

The Effect of Noncompliance with the Contractual Time Limits for Resorting to Arbitration

عواقب عدم الالتزام بالحد الزمني المتعاقد عليه للجوء إلى التحكيم

by

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ABSTRACT

Disputes may arise from any contractual relationship, and it is the duty of the legislator to create a suitable legal framework to ensure that such disputes are resolved in a fair and effective manner. Nowadays, most international and domestic disputes are resolved using arbitration instead of the traditional judicial system, which forced many jurisdictions to adopt laws and acts to administrate the arbitrations thereby.

Opting to arbitration as a final recourse to resolve disputes is an irreversible choice, where the contracting parties are expecting that the state laws or acts will respect their agreement by enforcing its end result, arbitral awards, and facilitating its formation. The UAE has adopted a new Arbitration Law in 2018 in an endeavour to promote the UAE as the regional arbitration hub, wherein a significant enhancement has been made to the old arbitration laws.

Despite the fact that the UAE law has gone a long distance to keep up with the international position on arbitration laws, yet there are matters that need to be improved further. One of these matters is the effect of not abiding with the contractual time-limit to commence arbitration.

The UAE laws are unclear in respect of contractual time-limits and the consequences of not following such limits. In addition to that, the UAE courts seem to be reluctant to raise any consequences for not abiding of the time-limits thereof, which is adversely affecting the goal of promoting UAE as an arbitration hub.

In pursuit of a better understanding of the UAE position on time limit clauses, the relevant provisions of the law have been analysed in conjunction with legal and judicial interpretations; and case studies have been scrutinized in detail. Also, a comparison has been made with other international laws to establish their standing on the subject matter and as a reference for enhancement.

نبذة مختصرة

قد تنشأ النزاعات من أي علاقة تعاقدية ، ومن واجب المشرع إنشاء إطار قانوني مناسب لضمان حل هذه النزاعات بطريقة عادلة وفعالة. في الوقت الحاضر ، يتم حل معظم النزاعات الدولية والمحلية باستخدام التحكيم بدلاً من النظام القضائي التقليدي ، الذي دفع العديد من النظم القضائية على اعتماد قوانين لإدارة عمليات التحكيم على هذا النحو.

يعتبر اختيار التحكيم كطريقة أخيرة لحل النزاعات خيارًا لا رجعة فيه ، حيث تتوقع الأطراف المتعاقدة أن قوانين أو أفعال الدولة ستحترم اتفاقهم من خلال فرض نتائجها النهائية (قرارات التحكيم) وتسهيل تشكيلها. اعتمدت دولة الإمارات العربية المتحدة قانون تحكيم جديد في عام 2018 في محاولة للترويج لدولة الإمارات العربية المتحدة باعتبارها مركز التحكيم الإقليمي، حيث تم إجراء تحسين كبير على قوانين التحكيم القديمة.

على الرغم من أن قانون دولة الإمارات العربية المتحدة قطع مسافة طويلة لمواكبة الموقف الدولي بشأن قوانين التحكيم ، إلا أن هناك أمور تحتاج إلى مزيد من التحسين. أحد هذه الأمور هو تأثير عدم الالتزام بالحد الزمني التعاقد لبدء التحكيم

قوانين دولة الإمارات العربية المتحدة غير واضحة فيما يتعلق بالحدود الزمنية التعاقدية وعواقب عدم اتباع هذه الحدود. بالإضافة إلى ذلك يبدو أن محاكم الإمارات العربية المتحدة مترددة في تفعيل أي عواقب لعدم الالتزام بالحدود الزمنية مما يؤثر سلبيًا على هدف الترويج لدولة الإمارات العربية المتحدة كمركز اقليمي للتحكيم.

سعيًا لتحقيق فهم أفضل لموقف الإمارات العربية المتحدة بشأن بنود الحد الزمني ، تم تحليل الأحكام ذات الصلة مع التفسيرات القانونية والقضائية. تم أيضا إجراء مقارنة مع القوانين الدولية الأخرى لتوضيح موقفها في هذا الموضوع وكمراجع للتحسين.

DEDICATION

This work is dedicated to the first person who loved me, loved me without even the need to meet me or know me; the person who merely the thought of my existence delighted his days; the person whose preference is to fight my battles instead of his; the person who provided me with unconditional love and support; my first and ultimate believer, my mother.

