration agreements were held invalid due to lack of capacity of the signatory, with the court concluding that the evidence for implied authority was not sufficient¹³³. In addition, it was stated by the court, that for implication of authority to succeed, the party relying on it (*inter alia*) should raise this defense at an early stage¹³⁴ - which is similar to the position under the New Law¹³⁵.

¹²⁸ Federal Law No. 11 of 1992; this article was not explicitly repealed by the New UAE Arbitration Law) - “58(2) - No admission or waiver of a right alleged or settlement or submission to arbitration ... may be made without special authority.”

¹²⁹ Under article 203(4) as well as 58(2) of the old Law.

¹³⁰ see Abu Dhabi Court of Cassation case 873/ Judicial Year 3 dated 22 October 2009

¹³¹ Dated 24 February 2016

¹³² Zafer Oghli, 'Apparent Authority When Signing Arbitration Agreements' <https://www.tamimi.com/law-update-articles/apparent-authority-when-signing-arbitration-agreements/>, (accessed 13 January 2019)

¹³³ John Gaffney, 'UAE: Capacity Of Companies' Representatives To Agree On Arbitration' <https://www.tamimi.com/law-update-articles/uae-capacity-of-companies-representatives-to-agree-on-arbitration>, (accessed 13 January 2019).

¹³⁴ Suzanne Abdallah, 'The UAE Courts Approach With Respect To Upholding Arbitration Awards' <https://www.tamimi.com/law-update-articles/the-uae-courts-approach-with-respect-to-upholding-arbitration-awards-1/>, (accessed 13 January 2019).

¹³⁵ See the below section – “Waiver of the right to object”.

Arbitration Agreements – Arbitrability

The UAE legislator has envisaged that some types of contracts shall not be under the sole jurisdiction of the UAE courts¹³⁶ – this jurisdiction is thus not meant to be delegated to the jurisdiction of an arbitral tribunal. The New UAE Arbitration Law, in article 4, preserves this position by stating that arbitration agreements shall not be allowed for matters which are not capable of conciliation. This section shall be further discussed under the next chapter.

Jurisdiction of the arbitral tribunal and the scope of the arbitration agreement:

As the arbitration agreement is what gives an arbitral tribunal authority to deal with a dispute¹³⁷, the scope of the arbitration agreement must be closely adhered to by the arbitral tribunal so as not to overreach its jurisdiction. Hence, the arbitral tribunal must conform in what it deals with, with what was assigned to it in the arbitration agreement as well as the claim submitted to it, otherwise the arbitral tribunal may be found not to have jurisdiction, and the arbitral proceedings would be terminated, or the award rendered null and void. It is important to note that an arbitral award that deals with matters not contained in the claim or subsequent counter-claims submitted by the parties during the arbitration may be set aside for overreaching the arbitration mandate by the arbitral tribunal¹³⁸ – although the part of the award overreaching the mandate may be severed by the courts¹³⁹. Under the New UAE Arbitration Law (in article 19), a party may raise the defense that the arbitral tribunal has gone beyond its jurisdiction in dealing with a certain matter. First to the arbitral tribunal – article 19 of the New Law allows the arbitral tribunal to decide on challenges

¹³⁶ Or some other prescribed tribunal.

¹³⁷ This along with the arbitration law.

¹³⁸ As provided for in article 53(h) of the New UAE Arbitration Law.

¹³⁹ See chapter 2 above – “severability of an arbitral award”.

made to its jurisdiction¹⁴⁰. Once the arbitral tribunal makes a decision on the challenge to its jurisdiction, the objecting party can either accept the tribunal's decision or, in case the tribunal decided positively to the question of its own jurisdiction, raise a challenge against the decision to the competent court for a final ruling¹⁴¹ – the opposing party has 15 days within which it may raise a challenge to the court. The court shall then decide whether to uphold the tribunal's decision or to decide for its lack of jurisdiction, within 30 days from the date of submission of the challenge to the court. During such time as the matter of the jurisdiction of the arbitral tribunal is being decided by the court, the arbitration shall be suspended, unless the arbitral tribunal decides to continue the arbitration upon the request of one of the parties – article 19 states that if the arbitration was continued in such scenario, then the additional costs of arbitration shall be borne by the requesting party if the court decides that the arbitral tribunal has no jurisdiction.

In spite of the above, according to the Dubai Court of Cassation,¹⁴²; an arbitral award may include matters which are incidental to the main issue in dispute which is referred to arbitration, even if this was not expressly agreed in advance to be referred to arbitration¹⁴³. In another Dubai Court of Cassation case¹⁴⁴, the arbitral award for a debt (which was the main issue referred to arbitration) was given along with the incidental award of interest for late payment; the respondent argued that the arbitral award should be set aside as the award included a matter which was not included in the arbitration agreement (which was the award of interest). The court held that since the delay

¹⁴⁰ This includes the challenge to the existence of the arbitration agreement or its validity.

¹⁴¹ Would failure to challenge the arbitral tribunal's decision on its own jurisdiction prevent the losing party from raising this as a challenge against the arbitral award subsequently? This has received varied responses from Model Law jurisdictions – the answer was yes in a leading German case (Bundesgerichtshof, Germany, III ZB 83/02, 27 March 2003), and no in other cases (such as the Singapore case - Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey, High Court, Singapore, 30 November 2000, [2000] SGHC 260, [2000] 3 SLR(R) 847.).

¹⁴² Dubai Court of Cassation case no. 268/ 2007 and 167/ 2002.

¹⁴³ Hassan Arab, 'Recent Rulings On Arbitration By The Dubai Courts' <https://www.tamimi.com/law-update-articles/recent-rulings-on-arbitration-by-the-dubai-courts/>, (accessed 13 January 2019).

¹⁴⁴ Civil appeal no. 2/ 2012.

payment is a matter incidental to the main issue of the payment of the debt, then the award was valid, and the court upheld its enforcement. It is important to note that if the parties agree in the arbitration agreement that they are to refer all disputes to arbitration, this shall include disputes regarding the formation and termination of the contract^{145 146}.

Furthermore, an arbitration agreement under the New UAE Arbitration Law is severable from the principle contract – this is provided for in article 6 of the New Law - it is explained that an arbitration agreement is to be treated dependently from the principle contract and that nullity, rescission or termination of the latter will not apply to the former¹⁴⁷; unless the cause for nullity, rescission or termination of the principle contract also relates to the arbitration agreement (e.g. lack of capacity of signatory)¹⁴⁸. Article 6 of the New Law also states that any challenge to the validity of the arbitration agreement due to invalidity, rescission or termination of the principle contract shall be decided by the arbitral tribunal – this would be a challenge under article 19 of the New Law.

It is interesting to note that in some UNCITRAL Model Law cases¹⁴⁹, it was held that the court could not reject the arbitral tribunal's decision that it did not have jurisdiction, even though such

¹⁴⁵ This was confirmed in the UAE Federal Supreme Court in UAE administration appeal no. 302/ 2015 - Jalal Kudsi, 'Arbitration Clauses In UAE Government Contracts' <https://www.tamimi.com/law-update-articles/arbitration-clauses-in-uae-government-contracts/>, (accessed 13 January 2019).

¹⁴⁶ An arbitration agreement must specifically state the authority of the arbitral tribunal to decide upon receivership, otherwise this shall be outside the scope of arbitration and in the jurisdiction of the court – this was stated by the court in the Union Supreme Court case no. 274/ 1993.

¹⁴⁷ It has been held in a number of cases in jurisdictions that have adopted the Model Law that the principle of severability may be extended to defend against objections to the arbitral tribunal's jurisdiction due to the main contract being void for being entered into through deceit, fraud or mistake. 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html, page 77.

¹⁴⁸ This is a general concept accepted by many Model Law jurisdictions; for example - Oberlandesgericht Köln, Germany, 19 Sch 12/08, 21 November 2008.

¹⁴⁹ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html, pages 143-144.

decision was erroneous, based on the principle that an award shall not be set aside simply because it has misapplied the law.

Waiver of right to object:

All the above-mentioned grounds for annulment of an arbitral award are related to the jurisdiction of the arbitral tribunal. Furthermore, the grounds set under article 53 relating to default in the arbitration agreement (i.e. articles 53(1.a), 53(1.b), 53(1.c), 53(1.h) and 53(2.a)) would fall under the meaning of article 19 of the New UAE Arbitration Law¹⁵⁰ – in that a challenge to the jurisdiction of the arbitral tribunal due to these grounds must be raised to the arbitral tribunal for determination; with subsequent challenge raised to the court if requested by one of the parties.

In addition to the increased authority given to the arbitral tribunal to determine such matters under the New UAE Arbitration Law; article 20 of the New Law contains a general waiver of the right to object to the jurisdiction of the arbitral tribunal. Article 20 states that the party objecting to the jurisdiction of the arbitral tribunal shall raise this objection prior to the submission of the statement of defense, or in case of a challenge that the arbitration agreement does not cover the matters raised by the other party, not later than the hearing after the hearing where the plea was raised; otherwise the appealing party may not raise objection to the jurisdiction of the arbitral tribunal, as it would have waived that right. An exception is drawn where the arbitral tribunal finds that the delay in raising the objection is reasonable, thus allowing for the appealing party to raise objection to the jurisdiction of the arbitral tribunal. It is submitted that another exception to article 20 are the grounds set out under article 53(2) – which are related to matters of arbitrability and public policy.