ACKNOWLEDGEMENT

Foremost, I would like to express my gratefulness to Allah, the one and only God, for his endless blessings to me, which without, the creation of this work would be impossible. After that being said, the acknowledgement of the guidance provided for this work, to be in its existing level, should be stated.

The spiritual support is of the essence for any work to come to life, without such support no author will be able to withstand the various emotional hindrances that might put his work to its end. Thus, the core acknowledgement of this work is to my wife who stood beside me in the good and bad times; and made me believe that I could achieve anything.

Also, I would like to acknowledge the continuous support given by the supervisor of this work on both personal and academic levels, where the knowledge and inspiration were always there when needed.

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1 INTRODUCTION

1.1 Background

Disputes may arise from any contractual relationship, and it is the duty of the legislator to create a suitable legal framework to ensure that such disputes are resolved in a fair and effective manner. Nowadays, most international and domestic disputes are resolved using arbitration instead of the traditional judicial system, which forced many jurisdictions to adopt laws and acts to administrate the arbitrations thereby, such as the English Arbitration Act 1996 ¹, and the United Arab Emirates [hereinafter shall be referred to as the ‘UAE’] Arbitration law ².

The objective of the contracting parties, when opting to resort their disputes to arbitration, was to resolve their dispute in a timely effective manner to be able to carry out their businesses. Hence, arise the need to include a provision to limit the time of resorting the dispute to arbitration. Nevertheless, some of these provisions were drafted to create uncertainty and deadlock situations using the gaps related to time bars in each jurisdiction legislation (i.e. the cases which were not considered in the time of drafting the legislation).

¹ An act by the Parliament of the United Kingdom which sets the rules of administration the arbitration agreement issued on June 17, 1996

² UAE Federal Law No. 6 of 2018

This research will illustrate the different types of statutory time-bars, in the common and civil law jurisdictions, for better understanding of the contractual time-limits. The research will focus on the outcome of not abiding with the time-limit to resort to arbitration, it will also discuss and investigate the gaps in law-making with reference to the contractual time-bars.

1.2 The Problem Subject Matter of the Research

Two of the main reasons, in my opinion, why the contracting parties opt to arbitration as their dispute resolution resort are that:

- (a) the preference of the international contracting parties is to push their disputes to be resolved in their own state courts, and it is just reasonable to have an independent third party to act as an arbitrator; and
- (b) the disputes with complicated technical nature, such as construction disputes, are better resolved by a specialist of the parties choice.

The opting to arbitration regarding the disputes arising out of the contract is an irreversible commitment by the parties unless agreed otherwise in a later stage. It is also a business choice affecting the bargaining considerations prior to signing the contract, and it is expected from both parties to keep their end of the bargain. Unfortunately, the outcome of not abiding by the contractual agreed on time limits to commence arbitration is uncertain

in the UAE, as there is no express law provision that deals with this particular situation. This research is discussing in details the different opinions of legal practitioners regarding such grey area of mandatory and regulatory contractual time limits, in addition to the UAE court's interpretation of such contractual clauses.

1.3 Methodology of the Research

The research will be doctrinal research, it will be concerned with a legal preposition, civil laws and doctrines. It is a research into the law and legal concepts of the effect of non-compliance with the contractual time limit of resorting to arbitration. The sources of data are legal codes and acts; court decisions in common and civil law jurisdictions; and legal practitioner opinions. The outcome of this research is achieved by analyzing the related law provisions to the subject matter of the research and objectifying the court's interpretation of these provisions.

1.4 Research Aims and Objectives

This research aims to examine and scrutinize the efficiency of arbitration laws in different jurisdictions with reference to the failure of fulfilling the contractual time limit for resorting to arbitration. Moreover, it will highlight the deficiencies regarding time-bars in the UAE

Law and propose amendments in accordance with other state laws which has encountered matters with similar nature.

The objective of this research can be summarized as follows:

1. Discussing the different standing in common and civil law jurisdictions about the binding effect of contractual time-bars;
2. Understanding the expected extent of intervention by the state judiciary system in amending the contractual agreed on time-limit to commence the arbitral process;
3. Scrutinizing the UAE Laws regarding the contractual time-bars in general context and particularly in relation to the arbitration agreements; and
4. Highlighting the areas of potential enhancement of the UAE Laws for legislator's consideration in comparison of other states laws.

1.5 Significance of the research

The significance of this research is to illustrate the entirely different outcome expected from the non-compliance of contractual time limits between contracting parties from common law and civil law backgrounds, where parties from common law jurisdictions may believe that, during the course of conducting business in a civil law jurisdiction, such non-

compliance will definitely deprive the other party of its right to resort to arbitration which might not be the case.

In addition to that, it is identifying the areas of potential amendments in the UAE legislation that will negatively impact both domestic and foreign investment; and jeopardize the UAE position as an arbitration hub. This approach was inspired from the unveiling of the long-anticipated new Arbitration Law ³ that is going along with the consolidation of the UAE's standing as one of the attractive hub for arbitration in North Africa and the Middle East regions. ⁴

1.6 Research Outline

The research has been structured to walk through the reader smoothly through its contents. The first chapter is the introductory chapter providing the research background; statement of the problem; aims and objectives; methodology; significance; and outline. The second chapter can be described as the literature view of the research, wherein the time-bars definition and significance is discussed; the statutory limitation periods under common law and prescription periods under civil law jurisdictions are briefly explained; the binding effect of contractual time-bars are compared under both common and civil laws; and an insight of the knowhow of administrating time-bars is introduced. The third chapter is

³ UAE Federal Law No. 6 of 2018

⁴ Thomas R. Snider, 'The UAE Federal Arbitration Law on its First Anniversary' (July 2019) (1) <<https://www.tamimi.com/law-update-articles/the-uae-federal-arbitration-law-on-its-first-anniversary/>> accessed October 30, 2019

illustrating the distinguishing features of the arbitration agreement to the common contractual agreement which will affect the legal view of such agreements. The fourth chapter is introducing the problem subject matter of the research and analyzing the relevant case studies in details for the reader to understand the standing of state law and court in view of the effect of noncompliance with contractual time limits for resorting to arbitration. The fifth chapter is scrutinizing and highlighting the areas of potential enhancement of the UAE legislation for the legislator's consideration in comparison of other state legislation. The final chapter is concluding my findings throughout the research and recommendations

2 Time bars legal framework

2.1 Time bar definition, and significance

The statement of 'your claim is time-barred' is confusing and requires further explanations for those who are nonlegal practitioners. In addition to that, the concept of legitimately have a right, but, not able to pursue it, is more confusing, even frustrating, and might raise the question of 'is that justice?'. First, it is important to understand what is the time-bar.

In a legal context, time-bar refers to the bar that blocks a claim to proceed further due to the lapsing of a predefined time period.⁵ The concept is explained by Grose '[t]ime limits

⁵ Similar to legal bar, which creates a separates the court into two sections, the first includes the attendee and the second which includes the lawyers and court officials.

or time bars are a feature of civil and common law systems each of which imposes restrictions on a party's recourse to legal proceedings based on the passage of time.'⁶

Going back to the first question, is it justice to reject a lawful claim due to failure of complying with the time-bar, the answer is yes, and below is an explanatory hypothetical example:

X borrowed AED 1,000 from Y with a promise to return it, after 10 years Y initiated a legal action claiming that X did not repay him back the borrowed sum. X was unable to provide proof that the borrowed amount has been paid, thus, Y's claim seems genuine in the context of any evidence law. However, what actually happened is that X has repaid the borrowed amount to Y, but, the evidence has been destroyed with time.

If there is no limitation act or law in place, the aforementioned claim will succeed, and injustice will be the only thing being served.

The purpose of time-bar is to create a balance between; a long enough period for the claimant to discover and file the merits of the claim and the respondent to keep and maintain evidence;⁷ and a short period wherein the merited evidence would not have been lost, or memories have been faded.⁸

⁶ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st Edn, John Wiley & Sons 2016), page 223.

⁷ See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) where it was stated that 'Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones'. Also see *Law v. Medco Research, Inc.*, 113 F.3d 781,786 (7th Cir. 1997).