¹⁵⁰ Jurisdiction of the arbitral tribunal to decide on its own jurisdiction.

Notwithstanding the waiver of the right to object under article 20; article 54(5) of the New UAE Arbitration Law states that waiver of the right to object prior to the issuance of the arbitral award shall not prevent the objecting party from submitting an action for annulment based on such ground to the court subsequent to the issuance of the award¹⁵¹. It is submitted that this implies that there may be circumstances, where the court would accept an application for the annulment of an arbitral award based on a ground that would also have been waived under article 20¹⁵². In the travaux préparatoires of the UNCITRAL Model Law, the waiver of the right to challenge the jurisdiction of the arbitral tribunal should prevent the losing party from using this defense in challenging the arbitral award, except in one of two scenarios; if this challenge relates to a challenge on public policy (such as in arbitrability)¹⁵³, or if the losing party was not given the opportunity to raise the challenge¹⁵⁴. However, there seems to be divergence on this matter between UNCITRAL Model Law adopting jurisdictions, as some courts have decided otherwise¹⁵⁵, stating that this article (i.e. waiver of right to object) is only optional and that there is no specific mention of preclusion.

¹⁵¹ Article 54(5) of the new Law states - “Waiver of the right to institute the annulment action prior to the passing of the award shall not prevent the admission of the action.”

¹⁵² It is submitted that this would only occur in exceptional cases; otherwise article 20 would lose its value.

¹⁵³ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html, pages 78-79.

¹⁵⁴ In a particular German case, the losing party was not given proper notice of the commencement of the arbitration - Hanseatisches Oberlandesgericht Hamburg, Germany, 6 Sch 04/01, 8 November 2001

¹⁵⁵ Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey, High Court, Singapore, 30 November 2000, [2001] 1 SLR 624; and Supreme Court, Hungary, BH 2007, 193.

Arbitration Tribunal

The provisions of article 53.1 of the New UAE Arbitration Law relating to grounds for annulment of an arbitral award based on some default in the composition of the arbitral tribunal are laid out below:

“1. Arbitral awards shall not be challenged except by instituting an action for annulment or during the consideration of the confirmation decision. The party requesting the annulment of the arbitral award shall prove the existence of any of the following reasons:

...

f. If the composition of the Arbitral Tribunal or the appointment of one of the Arbitrators is in conflict with the provisions of this Law or the agreement of the parties;”

The establishment of the arbitral tribunal and the impartiality and independence of the arbitral tribunal during the arbitration are critical matters that could give rise to valid grounds for appealing against an arbitral award under the New Law.

The New UAE Arbitration Law sets very liberal conditions for the identity of the members of the arbitral tribunal in article 10 - a member of the arbitral tribunal must be “a natural person who is not a minor, interdict, or deprived of his civic rights for having been convicted in a felony or misdemeanor involving breach of honor or trust, or declared bankrupt, unless he or she has been rehabilitated.” The only other stipulation for the composition of the arbitral tribunal is set out in article 9(2) and 10(2) thereof; article 9(2) states that the number of members of an arbitral tribunal must always be odd, otherwise the arbitration would be considered null and void¹⁵⁶, and article

¹⁵⁶It was stated by the Abu Dhabi Court of Cassation court case no. 186/ 2008 that this was a matter of public policy. The qualification of odd number of arbitrators does not exist in the UNCITRAL Model Law – the number of arbitrators can be even upon the agreement of the parties (see article 10(1) of the Model Law).

10(2) states that no member of the arbitral tribunal can be a member of the board of trustees or administrative body of the arbitral institution that is overseeing the arbitration (if any)¹⁵⁷. Otherwise, there are no conditions set on the nationality, gender or other discriminative features of an arbitrator, except any agreed by the parties¹⁵⁸. To that end, article 9 of the New Law states that the constitution of the arbitral tribunal shall be in accordance with the arbitration agreement¹⁵⁹.

If the parties have not agreed upon the procedure for the composition of the arbitral tribunal, article 11 of the New Law provides the default provision for the composition of the tribunal¹⁶⁰. According to this article, if there is no agreement on the nomination of the arbitral tribunal - and the tribunal is composed of a sole arbitrator - then within 15 days from the submission of request to nominate an arbitrator¹⁶¹, either party may request the concerned body¹⁶² to nominate the arbitral tribunal¹⁶³. Similarly, if there is no agreement regarding the method of nomination, and the arbitral tribunal is said to be composed of three arbitrators (or a higher odd number¹⁶⁴), then each party shall nominate an arbitrator and the two nominated arbitrators shall nominate a third arbitrator¹⁶⁵; if either party

¹⁵⁷ It is submitted that this means any arbitral institution, whether domestic or international - Essam Al Tamimi, 'Commentary On The UAE's New Arbitration Law' <http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAEs+New+Arbitration+Law>, (accessed 13 January 2019).

¹⁵⁸ However, in a Canadian case (*Desbois v. Industries A.C. Davie Inc.*, Court of Appeal of Quebec, Canada, 26 April 1990, [1990] CanLII 3619 (QC CA)), it was held that a stipulation that the arbitral tribunal shall be composed of a certain individual, who is clearly connected to the contract (in this case it was a minister in a governmental contract – whom in effect is a party to the contract), then such provision would be null – as impartiality and independence is an essential feature of arbitration, this was held to be contrary to public policy and the arbitration agreement was held to be null. It is submitted that this would also be the position of the UAE courts.

¹⁵⁹ Both in qualification/ description of the arbitral tribunal and in its method of composition.

¹⁶⁰ It is submitted that this provision would be especially helpful for ad hoc arbitrations – the New Law also has default provisions for challenge of an arbitrator, termination of an arbitrator's mandate and appointment of a substitute arbitrator.

¹⁶¹ By the party wishing to instigate the arbitration.

¹⁶² Which is the arbitral institution named in the arbitration agreement or agreed upon subsequently; in case none is specified, then it would be the competent court – this definition is given in article 1 of the New Law.

¹⁶³ It is not explicitly stated that only the decision of the court is not subject to appeal (and not also that of the arbitral institution) – however, this is implied from article 11(5) of the New Law. Nomination of the arbitrator, if decided by the court, would not be subject to appeal.

¹⁶⁴ As mentioned earlier, the arbitral tribunal must be composed of an odd number of arbitrators under the New Law.

¹⁶⁵ Who shall be the chairman/ president of the arbitral tribunal - in case the arbitral tribunal consists of a higher odd number, then the same logic applies to whom the chairman/ president would be.

fails to nominate an arbitrator¹⁶⁶, then after 15 days of receipt of the request to nominate an arbitrator received by one party from the other¹⁶⁷, then either party may request the concerned body to nominate the arbitral tribunal (or remaining members thereof)¹⁶⁸ – again, if such a decision is given by the competent court, then it shall not be subject to appeal. In such cases, the concerned body shall take into consideration the provisions of the New Law and the prior agreement of the parties, and shall nominate an independent and impartial arbitral tribunal – in case the concerned body is other than the court, and such body fails to nominate in accordance with the same, then either party may request the competent court to take such action¹⁶⁹ (such decision by the court shall not be subject to appeal). When a party is submitting a request for nomination to a concerned body under article 11; paragraph 6 thereof provides that such a request shall concisely state the subject matter of the dispute, any qualification required of the nominee(s) according to the arbitration agreement, and all steps taken to nominate the arbitrator (which have failed, thereby justifying the request) – a copy of the request shall also be forwarded to the other party(s) and any previously appointed arbitrator(s). Finally, article 11 also provides for the assistance of the court (at the request of either of the parties) in requesting an arbitral institution in the country, to provide a list of not more than six names of arbitrators specialized in the subject matter of the dispute – subject to payment of any fees requested by the arbitral institution.

¹⁶⁶ or the two nominated arbitrators fail to nominate a third.

¹⁶⁷ or in case of failure of the arbitrators to nominate a third – 15 days after the nomination of the latter of the two arbitrators.

¹⁶⁸ It may be worth noting that under this provision, it is stated that such decision by the concerned body shall be done on an expedited basis. This is not mentioned in the earlier provision. It is not entirely clear what the difference is between a sole arbitrator and a three-arbitrator tribunal.

¹⁶⁹ Article 58 of the New Law states that a list of arbitrators shall be developed by the minister of justice or the president of the competent judicial body; it is submitted that should improve the quality of arbitrators nominated by the court - Antonios Dimitracopoulos, 'The New UAE Arbitration Law: It Is Not What It Says But How You Read It' <https://bsabh.com/the-new-uae-arbitration-law-it-is-not-what-it-says-but-how-you-read-it/>, (accessed 13 January 2019).