⁸ See *Marc J. GABELLI and Bruce Alpert, Petitioners v. Securities And Exchange Commission*, 133 S. Ct. 1216,1221 (2013) where it was stated that 'Statutes of limitations are intended to promote justice by preventing surprises

In addition to that, the time limits should aim to reduce the lawsuit uncertainty which is based on two rationales.⁹ First, it is against human nature to be in constant fear and threat to the possibility of going to be sued or not, in *Gabelli v. SEC* the Supreme Court of the United States of America¹⁰ stated that ‘...even wrongdoers are entitled to assume that their sins may be forgotten’¹¹, also *Oliver Wendell Holmes* stated that ‘A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be tom away without your resenting the act and trying to defend yourself, however, you came by it’¹². Second, the continues embracing for lawsuits is adversely affecting the business market, as the business owners are likely to take precautionary steps to encounter the risk of being sued which may include extra documents preservation, more resources devoted to lawsuits, and the likelihood of an increase in insurance costs. This concept has been explained by the United States of America Court of Appeal in *Norris v. Wirtz* ‘[t]he legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims’¹³.

through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared’ [internal citation and quotation omitted]

⁹ Michael J. Kaufman and John M. Wunderlich, ‘Leave Time for Trouble: The Limitations Periods Under the Securities Laws’ (Journal of Corporation Law, 2014) pages 148 - 153. <<https://search-ebscohost-com.ezproxy.rgu.ac.uk/login.aspx?direct=true&AuthType=ip,shib&db=bth&AN=101534335&scope=>> accessed Oct 30, 2019

¹⁰ ‘The Supreme Court of the United States of Amercia is the highest court in the federal judiciary of the United States’.

¹¹ Marc J. GABELLI and Bruce Alpert, *Petitioners v. Securities And Exchange Commission*, 133 S. Ct. 1216,1221 (2013)

¹² Oliver Wendell Holmes, *The Path of Law* (10 HARV. L., 1897).

¹³ Susan Mary NORRIS, Plaintiff-Appellee, Cross-Appellant, v. William W. WIRTZ, et al., Defendants-Appellants, Cross-Appellees 818 F.2d 1329, 1332 (7th Cir. 1987)

It is worth mentioning that, one of the main, if not the main, driving engines in the time-bar lawsuits is the integrity of supporting documents, which is directly linked to the passage of time. The logic behind time-bar is that the supporting documents would survive the test of time, and to ensure that defendants are not motivated to cover up their wrongdoings under the carpet, as the Senate Committee Report warning that ‘[i]t only takes a few seconds to arm up the shredder’¹⁴. The next sub-chapter will be discussing the statutory time limits in common law jurisdictions.

2.2 Limitation periods under common law jurisdiction

Tracking down the adaptation of limitation acts in Common-Law ¹⁵ jurisdictions though time is not an easy task. According to the *Law Reform Commission* , the concept of time restraining was not introduced until the enactment of the Act of Limitation 1540 ¹⁶, however, restrictions periods were found in equity, through the doctrines of *laches and acquiescence* ¹⁷. The intention of tracking down the origin of limitation acts was to understand the differences between the different time limits and the reasons behind these limits.

Through the time, the two main oars that moved the statutory limitation periods ship were the public values, for the common good of society, and legal policies. The latter was mainly

¹⁴ The USA Senate Committee report on The Corporate And Criminal Fraud Accountability ACT of 2002 - S. Rep. No. 107-146, at 9 (2002)

¹⁵ Laws derived from custom and judicial precedent rather than statutes.

¹⁶ Act of Limitation 1540 32 Hen VIII, c. 2 (1540)

¹⁷ Law Reform Commission, ‘Limitation of Actions’ (July 2009), page 14

related to the court administrations, costs of professional aids,...etc. The first was related to maintaining the public stability and prosperity of the community by levelling both private and public interest in serving justice.

The policy-making, whether legal or for the public values, has been expressly explained by the *Supreme Court of Canada*¹⁸ in *M(K) v. M(H)*¹⁹, wherein the court has featured three pillars to reasoning the limitation act, ‘repose, evidentiary, diligence’²⁰:

- (a) repose or the statute of repose is a distinct type of limitation period, others²¹ explain it as a substantive right to repose for defendants rather than a procedural mechanism ‘extinguish[ing] a plaintiffs cause of action after the passage of a fixed period of time’²². The repose period, unlike the limitation period, is triggered by a certain event and doesn’t depend on the plaintiff awareness of the event thereof or even whether damage has occurred, the *Limitation of Actions*²³ elaborated the concept by stating that ‘collecting cases and stating that a statute of repose begins running when a specific event occurs, regardless of whether an action has accrued or whether any injury has resulted; once the statute of repose has expired, the potential plaintiff no longer has a recognized right of action to redress any harm that has been done. Statutes of repose do not incorporate the discovery rule and generally terminate claims regardless of a plaintiff’s lack of knowledge of his or

¹⁸ ‘The Supreme Court of Canada is the highest court of Canada’

¹⁹ *M(K) v. M(H)* (1993) 96 D.L.R. (4th) 289 301 (S.C.C.).

²⁰ *M(K) v. M(H)* (1993) 96 D.L.R. (4th) 289 302 (S.C.C.).

²¹ Michael J. Kaufman and John M. Wunderlich, ‘Leave Time for Trouble: The Limitations Periods Under the Securities Laws’ (Journal of Corporation Law, 2014) page 158. <<https://search-ebshost-com.ezproxy.rgu.ac.uk/login.aspx?direct=true&AuthType=ip,shib&db=bth&AN=101534335&scope=>> accessed Oct 30, 2019

²² *Margoillies v. Deason*, 464 F.3d 547, 551 (5th Cir. 2006) where it was stated that ‘[s]tatutes of limitations speak to matters of remedy, whereas statutes of repose eliminate the underlying rights when they lapse’. Also, see *Wuliger v. Owens*, 365 F. Supp. 2d 838, 844 (N.D. Ohio 2005) which stated ‘Unlike statutes of limitations, statutes of repose . . . extinguish the claim and ‘rest[] on the time from some initiating event unrelated to an injury’

²³ American jurisprudence, ‘Limitation of Actions’ (2nd edition, 2014), 51

her cause of action’²⁴. The second distinct feature of repose period is that it is not subject to extension, in simple words ‘There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations.’²⁵. However, it is worth mentioning that, from the public interest point of view, there are specific claims which shouldn’t be undeterred;

- (b) Evidentiary is the logical rationale related to the depreciation of evidence, or as called ‘stale of evidence’, the question in place is up to when should the end result of decision making depend on the integrity of records? or better to say on how ignorant the defendant is²⁶; and
- (c) Diligence which is the expected vigilance by the plaintiffs to pursue their legal rights and not to sleep on them, and also as an incentive to raise suit in a timely manner. The concept serves the private interest by not being surprised years later by a claim that is prejudice in defending.

The English Limitation Act 1980²⁷ is applicable to all civil actions including arbitration²⁸, the previously discussed principles and pillars are embedded within the *Limitation Act*, except for the repose period, in fact, on the contrary, there are timeless actions which can

²⁴American jurisprudence, ‘Limitation of Actions’ (2nd edition, 2014), 51. See also *City of Pontiac Gen. Emps.’ Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169,176 (2d Cir. 2011) where it was stated that ‘[u]nlike a statute of repose, which begins to run from the defendant’s violation, a statute of limitations cannot begin to run until the plaintiff’s claim has accrued’

²⁵ *M(K) v. M(H)* (1993) 96 D.L.R. (4th) 289 at 301 (S.C.C.).

²⁶ Also see the Alberta Law Institute Limitations Report No. 55, ‘at what point should the game of lack of light (continue)?’ (1986) at page 30.

²⁷ ‘A British Act of Parliament applicable only to England and Wales which is an Act to consolidate the Limitation Acts 1939 to 1980.’

²⁸ See Nicola Laver LLB, ‘What are limitation periods under UK Law?’ <<https://www.inbrief.co.uk/claim-preparations/civil-claim-limitation-periods/>> accessed Oct 30, 2019 where she stated that ‘The Limitation Act 1980 only applies to civil claims. In the case of criminal acts, there are no statutory limits on the prosecution of crimes in the UK except for “summary” offences. In these cases, criminal proceedings must be brought within 6 months’

never be barred. Section 37 of the Limitation Act states:

‘(1) Except as otherwise expressly provided in this Act, and without prejudice to section 39, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects.