Furthermore, if there is an agreed procedure for the composition of the arbitral tribunal, Article 13 of the New Law provides for the case where such method fails; whereby in case either party breaches the previously agreed upon method of composition of the arbitral tribunal¹⁷⁰ or if this method for some reason fails to succeed in forming the arbitral tribunal as agreed by the parties¹⁷¹, then either party may request the court to carry out the procedure for the establishment of the arbitral tribunal. Furthermore, article 13 mentions that decisions by the court under this article is not subject to appeal.

However, if the arbitral tribunal is established in default of the arbitration agreement (or the parties' subsequent agreement) or if it does not comply with the rules of arbitration agreed to or the provisions of the arbitration law, then this may be raised as a ground for annulment an arbitral award under article 53(1.f) of the New UAE Arbitration Law.

Much like article 20 of the New UAE Arbitration Law deals with waiver of right to raise a challenge to the jurisdiction of the arbitral tribunal, article 25 deals with waiver of the right of either party to object to any matter which is not in accordance with the arbitration agreement or any non-mandatory provision of the New Law (such as the composition of the arbitral tribunal). The article states that unless a party objects within 7 days of the date of knowledge of such default, then the party is deemed to have waived its right to object¹⁷². That means if there is any deviation with the constitution of the arbitral tribunal (or the arbitral process¹⁷³), a party must object within 7 days or lose the right to do so. It is important to note here that only objection to deviation from

¹⁷⁰ e.g. one of the parties delays/ refuses to appoint an arbitrator.

¹⁷¹ e.g. if the arbitral institution charged by the parties with the appointment of an arbitrator fails to appoint one.

¹⁷² It is submitted that it is up to the arbitral tribunal to determine whether a party has waived such a right; this is confirmed by the Hong Kong Court (which is a jurisdiction that has adopted the UNCITRAL Model Law) - Attorney-General v. Vianini Lavori Spa, High Court—Court of First Instance, Hong Kong, 11 February 1991], [1991] HKCFI 221

¹⁷³ This will be discussed in the next section – “Arbitration Process”.

the agreement of the parties or non-mandatory provision of the New Law can be waived¹⁷⁴. The New Law, makes it clear which provisions are non-mandatory¹⁷⁵. As mentioned earlier, waiver of the right to object under the New Law does not prevent the admission of an action for the annulment of the arbitral award by the competent court on the same ground¹⁷⁶. However, in various UNCITRAL Model Law adopting jurisdiction cases, the courts have held that if a challenge against an arbitral award has been waived during the proceedings, and the reasons for this challenge were known, then this may not be used by the parties to challenge an arbitral award in front of the court¹⁷⁷.

The New UAE Arbitration Law maintains that the arbitral tribunal must be impartial and independent to the parties or the dispute in question. Article 10(4) of the New Law states that a nominated arbitrator must disclose to the parties, and to other members of the arbitral tribunal, in writing, all information that may suggest bias; this obligation to disclose any material information shall continue for any information that arises after appointment of an arbitrator - throughout the arbitration process up to the issuance of the award. Once information of an arbitrator's relation to the parties or the case in question is disclosed to the parties, and no objection is raised, this is taken under the New Law, in article 15, as implied acceptance to the impartiality and independence¹⁷⁸

¹⁷⁴ Objection to provisions such as that regarding the number of arbitrators must be odd (article 9(2)) cannot be waived (see Abu Dhabi Court of Cassation, 186/Judicial Year 2).

¹⁷⁵ Articles that mention that they apply unless otherwise agreed by the parties would be non-mandatory. There are some articles that do not mention this yet are still non-mandatory, but it is clear that they are non-mandatory from the text. Although, as mentioned earlier, for some provisions, it will be up to the court to determine whether it is a mandatory provision or not.

¹⁷⁶ As stated in article 54(5) of the New Law.

¹⁷⁷ Even if such challenge was rejected by the arbitral tribunal but was not subsequently challenged in front of the court - 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html At page 155.

¹⁷⁸ It is submitted that Independence is lack of personal, employment or any sort of economic relationship; while impartial is the lack of inclination or disinclination - Shivani Khandekar, 'Independence And Impartiality Of Arbitrators: Are We There Yet?' <http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/>, (accessed 13 January 2019).

of the arbitrator regarding the matter in question and information made known at the time, and unless an objection is raised by any of the parties within 15 days of either the appointment of the arbitrator or the release of new information giving rise to doubt of the arbitrator's impartiality or independence, then this defense can no longer be used by either party to challenge an arbitrator or an arbitral award. If however, such a challenge is raised by one of the parties, and the other party does not agree to remove that arbitrator (or the arbitrator does not withdraw), then the party making the challenge may present its case to the Concerned Body¹⁷⁹ within 15 days after the initial 15 days have passed – the concerned body shall make its decision within 10 days of this submission, and its decision shall not be subject to appeal. It is important to note that raising a challenge against an arbitrator does not entail holding the proceedings, nor does it stop the arbitral tribunal from issuing an arbitral award^{180 181}. Furthermore, if it can be proven to the court during an action for annulment of an arbitral award¹⁸² that certain information was not disclosed by a member of the arbitral tribunal, and that this information cast serious doubt on the impartiality or independence of that arbitrator, then this may be used as a ground for annulment of an arbitral award¹⁸³. In fact, in a Hong Kong court case¹⁸⁴, it was held that the fact of the failure of an arbitrator to disclose any material information is in itself a justifiable doubt to that arbitrator's independence and

¹⁷⁹ The definition of the concerned body is the same as the one for nomination of the arbitral tribunal given earlier in this section.

¹⁸⁰ This is another way the legislator has attempted to improve the efficiency of arbitration in the new Law - Nassif BouMalhab, 'The UAE'S New Arbitration Law' <https://www.clydeco.com/insight/article/the-uaes-new-arbitration-law>, (accessed 13 January 2019).

¹⁸¹ Such challenges were often used without merit to disrupt arbitrations prior to the New Law - Essam Al Tamimi, 'Commentary On The UAE's New Arbitration Law' <http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAES+New+Arbitration+Law>, (accessed 13 January 2019).

¹⁸² Or in a challenge to an action for the recognition/ enforcement of an arbitral award.

¹⁸³ Andrew Tweeddale and Keren Tweeddale, *Arbitration Of Commercial Disputes* (Oxford University Press 2007).

¹⁸⁴ Hong Kong being a jurisdiction that has adopted the UNCITRAL Model Law.

impartiality¹⁸⁵. Furthermore, it is considered in some Model Law adopting jurisdictions¹⁸⁶ that it is an implied obligation of the arbitrator to investigate whether any of its relationships needs to be disclosed or would cause any doubt as to their independence and impartiality. The matters which may impede an arbitrator from being involved in an arbitration were stated in the Union Supreme Court case no. 303/ 2012(30); the court explained that they are similar to matters which render a judge incompetent to adjudicate a court case¹⁸⁷ – such matters would be valid grounds for challenging an arbitrator if they exist. It is further explained that it is not allowable for an arbitrator to be a “representative, attorney-at-law, attorney, a follower or an employee for any of the parties to the arbitration, a party that has previously mediated in sorting the dispute or has expressed an opinion thereon or to be an undetermined person or persons”¹⁸⁸ – this is even if such was the agreement of the parties. It is likely that this will remain the same under the New Law. Furthermore, article 58 of the New Law states that the Minister of Economy shall issue a code of conduct for arbitrators; which might further help clarify what constitutes the minimum required impartiality and independence of the arbitral tribunal¹⁸⁹.

¹⁸⁵ Jung Science Information Technology Co. Ltd. v. Zte. Corporation, High Court—Court of First Instance, Hong Kong Special Administrative Region of China, 22 July 2008, [2008] HKCFI 606

¹⁸⁶ As stated in HSMV. Corp. v. ADI Ltd., Central District Court for California, United States of America, 8 November 1999, 72 F. Supp. 2d 1122 (C.D. Cal. 1999).

¹⁸⁷ These are listed in article 114 and 115 of the UAE Law of Civil Procedures; Federal Law no. 11 of 1992.

¹⁸⁸ Any UAE court case judgments quoted herein are from unofficial English translations of the original Arabic text of the judgments.

¹⁸⁹ This can be used by arbitrators to guide them how to behave, as well as by court judges in determining whether the impartiality and independence of an arbitrator has been jeopardized to the extent of invalidating the arbitral award.

Arbitration Process

The provisions of article 53.1 of the New UAE Arbitration Law relating to grounds for annulment of an arbitral award based on some default in the arbitral process are laid out below:

“d. If one of the parties to the Arbitration is unable to present its case as a result of not being given proper notice of the appointment of an Arbitrator or of the arbitral proceedings, the Arbitral Tribunal's violation of the litigation principles or for any other reason beyond its control;

e. If the arbitral award fails to apply the law agreed upon by the parties to govern the subject matter of the dispute;

...

g. If the arbitral proceedings are invalid to the effect that impairs the award; or if the award is rendered after the due time limit;”

The New UAE Arbitration Law upholds the flexibility of the proceedings that is characteristic of arbitration – article 23 of the New Law states that such procedure shall be in accordance to the parties’ agreement¹⁹⁰. Furthermore, the UAE courts have shown to uphold this characteristic of Arbitration as long as basic matters of fairness and compliance with certain mandatory rules of law and matters of public policy are observed¹⁹¹ ¹⁹². Further to this, the parties may agree on one of many available standard rules of arbitration that provide a framework by which the arbitration

¹⁹⁰ It is submitted that this freedom in forming the rules of arbitration makes the need to choose a foreign law to govern the procedure of the arbitration unnecessary - 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html, page 8.