(2) Notwithstanding subsection (1) above, this Act shall not apply to-

(a) any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty;

(b) any forfeiture proceedings under the customs and excise Acts [narrative omitted]; or

(c) any proceedings in respect of the forfeiture of a ship.

In this subsection “duty” includes any debt due to Her Majesty under section 16 of the Tithe [commentary reference omitted] Act 1936, and “ship” includes every description of vessel used in navigation not propelled by oars[Section continues...],’²⁹

The Law Commissioners in the Limitation of Actions Report commented on the objectiveness of the English Limitation Act and stated in the executive summary that ‘The current law on limitation periods suffers from a number of problems. The Limitation Act 1980 makes different provision in respect of different causes of action. It is not always clear which category a cause of action falls into, and thus how it should be treated for limitation purposes. The date on which the limitation period starts to run does not always take account of the claimant’s knowledge of the relevant facts, leading in some cases to unfairness’³⁰,

²⁹ *English Limitation Act 1980, S.37 [Application to the Crown and the Duke of Cornwall]*

³⁰ *Law Reform Commission, ‘Limitation of Actions’ (July 2009) <<https://www.lawcom.gov.uk/>> accessed Oct 30, 2019 on August 09, 2019 at 18:57 PM*

wherein it is clear that the English Limitation Act is facing challenges in respect of the principles behind the categorization types.

Notwithstanding the above, The English Limitation Act has encountered the issue of exceptions to the bar in a comprehensive manner, to the extent that the first section of the Act is subjecting the entire Part I, the time limit sections, to the provisions of Part II, exceptions sections, as stated below:

‘Time limits under Part I subject to extension or exclusion under Part II

(1) This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part.

(2) The ordinary time limits given in this Part of this Act are subject to extension or exclusion in accordance with the provisions of Part II of this Act.’³¹

This part will be extensively discussed in Sub-Chapter 2.6 [*Administering Time Bars*] of this dissertation.

It is worth mentioning that there are two basic opinions regarding the limitation periods in common law jurisdiction. First, the rights extinguish with the passage of time. Second, the passage of time is a defence mechanism in pursuing rights, however, the right isn't extinguished.³² Through a preliminary investigation, these two systems do not affect the understanding of the rationale of the limitation period, but it is only the jurisdictional public

³¹ English Limitation Act 1980, S.1

³² International Institute for the Unification of Private Law [UNIDROIT], ‘Principles of international commercial contracts’ (2010)

policy rooted in the origins of the legislators.³³ the next Sub-Chapter, on the other hand, will be discussing time limits under civil law jurisdictions

2.3 Prescription periods under civil law jurisdictions

It is believed by historians that the Romans are the first nation to develop a civil law code³⁴ when Justinian I³⁵ initiated the process of compiling the legal codes, which was known as ‘Codex Justinianus 534’³⁶.

The UAE has a written constitution and adopts the civil law principles, which is highly influenced by Egyptian law³⁷, and Shari’a law³⁸. Accordingly, prescription period provisions related to both laws will be discussed in this Sub-Chapter.

Unlike the English common law, the UAE legislation does not contain a comprehensive

³³ Discussing this matter is beyond the scope of this dissertation. For further reading refer to UNIFROIT principales of international commercial contracts, 2010

³⁴ Diffen website, ‘Civil Law vs. Common Law’ <https://www.diffen.com/difference/Civil_Law_vs_Common_Law> accessed Oct 30, 2019 page 1

³⁵ ‘Roman Byzantine Emperor around the time of 600 CE (Common Era) originally named Petrus Sabbatius’

³⁶ ‘Code of Justinian, Latin Codex Justinianus, formally Corpus Juris Civilis “Body of Civil Law”, collections of laws and legal interpretations developed under the sponsorship of the Byzantine emperor Justinian I from 529 to 565 CE (common era)’

³⁷ See Andrew Tarbuck & Chris Leste, ‘Dubai’s Legal System’ (Motivate Publishing, 2009) page 6

³⁸ See Article 1 of the Civil Transaction Code [CTC], Federation Law No. 5 of 1985 of the UAE which states ‘[t]he legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning in the case of provisions of definitive import. If the judge finds no provision in this Law, he must pass judgment according to the Islamic shari’ah. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi’i and Imam Abu Hanifa as dictated by expediency. If the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morals, and if a custom is particular to a given emirate, then the effect of it will apply to that emirate.’

piece of law pertaining to the prescription periods. However, and similar to the Egyptian Law, there are 15 provisions in the UAE Civil Transaction Code [hereinafter will be referred to as 'CTC'] detailed under section 3 [lapse of time barring a right], part 6 [extinguishment of rights], chapter 1 [sources of personal obligations and rights] of book 1 [personal obligations and rights] in addition to other scattered provisions in different UAE laws.