¹⁹¹ Hassan Arab, 'UAE Courts On The Signing Of Arbitral Awards' <https://www.tamimi.com/law-update-articles/uae-courts-on-the-signing-of-arbitral-awards>, (accessed 13 January 2019).

¹⁹² The UAE courts in multiple cases have stated that the arbitral tribunal is not bound by the procedures followed in actions before the court, but that it is bound to follow the mandatory procedural rules set out in the arbitration law, the agreement of the parties and the right of fair litigation of the parties – see Dubai Court of Cassation case no. 305/ 2007. This position is the same as that of the new Law.

is to be conducted¹⁹³ – with perhaps the more specific details agreed upon between the parties during the arbitral process. On the other hand, article 23(2) of the New Law states that in case of non-agreement by the parties on a procedural matter, then the arbitral tribunal may decide this¹⁹⁴, subject to complying with any mandatory laws¹⁹⁵. However, if there are deviations to these agreed procedures¹⁹⁶, or the mandatory provisions of the New Law, then this would constitute a defect in the arbitration process, which may be used to annul an arbitral award¹⁹⁷. It is not entirely clear which provisions of the New Law are mandatory¹⁹⁸. In fact, there is a lack of consensus on this between jurisdictions adopting the UNCITRAL Model Law^{199 200}.

Article 53(d) of the New UAE Arbitration Law states that if the one of the parties is unable to present its case due to lack of proper notice of the appointment of an arbitrator or the commencement of the arbitral proceedings²⁰¹, then this is a valid ground that can be raised by the

¹⁹³ It is submitted that the arbitration rules agreed upon take precedence to the non-mandatory rules of the arbitration law – 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

http://www.uncitral.org/uncitral/en/case_law/digests.html, pages 155-156. Furthermore, it was held in a case of the Kenyan High Court, that application of the arbitral tribunal of different set of arbitration rules was sufficient deviation from the agreement of the parties for the court to set aside the arbitral award.

¹⁹⁴ It is important to note that under article 33(2) of the new Law, unless the parties agree, the arbitral tribunal shall decide whether to hold oral pleadings or to limit the proceedings exclusively on the basis of the submitted and written evidence.

¹⁹⁵ Most importantly of which is the general principle of fairness of litigation.

¹⁹⁶ This includes pre-arbitral procedures; the UAE court under the old Law have set aside some arbitral awards for noncompliance/ fulfillment of the prerequisites to arbitration set out in the arbitration agreement. See Dubai Court of Cassation no. 53/ 2011 and 188/ 2012 where arbitral awards were set aside due to the same.

¹⁹⁷ As provided for in article 53(1.d, e and g) of the new Law.

¹⁹⁸ Although it is clear that the ones that state that it is applicable if not agreed otherwise by the parties is clearly not mandatory.

¹⁹⁹ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html, pages 13-14.

²⁰⁰ For example, a court in Canada has found a certain provision of the law to be non-mandatory and a court in New Zealand has found that the same provision is a mandatory provision – see *Noble China Inc. v. Lei Kat Cheong*, Ontario Court of Justice, Canada, 4 November 1998, [1998] CanLII 14708 (ON SC), published in (1998) 42 O.R. (3d) 69 and *Methanex Motunui Ltd. v. Spellman*, Court of Appeal, Wellington, New Zealand, 17 June 2004, [2004] 3 NZLR 454.

²⁰¹ Article 27 of the new Law states that unless otherwise agreed by the parties, the arbitration commences from the day following the formation of the arbitral tribunal.

losing party for annulment of the arbitral award. The effectiveness of a notice²⁰² is governed by the agreement of the parties. However, if no such agreement is made, article 24 of the New Law provides for default provisions for notices and other service procedures²⁰³. Furthermore, the matter of content of a notice has been discussed in a number of UNCITRAL Model Law adopting jurisdictions; in a Hong Kong case²⁰⁴, it was confirmed that a notice stating that the claimant has appointed an arbitrator and requests the defendant to appoint an arbitrator is sufficient to commence the arbitration. However, in another Hong Kong case²⁰⁵, it was stated that the mere enquiry into the position of the other party in regards to arbitration does not qualify as a notice to commence arbitration. Furthermore, the inability of a party to present its case may arise from matters other than notification – any matter which prevents the parties from properly presenting themselves either due to the arbitral tribunal or due to some extraneous circumstances that are beyond the parties’ control may give rise to a challenge to the arbitral award. For example, in a Canadian case²⁰⁶, the court decided that the arbitral tribunal has not given the parties their right to be heard when they based the arbitral award on a legal doctrine that was not discussed during the proceedings – thus not giving the parties an opportunity to submit their pleadings on the same. Furthermore, it was also held in a Singaporean case²⁰⁷, that the weight of the matter that either

²⁰² As well as other procedural matters.

²⁰³ The common position of many jurisdictions that have adopted the UNCITRAL Model Law is that this article applies not only to the communication between the parties (such as notice of request for arbitration), but also between the arbitral tribunal and the parties (such as the notice of an award). 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html, pages 16-17.

²⁰⁴ Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited, High Court—Court of First Instance, Hong Kong, 29 October 1991

²⁰⁵ Fustar Chemicals Ltd. v. Sinochem Liaoning Hong Kong Ltd., High Court—Court of First Instance, Hong Kong, 5 June 1996

²⁰⁶ Louis Dreyfus S.A.S. v. Holding Tusculum B.V., Superior Court of Quebec, Canada, 8 December 2008.

²⁰⁷ Soh Beng Tee & Co. Pte. Ltd. v. Fairmont Development Pte. Ltd., Court of Appeal, Singapore, 9 May 2007.

party was prevented from arguing is one of the matters to be considered when assessing this effectiveness of this ground for annulment the arbitral award.

It is worth noting here that the New Law, under article 22, explicitly allows for the intervention and impleader of a third party at the request of one of the parties to the arbitration – this of course is subject to the third party being a party to the arbitration agreement and that all the parties are given an opportunity to make a statement about the joinder/ impleader²⁰⁸.

Further to the rules of procedure, and regardless of any agreement, the arbitral tribunal must ensure that the parties to an arbitration are given a fair chance of presenting their case; this is provided for in article 26 of the New UAE Arbitration Law. Breaching this fair treatment requirement or not allowing a party to properly present its claim or defense would be a procedural flaw that may be used by the losing party to annul the arbitral award (article 53.1). Notwithstanding the fair treatment that the arbitral tribunal is expected to uphold in its proceedings, article 32(2) of the New Law states that if the claimant fails or delays, without valid excuse, its submission of statement of claim, then arbitral tribunal may terminate the proceedings – that is if the tribunal decides there is undue or unjust delay and that this makes it impossible to reach a fair resolution or this delay causes prejudice to the respondent/ defendant. However, once the statement of claim is submitted, all statements of defense²⁰⁹ do not fall under this rule, and the arbitral tribunal is obliged to continue the proceeding regardless of delay in submission of defense. However, in such a case, article 32(3) states that “if one of the parties fails, without a valid excuse, to appear at a hearing, to submit the required documents, or to observe any procedure, the arbitral tribunal may continue the arbitral proceedings, conclude what it deems appropriate in light of such party’s acts and breach of

²⁰⁹ Either defense to the main statement of claim or to a counterclaim.

obligations, as justified by the circumstances of the arbitral action, and issue an award on the dispute, based on available evidence.” This provision, if ever the need arises to put it in use, should be done carefully by the arbitral tribunal, otherwise the arbitral award is in risk of being nullified by the court for lack of due process or breach of natural justice in the arbitration process - if it is found by the court that the arbitral tribunal was not justified in taking such action. It is generally accepted in UNCITRAL Model Law adopting jurisdictions that the same implies that the party which has deliberately failed to participate in the arbitral proceedings has waived its right to be heard²¹⁰.

It is worth re-iterating here that most of the provisions of the New UAE Arbitration Law for determining the procedure in an arbitration can be changed by agreement of the parties, but any change should still maintain fair and equal treatment to the parties, if it is not to run the risk of the award being nullified by the court.

Under article 37 of the New UAE Arbitration Law, the parties may also agree upon the substantive law to be applied by the arbitral tribunal to determine the outcome of the dispute. The article further states that the chosen substantive law shall apply, without applying the rules for conflict of laws (unless otherwise agreed by the parties) – subject to such laws not being in contradiction with the public order and morality of the UAE²¹¹. However, if the parties do not agree on the substantive law to be applied, then the arbitral tribunal shall apply the law that it determines to be the most connected to the subject matter of the dispute. The arbitral tribunal may also determine the dispute

²¹⁰ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html, page 151.