Article 473³⁹ of the CTC explain that rights are not extinguished by the passage of time, however, the claim of such right shall not be heard by the competent court if the respondent raises the time barrier as a defence mechanism, and the claimant did not have a lawful excuse not to pursue his right. Exceptions are made to special provisions of the law that provide otherwise, it can be interpreted from the context that the exception is made to the periods stated in the article (i.e. 15 years) and not the legal meaning of the article. In addition to that, neither the article nor other law provisions clearly define the term 'lawful excuse' which leaves the door open for the court discretion on the integrity of the excuse, thus uncertainty becomes the subject matter during the pursual of the right.

The concept of a lawful claim never dies is also derived from the Islamic Shari'a law, however, the Federal Supreme Court⁴⁰ of the UAE has explained that the shari'a principle is acknowledged although only the action should be barred when denied⁴¹. *Grose* explained that the shari'a principle is originated from various Hadith⁴² emphasizes on the Muslims'

³⁹ Article 473 of the CTC '[a] right shall not expire by the passage of time but no claim shall be heard if denied after the lapse of fifteen years without lawful excuse, but having regard to any special provisions relating thereto.'

⁴⁰ 'The Federal Supreme Court of the United Arab Emirates is the highest federal court in the United Arab Emirates.'

⁴¹ Federal Supreme Court Nos. 721 & 815/26 dated 22 January 2006.

⁴² Hadith means the record of the words of prophet Muhammad.

obligation to pay their debts and not to abuse time. ⁴³ Therefore, barring the action is integrating with shari'a principles on protecting the public interest in reference to deterioration of evidence. ⁴⁴

Article 478 of the CTC states that 'The period laid down for the prescription of claims shall commence as from the day upon which the right falls due for exercise and from the time a condition is satisfied if the right is dependent upon a condition, and from the time the entitlement is proved in claims under a guarantee of an entitlement' ⁴⁵, it is clear that the article is defining the commencement, or better to say the trigger date, for the prescription period, where it will start from the date the right is due, similar to article 381 of the Egyptian Civil Code⁴⁶, however, the article does not stop there, it continues that the trigger can be when a condition for the right is fulfilled. So the right is linked to a condition to be satisfied, a condition precedent, which might, for example, be serving a notice. ⁴⁷

2.4 Contractual Time Bars

Treitel defined the contract as '[a]n agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.' ⁴⁸, the

⁴³ Grose Michael, *Construction Law in the United Arab Emirates and the Gulf* (1st Edn, John Wiley & Sons 2016) page 223

⁴⁴ Federal Supreme Court No. 24/15 dated 19 June 1993 and Dubai Cassation No. 381/2001 dated 12 January 2002

⁴⁵ Article 478 of the UAE CTC, federal law no.05 of 1985

⁴⁶ Egyptian Civil Code issued under the law number 131 the year of 1948

⁴⁷ This subject matter will be discussed in Contractual Time Bars Sub-Chapter

⁴⁸ Peel *Treitel, The Law of Contract* (13th ed. Thompson Reuters: London, 2011)

framework of the contractual rights and obligations which operates under the umbrella of the law. Accordingly, parties of the contract are not free to agree on contrary to the mandatory provisions of the law such as public policies. The common law jurisprudence allows a broader spectrum of freedom in respect of contracts, wherein there is a limited number of provisions under the common law which mandate the administration of the contract. In other words, the principle of party autonomy ⁴⁹ is highly appreciated, as it is not conflicting with the common law. Nevertheless, the principle of; the sanctity of contract which states ‘(a) A valid contract is binding upon the parties. It can only be modified or terminated by consent of the parties or if provided for by the law. The parties to a contract must, unless legally excused from performance, perform their respective duties under the contract [internal reference omitted from the original text]. (b) A valid unilateral promise or undertaking is binding on the party giving it if that promise or undertaking is intended to be legally binding without acceptance’ ⁵⁰ and; the principle of unfair standard terms ⁵¹, have to be taken into consideration during the drafting of the contractual obligations.