²¹¹ Or whatever seat of arbitration the parties have agreed upon, in case of international arbitration.

based on the principle of *ex aequo et bono*²¹² if the parties expressly agree to the same. However, if the agreed substantive law is not applied by the arbitral tribunal, then this shall be a valid ground for the losing party to challenge the arbitral award²¹³. It is important to note this would not give the court the ability to review the merits of the dispute. In an Egyptian case²¹⁴, the court emphasized that when this defense is raised, that a court must investigate whether the award was determined based on the legal sources of the applicable law²¹⁵ – this is different than reviewing the merits of the case. Furthermore, numerous other UNCITRAL Model Law adopting jurisdictions have set aside awards for non-application of the contract by the arbitral tribunal, as well as for the arbitral tribunal deciding on the merits based on the principle of *ex aequo et bono* without the express authorization of the parties to do so²¹⁶.

Despite the above grounds for annulment an arbitral award in relation to the arbitral process, article 25 of the New UAE Arbitration Law²¹⁷ gives a deadline for a party complaining of a deviation in the arbitral process from the agreement of the parties or any non-mandatory provision of the New Law, to raise such matter in a challenge to the arbitral tribunal within 7 days of the knowledge of such violation or non-compliance, otherwise the parties would be considered to have waived such right to object. Again here, emphasis has to be made on that only deviation from non-mandatory provisions of the law apply to this waiver; laws that are mandatory, such as article 26 relating to

²¹² i.e. based on principles of fairness – not in strict adherence to any law. Nobumichi Teramura, 'Ex Aequo Et Bono: An Overlooked And Undervalued Opportunity For International Commercial Arbitration' <http://arbitrationblog.kluwerarbitration.com/2018/11/18/ex-aequo-et-bono-an-overlooked-and-undervalued-opportunity-for-international-commercial-arbitration/>, (accessed 13 January 2019).

²¹³ This is according to article 53(e) of the new Law.

²¹⁴ Cairo Court of Appeal, Egypt, 5 May 2009, case No. 112/124. Egypt being a jurisdiction that has adopted the UNCITRAL Model Law.

²¹⁵ i.e. are the decisions of the award based on the agreed upon substantive law – regardless whether the arbitral tribunal have correctly applied the substantive law or whether there is misapplication of this law.

²¹⁶ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW http://www.uncitral.org/uncitral/en/case_law/digests.html, page 153.

²¹⁷ Which was explained in the previous section – “Arbitral Tribunal”.

the equality of the parties to arbitration, would not apply²¹⁸. Furthermore, the fact that a violation or non-compliance has been waived by the losing party does not prevent the court from admitting the application for an action for the annulment of the arbitral award based on such ground²¹⁹. In a German case²²⁰, the court has applied this rule on an objection over a procedural matter – the objecting party had failed to raise its objection in a timely manner and was therefore considered to have waived its right to object. Furthermore, in another German case²²¹, it was decided that even an objection relating to due process can be waived under this rule. How this article will be treated by the UAE courts is a matter to be gleaned from future cases – although it is submitted that matters of public policy (e.g. due process) will not be applicable to waiver under this article.

Further to the above, the arbitral tribunal must determine the dispute and issue the arbitral award within the time agreed upon by the parties to the arbitration. In case there is no agreement on this matter, then article 42 of the New UAE Arbitration Law states that the default period for this is 6 months from the start of the arbitration²²²; this period may be extended by the tribunal by a maximum period of 3 months if it sees fit to do so²²³. If the period for issuing the final award has passed without the award being issued, then either party may apply to the court for an extension of the period²²⁴ or for termination of the arbitration²²⁵ – such an award by the court is not subject to appeal. Finally, if the arbitral tribunal does not comply to this time limit, then it may be raised as a defense by the losing party that the arbitral award is invalid for expiry of duration and the

²¹⁸ i.e. right to object to default in such provision cannot be waived by the losing party.

²¹⁹ As stated in article 54.5 of the new Law.

²²⁰ Oberlandesgericht Naumburg, Germany, 10 Sch 08/01, 21 February 2002 – Germany being a jurisdiction that has adopted the UNCITRAL Model Law.

²²¹ Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002

²²² Arbitration commences on the day after the formation of the arbitral tribunal - unless otherwise the parties agree on a different date. As stated in article 27 of the new Law.

²²³ Unless the parties agree to allow the tribunal to extend the arbitration for a longer period.

²²⁴ The court may extend such period upon certain conditions.

²²⁵ If the court decides to terminate the arbitration, then either party may apply its claim to the same court (instead of arbitration) – as stated in article 42(3) of the new Law.

award determined void by the competent court²²⁶. On the other hand, it was stated in Union Supreme Court case no. 43/ 2003 that the time for issuance of the award can be extended by implication - whether the parties indeed implied an extension or not would depend on the facts of the case^{227 228}. It is interesting to note that the UNCITRAL Model Law does not contain a specific time limit for issuance of the arbitral award; however, in UNCITRAL Model Law adopting jurisdiction - there were cases where an agreement by the parties on the time to issue the award, and the court held that the arbitral award is null due to the late issuance of the award²²⁹. Furthermore, it was considered by the Jordanian Supreme Court²³⁰ that the fact the losing party did not object to the continuation of the arbitration past the time limit meant that the right to object to the same had been waived. On the other hand, in a Tunisian case²³¹, the arbitral tribunal extended the time limit within the allowance of the applicable law, but to the objection of the parties; the court decided to set aside that arbitral award for the arbitral tribunal exceeding its powers in disregarding the objection of the parties, as this was considered to be the time limit agreed by the parties. Hence, from these cases, it is submitted that unless the parties agree to extend the time limit, either explicitly or implicitly²³², then the arbitral tribunal is unable to do so, even if this is within the allowance given by the New Law.

²²⁶ See article 53(1.g) of the new Law.

²²⁷ An example of implication was given by the Dubai Court of Cassation in case no. 268/ 2007, where the court said that "Such agreement may be impliedly deduced from the presence of the parties to the dispute during the hearing of the arbitration and the fact that they are arguing the subject matter after the expiration of the time limit..."

²²⁸ Agreement to extension of time may be implied even if there was prior explicit agreement by the parties to set the time limit for the arbitration at a certain date or period - as stated by the Dubai Court of Cassation in case no. 151/ 2007.

²²⁹ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html, page 143.

²³⁰ Supreme Court, Jordan, 7 November 2007, No. 1242/2007 – Jordan being a jurisdiction that has adopted the UNCITRAL Model Law.

²³¹ Court of Appeal, Tunisia, 3 December 2002, case No. 134; see also, N.B.C.C. Ltd. v. JG Engineering Pvt. Ltd., Supreme Court, India, 5 January 2010.

²³² And implication being a matter of fact to be decided by the court.

Another procedural matter worth noting is the administration of oath. Under the Old UAE Arbitration Law the matter of administering an oath by the arbitral tribunal was considered imperative for the validity of an arbitral award when taking testimony from a witness²³³, otherwise the award may have been invalidated²³⁴; as had happened in the infamous 2006 Bechtel case - where the Dubai Court of Cassation refused the enforcement of the arbitral award due to lack of strict compliance to the UAE's prescribed oath^{235 236}. However, under the New Law, it is submitted that article 33(7), which states that the witnesses and experts shall be heard in accordance with the law of the UAE, is less strict than article 211 of the Old Law, which required the administration of an oath²³⁷, and that article 33(7) allows for the parties to agree out of the law of the UAE to regulate the hearing of witnesses and experts²³⁸.

²³³ Whether testimony be oral or written; even if there was an agreement to the contrary.

²³⁴ Dalal Al Houti, 'A Checklist For What You Need For An Enforceable UAE Arbitral Award' <https://www.tamimi.com/law-update-articles/a-checklist-for-what-you-need-for-an-enforceable-uae-arbitral-award/>, (accessed 13 January 2019).

²³⁵ Bill Smith, 'The Impact Of The UAE's New Federal Arbitration Law' https://www.pinsentmasons.com/Global/UAE_Arbitration_law_update.pdf, (accessed 13 January 2019).

²³⁶ Article 41(2) of the UAE Law of Evidence – Federal Law no. 10 of 1992: The witness shall swear an oath, saying 'I swear by Almighty God that I shall tell the whole truth and nothing but the truth'. The oath shall be according to the particular custom of his own religion if he so requests."

²³⁷ Bill Smith, 'The Impact Of The UAE's New Federal Arbitration Law' https://www.pinsentmasons.com/Global/UAE_Arbitration_law_update.pdf, (accessed 13 January 2019).

²³⁸ However, if this is not done, then it is submitted that the arbitral tribunal must comply with the administration of the oath.

Formalities of an Arbitral Award:

Even though a default in the formalities and content of an arbitral award is not one of the grounds for annulment of an arbitral award listed in article 53 of the New UAE Arbitration Law; it is submitted that such a default can still be used to annul an arbitral award²³⁹²⁴⁰. In fact, there are numerous Model Law cases where the arbitral award was set aside due to failure to adhere to these matters²⁴¹ ²⁴². An arbitral award must be in writing; article 41(1) of the New Law states that “the arbitral award shall be passed in writing”²⁴³. Furthermore, the award must be issued by and signed by a majority of the arbitral tribunal²⁴⁴ ²⁴⁵. In case any of the arbitrators refuses to sign the award, then reason for refusal shall be given in the award. Furthermore, if the arbitrators cannot agree on the award, then it is enough that disagreement and different opinions are stated in the award, and the award of the majority will be valid²⁴⁶ - the award is still valid if only signed by the majority of the arbitral tribunal. The part of the award that must be signed as a minimum are the pages that contain the depository part of the award and the reasoning of the award²⁴⁷ (although if the depository part has enough of the reasoning, then this shall be sufficient)²⁴⁸. The content of the

²³⁹ It is submitted that this is one of the defects in the New UAE Arbitration Law.

²⁴⁰ It is worth remembering that the arbitral award is the only legal document that proves that the arbitration took place and the arbitral tribunal’s determination of the dispute to the court.

²⁴¹ e.g. the award was not signed by all arbitrators and the award lacked proper reasoning – in *Bursa Büyükşehir Belediyesi v. Güris Insaat VE Mühendislik AS*, Hoge Raad, Netherlands, 5 December 2008, C07/166HR and *Hanseatisches Oberlandesgericht Hamburg*, Germany, 11 Sch 01/01, 8 June 2001

²⁴² The matters that must be observed in an arbitral award; are that the arbitral award must be in writing, it must be signed by a majority of the arbitral tribunal, and it must contain the correct content. These matters are set out in article 41 of the New Law.

²⁴³ It would be difficult to imagine how an arbitral award, which is not in writing, being applied to the court for ratification and enforcement.

²⁴⁴ As stated in article 41(2) & (3) of the New Law.

²⁴⁵ See Dubai Court of Cassation case no. 156/ 2009 where the court stated that lack of appropriate signature on the arbitral award is a valid ground that can be raised to annul an arbitral award.

²⁴⁶ In case of complete disagreement, then the head arbitrator’s award would be the valid one. This is perhaps the logic behind the mandatory odd number of arbitrators discussed in the previous section – “Arbitral Tribunal”.

²⁴⁷ This was confirmed in the Dubai Court of Cassation commercial appeal no. 156/ 2009 and the Union Supreme Court case no. 16/ 2003.

²⁴⁸ Note that under the new Law, the parties may agree that reasoning does not need to be included in the arbitral award. In such case, only the depository part of the award needs to be signed.

award is also an important matter; the award shall have the reasoning for the award²⁴⁹. However, if the parties agree otherwise or the law applicable does not require the award to be reasoned, then this is not required. Furthermore, information regarding the parties and their respective arguments and claims as well as the arbitration agreement²⁵⁰ must also be included in the arbitral award²⁵¹. It is worth noting that the geographic location of the arbitrators during the time of signing the arbitral award is irrelevant under the New Law^{252 253}.

²⁴⁹ In an Egyptian case, the court set aside an arbitral award which did not contain any reasoning for the award, and the parties had not agreed that the award would not state the reasoning - Cairo Court of Appeal, Egypt, 2 December 2008, case No. 114/124.

²⁵⁰ It has been stated by the UAE courts that non-inclusion of the arbitration agreement (or content/ meaning) thereof shall be a valid ground for invalidating the arbitral award – see Abu Dhabi Court of Cassation case no. 486/ 2008, Dubai Court of Cassation case no. 151/2007 and Union Supreme Court case no. 438/2004.

²⁵¹ On the other hand, if a matter arises within the arbitration that is outside the jurisdiction of the arbitral tribunal, then this must not be included as part of the award issued by the arbitral tribunal, for fear of causing the whole (or part thereof) of the award to be annulled by the court for lack of jurisdiction. Instead of dealing with such an issue in the award, article 43 of the New Law states that “... the tribunal shall suspend the proceedings pending a final judgment in this regard [meaning the matter which is outside the jurisdiction of the arbitral tribunal]. This entails suspension of the time limit set for issuance of the award. It shall be resumed from the day following the date of informing the arbitral tribunal that the reason for the suspension has ceased to exist.” However, if the matter falling outside of the jurisdiction of the arbitral tribunal is not something relied upon by the arbitral tribunal in giving their award, then the arbitral award may be issued regardless of whether that matter has been resolved by the court or not (this is because it is considered irrelevant to the award).

²⁵² Hassan Arab, 'UAE Courts On The Signing Of Arbitral Awards' <https://www.tamimi.com/law-update-articles/uae-courts-on-the-signing-of-arbitral-awards>, (accessed 13 January 2019).

²⁵³ Under the Old UAE Arbitration Law, an award signed outside the UAE was considered an international award, and to avoid the uncertainty about enforcement of a foreign award, the arbitral tribunal would ensure that the they were physically in the UAE when signing the award so as to avoid this risk - Bill Smith, 'The Impact Of The UAE's New Federal Arbitration Law' https://www.pinsentmasons.com/Global/UAE_Arbitration_law_update.pdf, (accessed 13 January 2019).

Chapter 4 – Grounds for Annulment of Arbitral Awards: Grounds that can be raised by the court on its own initiative

Further to the grounds for annulment discussed earlier; the New UAE Arbitration Law also provides for grounds that can be raised by the court on its own initiative to nullify an arbitral award based on contravention to the state's public policy²⁵⁴ – these are provided in article 53(2).

“2. The court shall invalidate the arbitral award on its own if it finds out the following:

- a. The subject matter of the dispute is a matter in which Arbitration may not be held; or*
- b. The arbitral award contradicts the public order and morality in the State.”*

Article 53(2) of the New UAE Arbitration Law states that the grounds for annulment of an arbitral award that may be raised on the initiative of the court are either that a dispute that is included in an arbitration may not be settled by arbitration under UAE law²⁵⁵, or that an arbitral award contradicts the public policy and morality of the UAE.

Article 4(2) of the New Law states that an arbitration agreement may not be entered into with respect to matters that are not capable of being conciliated. Arbitrability is a matter of public policy – certain disputes that deal with public policy matters are not subject to settlement by arbitration. It is submitted that public policy relates to customs and rules that are essential to the public good

²⁵⁴ Of course, these can still be raised by the parties. However, unlike the grounds set out in the previous chapter, the court can consider these grounds on its own initiative; while the previously set out grounds cannot be raised by the court.

²⁵⁵ i.e. invalidity of the arbitration agreement – also referred to as a challenge on arbitrability of the dispute.

and the sovereignty of the state²⁵⁶. Article 3 of the UAE Civil Code (Federal Law no. 5 of 1985) describes public policy as follows:

“Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundation upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari’ah.”

This description is common to many civil law systems - to the exception of compliance to the Islamic Shari’ah, which is exclusive to Islamic countries such as the UAE²⁵⁷. As can be understood from this article, matters that are related to sovereignty, freedom of trade, the circulation of wealth (i.e. common wealth – as opposed to private wealth²⁵⁸) and rules of private ownership are matters of public policy, and are under the sole jurisdiction of the court²⁵⁹ and may not be arbitrated. Further clarifications as to what types of disputes may fall under these categories can be gleaned from the numerous UAE court cases discussing the matter of arbitrability.

Regarding leasing of real estate property, the Abu Dhabi Court of Cassation case no. 873/ 2009 explained that legal relationships arising from a lease of real estate, and a dispute arising out of such relationship²⁶⁰, is not a matter that may be settled by arbitration²⁶¹; a special judicial tribunal was created for the purpose of settling disputes arising from such relationships ²⁶². As for the

²⁵⁶ Ammar Haykal, 'Dubai Court Judgment On Public Policy As A Basis For Reviewing The Substance Of An Arbitral Award' <https://www.tamimi.com/law-update-articles/dubai-court-judgment-on-public-policy-as-a-basis-for-reviewing-the-substance-of-an-arbitral-award/>, (accessed 13 January 2019).

²⁵⁷ Essam Al Tamimi, 'Arbitrators Dealing With Real Estate Property Disputes – Is It A Matter Of Public Policy?' <https://www.tamimi.com/law-update-articles/arbitrators-dealing-with-real-estate-property-disputes-is-it-a-matter-of-public-policy/>, (accessed 13 January 2019).

²⁵⁸ Ibid.

²⁵⁹ Or some court appointed judicial tribunal – as set in certain legislation. As discussed below.

²⁶⁰ Such as breach by one of the parties of its obligation.

²⁶¹ Although the court stated that premises leased for hotel and tourist purposes, are excluded from this and such matters can be subject to arbitration.

²⁶² However, this position is not shared in all emirates – such as in Dubai, where such matters are arbitrable.

registration of real estate property and land – article 3 of Dubai Law 13 of 2008 (as amended by Law 9 of 2009) and article 7 of Abu Dhabi Law 3 of 2005 (as amended by Law 2 of 2007) states that registration of any disposition of ‘off plan’ real estate property must be done in an interim land register, otherwise such disposition of sale shall be void, and such an issue cannot be determined by an arbitral tribunal as control over registration of such property is a matter of public importance. In Dubai Court of Cassation case no. 180/ 2011, the court confirmed that an arbitral award that dealt with cancelation of a contract of sale of such property, due to lack of registry is void – as such, the sale of ‘off plan’ real estate property, that is not registered, cannot be the subject matter of an arbitration, as this is in contravention to the public policy of the Emirate^{263 264}. A limit to this rule was given by the Dubai Court of Cassation in case no. 282/ 2012, where the court explained that unless the dispute relates to invalidity of the contract due to lack of registration, then an arbitration may be had regarding a dispute relating to ‘off plan’ real estate property – in this case, the court upheld an arbitral award where it was found that an ‘off plan’ property contract was canceled and payment made refunded due to failure of the seller (developer) to meet its obligation (delivered a unit of real estate) – which is a matter not related to registration of property²⁶⁵.

Disputes arising from the performance of commercial agency shall also not be subject to settlement by arbitration – this in accordance with articles 3 and 6 of the UAE Commercial Agencies Law²⁶⁶. However, if a commercial agency is not registered in the register of commercial agencies, then a

²⁶³ This was also confirmed in Dubai Court of Cassation case no. 14/ 2012.

²⁶⁴ It is submitted by Mr. Essam Al Tamimi, in his article “a detailed analysis... Arbitrators Dealing with Real Estate Property Disputes – Is it a matter of Public Policy?”, that this is not indeed a matter of public policy. Refer to his article for an explanation of his point of view. Essam Al Tamimi, ‘Arbitrators Dealing With Real Estate Property Disputes – Is It A Matter Of Public Policy?’ <https://www.tamimi.com/law-update-articles/arbitrators-dealing-with-real-estate-property-disputes-is-it-a-matter-of-public-policy/>

²⁶⁵ This was also confirmed by the Abu Dhabi Court of Cassation in case no. 806/ 2013. However, in Abu Dhabi Court of Cassation case no. 8/ 2014, the court stated that it is in the sole jurisdiction of the court to determine matters of individual ownership.

²⁶⁶ Federal Law no. 18 of 1981, as amended by Federal Law no. 14 of 1998.

dispute arising from such agency may be settled by arbitration²⁶⁷. Furthermore, it has been explained by the Dubai Court of Cassation, in case no. 123/ 2009, that it is not possible to agree upon arbitration regarding matters which are laid down in the Labor Law (Federal Law no. 8 of 1980), and that the procedure for settlement of dispute laid down by the legislator in that law shall not be deviated from – any agreement to the contrary shall be void^{268 269}. Finally, agreement out of the jurisdiction of the court relating to criminal issues and personal status disputes (e.g. marriage, divorce, inheritance) is not permitted in the UAE (i.e. an arbitration agreement to resolve such disputes is void)²⁷⁰.

The grounds for annulment of an arbitral award under the New UAE Arbitration Law are restricted to procedural matters²⁷¹ and jurisdiction of the arbitral tribunal, with the exception of public policy. If an arbitral award is in contravention with the public policy of the UAE, then the court must examine the substance of the dispute (if the challenge is meritorious) to determine whether the award is indeed in contradiction with the public policy of the state²⁷². However, contravention of

²⁶⁷ This was stated in the Union Supreme Court, case no. 99 of 2000.

²⁶⁸ Any arbitration agreement would be void and consequently any arbitral award shall be considered void.

²⁶⁹ In a Canadian case, it was held that the mere fact that a case involves the application of rules that are part of the public order or that it deals with matters that effect third parties (such as copyright) is not sufficient to make the matter non-arbitrable - *Desputeaux v. Éditions Chouette (1987) inc.*, Supreme Court, Canada, 21 March 2003, [2003] 1 S.C.R. 178, 2003 SCC 17. It is yet to be seen if the UAE courts will adopt this attitude to such an arbitrability issue.

²⁷⁰ As confirmed in the Dubai Court of Cassation case no. 146/ 2008.

²⁷¹ Procedural issues include the arbitral tribunal conducting the procedure unfairly or in a manner not in line with due process, and perhaps the appointment of an even number of arbitrators. It is not clear if an even number of arbitrators contradicts public policy as the courts have diverged on this matter - Al Marzooqi M, 'Why Do The UAE Courts Annul Final Arbitral Awards Which Are Issued In The UAE?' (Postgraduate, British University in Dubai 2013). There is also the qualification that a member of the arbitral tribunal must not be a member of the board of trustees or the executive committee of an arbitral institution in the UAE in article 10(2), yet there are no court judgements discussing this new provision of the New UAE Arbitration Law to be certain whether this falls within matters of public policy. It is worth re-mentioning that the importance of differentiating contradiction of public policy and contradiction of agreement of the parties is that a public policy ground may be raised by the court on its own initiative.

²⁷² An example of this is given in the Dubai Court of Cassation in case no. 275/ 2014, where a challenge by the losing party stating that the arbitral award contravened the public policy of the UAE was heard by the court, and resulted in the court reviewing the substance of the dispute – even though the court later upheld the arbitral award.

public policy that would give rise to such a response shall only be when an award contradicts a fundamental principle of the law and morality of the country – a Canadian court gave examples of corruption, fraud, bribery and a serious procedural irregularity as matters applicable to the public policy defense²⁷³. It is a generally accepted principle shared by many UNCITRAL Model Law adopting jurisdictions that the court would not set aside the award if the arbitral tribunal wrongly applied the law or the contract, but only if such default offended the public policy of the state²⁷⁴. However, the definition of public policy – or contradiction thereof – is a matter of disagreement. Some courts have taken a narrow view of public policy; the Croatian Supreme Court has stated that a violation of a mandatory provision of law is not necessarily a violation of public policy, and that such should relate to a matter essential to society²⁷⁵. On the other hand, some courts have taken a broader view of public policy; in a Hungarian Supreme Court case²⁷⁶, it was held that excessively high lawyer rates in a case involving a large sum in dispute was in contradiction with public policy (even though this is not against any particular law), as this would deter/ limit the parties' access to justice²⁷⁷. However, contradiction to public policy may invalidate the whole or just part of the award - an arbitral award may be severed; the court may remove the part of the award relating to the contravention with public policy from the arbitral award, and uphold the remainder of the award, only if this is possible²⁷⁸.

²⁷³ *Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, Ontario Superior Court of Justice, Canada, 22 September 1999

²⁷⁴ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html At pages 161-162.

²⁷⁵ Supreme Court, Croatia, 30 May 2008, Gž 2/08-2

²⁷⁶ Supreme Court, Hungary, BH 2003, 127 at 5c.

²⁷⁷ These two examples are meant to show the difference between how different courts use/ interpret public policy very differently.

²⁷⁸ See Chapter 2 above for further explanation of severability of an arbitral award.

Conclusion

The New UAE Arbitration Law provides clearer more robust provisions for the conduct and enforcement of arbitrations in the UAE. The grounds for annulment of arbitral awards under the New Law are set out in article 53 thereof. These grounds for challenge are divided into matters which must be raised by the parties, and those that can be raised by the court on its own initiative. The grounds for challenge are related to one or more of the following: invalidity in the arbitration agreement, the constitution of the arbitral tribunal, the conduct of the arbitral process, the arbitral award, and finally matters in contradiction with the public policy of the UAE (including the arbitrability of the dispute – this last ground can be raised by the court on its own initiative, while the other grounds must be raised by the parties).

Grounds for annulment of an arbitral award due to invalidity in the arbitration agreement under the New UAE Arbitration Law can be broken down into failure to meet the requirement that the arbitration agreement must be set in writing, the lack of the requisite capacity/ authority of the signatories to execute an arbitration agreement, and finally that the arbitration agreement must be wide enough in its ambit to cover the dispute under arbitration²⁷⁹. However, it is most notable under the New Law, that, in relation to this ground, article 20 of the New Law sets out that a right to object to some invalidity in the arbitration agreement, which would otherwise be a valid ground for annulment an arbitral award, may be waived by the party if not raised in a timely manner in accordance with the provisions of the New Law or the agreement of the parties. In effect, it is submitted that article 20 of the New Law will significantly reduce the instances where invalidity (or some other default) in the arbitration agreement can be raised as a successful ground for

²⁷⁹ A certain dispute must fall within the scope of the arbitration agreement and the jurisdiction of the arbitral tribunal.

annulment of the arbitral award. In other words, article 20 of the New Law will encourage the arbitral tribunal and the court to imply the existence of a valid arbitration agreement.

As for the grounds for annulment of the arbitral award related to the composition of the arbitral tribunal, they are that the composition of the arbitral tribunal must be in accordance to the agreement of the parties²⁸⁰, and in compliance to the mandatory provisions of the New Law²⁸¹. As for the grounds for annulment of the arbitral award related to the conduct of the arbitral process, they are that the arbitral process shall be in accordance to the agreement of the parties²⁸² and that the arbitral process shall be conducted while maintaining due process and equality of treatment of the parties²⁸³. However, similar to article 20, article 25 of the New Law provides for waiver of the right to object to defaults in the composition of the arbitral tribunal and the conduct of the arbitral process, if not raised within a given time limit. It is submitted that this article will also significantly reduce the annulment of arbitral awards.

Finally, even though it is not a ground listed under article 53 of the New Law, it is submitted that invalidity in the form and content of an arbitral award remains to be a possible ground for annulment an arbitral award under the New Law²⁸⁴. For an arbitral award to be valid, it must be in writing, it must be signed by majority of the arbitral tribunal, and it must contain the proper content²⁸⁵.

²⁸⁰ Whether that is in relation to the method of nomination or the qualifications to be met by the arbitral tribunal.

²⁸¹ Such as article 9(2) of the New Law; that the number of arbitrators must be odd.

²⁸² Including the timely issuance of the arbitral award and the application of the arbitral tribunal of the substantive law as agreed by the parties.

²⁸³ Including the impartiality and independence of the arbitral tribunal and the affording of the opportunity to the parties to present their cases by ensuring proper notification of the commencement of the arbitration is given.

²⁸⁴ As was the case under the Old Law.

²⁸⁵ Reasoning of the award and a dispositive portion.

As for the grounds that can be raised by the court on its own initiative, these are that the dispute in question is not capable of settlement by arbitration due to some provision in the UAE legislation, or that the arbitration or the arbitral award contravenes somehow with the public policy and morality of the UAE.

As gleaned from UAE court cases dealing with arbitrations²⁸⁶; implication brought about by waiver was somewhat the pattern the UAE courts were moving in – the court would justify such decisions in that it was attempting to uphold commercial agreements and good faith. It is submitted that the UAE courts will now move in this same direction more confidently, with the permission of the legislator given in the New Law. The exception remains however, that matters which contradict the public policy of the UAE²⁸⁷, shall remain not subject to waiver, and shall thus remain a pitfall the parties and the arbitral tribunal must be mindful of, until enforcement of the final award is obtained.

It has been determined by numerous court cases in UNCITRAL Model Law adopting jurisdictions, that a court is still within its discretion to uphold an arbitral award, even if one or more of the grounds for annulment of an arbitral is fulfilled (including public policy)²⁸⁸. Furthermore, it is submitted that arbitration friendly jurisdictions adopt a narrow interpretation of public policy²⁸⁹. Thus, it is submitted that the UAE courts shall maintain discretion in deciding whether a successful ground raised to challenge an arbitral award is sufficient to annul the arbitral award. However, it

²⁸⁶ Under the Old Law.

²⁸⁷ As well as mandatory provisions of the New Law.

²⁸⁸ 'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012) 2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html At page 141.

²⁸⁹ Hence limiting successful challenges to arbitral awards based on this ground.

is not clear whether the UAE shall shift its view of public policy to accommodate a more arbitration friendly attitude.

Reference List

Al Marzooqi M, 'Why Do The UAE Courts Annul Final Arbitral Awards Which Are Issued In The UAE?' (Postgraduate Dissertation, British University in Dubai 2013).

Abbott J, 'THE NEW UAE ARBITRATION LAW – ANOTHER STEP IN THE RIGHT DIRECTION'
https://www.cliffordchance.com/.../05/the_new_uae_arbitrationlaw-anotherstepinth.html

Abdallah S, 'The UAE Courts Approach With Respect To Upholding Arbitration Awards'
<https://www.tamimi.com/law-update-articles/the-uae-courts-approach-with-respect-to-upholding-arbitration-awards-1/>

Al Houti D, 'A Checklist For What You Need For An Enforceable UAE Arbitral Award'
<https://www.tamimi.com/law-update-articles/a-checklist-for-what-you-need-for-an-enforceable-uae-arbitral-award/>

Al Muhtaseb M, 'When Can An Arbitration Clause Be Incorporated By Reference In The UAE?'
<https://www.tamimi.com/law-update-articles/when-can-an-arbitration-clause-be-incorporated-by-reference-in-the-uae/>

Al Shiri H, 'UAE: Ratification Of A Domestic Arbitral Award And The Issue Of Arbitration Clauses Incorporated By Reference' <https://www.tamimi.com/law-update-articles/uae-ratification-of-a-domestic-arbitral-award-and-the-issue-of-arbitration-clauses-incorporated-by-r/>

Al Tamimi E, 'Arbitrators Dealing With Real Estate Property Disputes – Is It A Matter Of Public Policy?'
<https://www.tamimi.com/law-update-articles/arbitrators-dealing-with-real-estate-property-disputes-is-it-a-matter-of-public-policy/>

Al Tamimi E, 'Commentary On The UAE's New Arbitration Law'
<http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAEs+New+Arbitration+Law>

Al Tamimi E, *Construction Law In The UAE* (Al Tamimi & Company 2005).

Al Tamimi E, *UAE Construction Law And Dispute Resolution* (Al Tamimi & Company 2005).

Arab H, 'Dubai Court Judgment Concerning Severability And Public Policy In Arbitral Awards'
<https://www.tamimi.com/law-update-articles/dubai-court-judgment-concerning-severability-and-public-policy-in-arbitral-awards/>

Arab H, 'Recent Rulings On Arbitration By The Dubai Courts' <https://www.tamimi.com/law-update-articles/recent-rulings-on-arbitration-by-the-dubai-courts/>

Arab H, 'The Importance Of A Complete Arbitral Award Under UAE Law' <https://www.tamimi.com/law-update-articles/the-importance-of-a-complete-arbitral-award-under-uae-law/>

Arab H, 'UAE Courts On The Signing Of Arbitral Awards' <https://www.tamimi.com/law-update-articles/uae-courts-on-the-signing-of-arbitral-awards>

'Assessing The Impact Of The New UAE Arbitration Law' http://afridi-angell.com/items/limg/c_324Assessing_the_Impact_of_the_New_UAE_Arbitration_Law_1532604463.pdf

BouMalhab N., 'The UAE'S New Arbitration Law', *Clyde&Co.* [web blog], 21 May 2018, <https://www.clydeco.com/insight/article/the-uaes-new-arbitration-law>, (accessed 13 January 2019).

'Contacting States - New York Convention' (*Newyorkconvention.org*, 2018) <http://www.newyorkconvention.org/countries>

Chadwick A, 'The New Arbitration Law' <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law>

Dimitracopoulos A, 'The New UAE Arbitration Law: It Is Not What It Says But How You Read It' <https://bsabh.com/the-new-uae-arbitration-law-it-is-not-what-it-says-but-how-you-read-it/>

'Dubai: The Heart Of Arbitration In The Middle East' (*Herbert Smith Freehills | Global law firm*, 2018) <https://www.herbertsmithfreehills.com/lang-ja/latest-thinking/dubai-the-heart-of-arbitration-in-the-middle-east>

Gaffney J, 'UAE: Capacity Of Companies' Representatives To Agree On Arbitration' <https://www.tamimi.com/law-update-articles/uae-capacity-of-companies-representatives-to-agree-on-arbitration>

Ghoneim A, 'Where Should You Go To Enforce Arbitration Awards Issued In UAE?' <https://www.tamimi.com/law-update-articles/where-should-you-go-to-enforce-arbitration-awards-issued-in-uae/>

Haykal A, 'Dubai Court Judgment On Public Policy As A Basis For Reviewing The Substance Of An Arbitral Award' <https://www.tamimi.com/law-update-articles/dubai-court-judgment-on-public-policy-as-a-basis-for-reviewing-the-substance-of-an-arbitral-award/>

Jenkins J, *International Construction Arbitration Law* (Kluwer Law International 2006).

Khandekar S, 'Independence And Impartiality Of Arbitrators: Are We There Yet?' <http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/>

Kudsi J, 'Arbitration Clauses In UAE Government Contracts' <https://www.tamimi.com/law-update-articles/arbitration-clauses-in-uae-government-contracts/>

Oghli Z, 'Apparent Authority When Signing Arbitration Agreements' <http://Apparent Authority when Signing Arbitration Agreements>

Redfern A and others, *Redfern And Hunter On International Arbitration* (6th edn, Bath Press 2015)

Smith B, 'The Impact Of The UAE's New Federal Arbitration Law' https://www.pinsentmasons.com/Global/UAE_Arbitration_law_update.pdf

Teramura N, 'Ex Aequo Et Bono: An Overlooked And Undervalued Opportunity For International Commercial Arbitration' <http://arbitrationblog.kluwerarbitration.com/2018/11/18/ex-aequo-et-bono-an-overlooked-and-undervalued-opportunity-for-international-commercial-arbitration/>

'The UAE Federal Arbitration Law, 2018' <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/global/MiddleEast/united-arab-emirates/the-uae-federal-arbitration-law-2018>

Turrini M, 'The New UAE Arbitration Law: An Incremental Shift Towards International Norms' <https://www.whitecase.com/publications/alert/new-uae-arbitration-law-incremental-shift-towards-international-norms>

Tweeddale AK Tweeddale, *Arbitration Of Commercial Disputes* (Oxford University Press 2007)

'UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006 | United Nations Commission On International Trade Law' (*Uncitral.un.org*, 2018)

https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, (accessed 13 January 2019).

'UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration' (2012)
2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
http://www.uncitral.org/uncitral/en/case_law/digests.html