⁴⁹ Principle No. IV.1.1 - Freedom of contract ‘The parties are free to enter into contracts and to determine their contents - principle of party autonomy’ <<https://www.trans-lex.org/918000> > accessed Oct 30, 2019

⁵⁰ Principle No. IV.1.2 - Sanctity of contracts <<https://www.trans-lex.org/918000> > accessed Oct 30, 2019

⁵¹ Principle No IV.3.5 - Unfair standard terms which states ‘(a) A standard term that is unfair is not binding on the party who did not supply it. (b) A standard term in a b2b contract is unfair only if it significantly disadvantages the other party and is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. When assessing the unfairness of a term for the purposes of this Subsection, regard is to be had to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends. (c) Contract terms are not subjected to an unfairness test under Subsection (b) if they reflect provisions of the law which would apply if the terms did not regulate the matter. The unfairness test under Subsection (b) does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the relevant contract terms are presented in an accessible and comprehensible way.(d) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.’

On the other hand, the contract is defined under the CTC as '[a] contract is the coming together of an offer made by one of the contracting parties with the acceptance of the other, together with the agreement of them both in such a manner as to determine the effect thereof on the subject matter of the contract, and from which results an obligation upon each of them with regard to that which each is bound to do for the other. There may be a coincidence of more than two wills over the creation of the legal effect'⁵² which is the first limitation under the civil law jurisprudence in comparison to common law, as the civil law opened the door to the argument on the validity of the contract in respect of the contract definition thereof. Also, the legal dilemma that the unilateral promises and dispositions are not regarded as contracts in the UAE, and in fact, it has a standalone chapter in the CTC⁵³ different from contracts. The number of provisions in the UAE law mandating the administration of the contract confines the parties' freedom in drafting the provisions of the contract. For example, article 1028 of the CTC states that '[a]ny of the following provisions appearing in a policy of insurance shall be void: [...]

- (b) a provision whereby the right of the assured shall lapse by reason of his delay in giving notice of the incident insured against to the parties which should be notified or to provide documents in the event that it appears that there is a reasonable excuse for the delay; [...].'⁵⁴ [translated]

The article is related to insurance contracts, wherein a set of provisions shall be deemed void if found in the contract. If this article is read in conjunction with other articles of the

⁵² Article 125 of the UAE CTC, Federal Law No. 5 of 1985

⁵³ Part II [Unilateral Dispositions] of the UAE CTC, Federal Law No. 5 of 1985

⁵⁴ Article 1028 of the UAE CTC , federal law no.05 of 1985

CTC, the position of the UAE legislators in respect of delay notices can be understood. However, it is essential to always keep in mind that this argument might fail in UAE courts, as the article is specifically drafted for the insurance contracts.

The contractual time-bar is a delicate subject in its nature, and this is substantiated by various reasons, one of which, and in my opinion the core reason, is that the majority of contracts which have a provision to time-bar a contractual right also have a provision for prior notice. The notice itself has to be submitted within a time limit, in other words, there are two-time limits running subsequently.

The English Limitation Act 1980⁵⁵ does not prohibit or restrict the amending of its time limits relating to the breach of contract, in other words, it is within the contracting parties' discretion to agree otherwise, this concept has been driven by virtue of the applicability of parties to extend the statutory time-limit by agreement.⁵⁶ In fact, it is the common practice in the construction contracts to shorten such time limits⁵⁷, however, that shortening will be subject to:

⁵⁵ A British Act of Parliament which is consolidating the Limitation Acts 1939 to 1980.

⁵⁶ Allen & Overy, 'Know your limits: Making the most of limitation periods' (Jan 13, 2011) page 1 <<http://www.allenoverly.com/publications/en-gb/Pages/Know-your-limits--Making-the-most-of-limitation-periods.aspx>> accessed Oct 30, 2019

⁵⁷ For example Sub-Clause 20.2.1 [Notice of a Claim] of the FIDIC conditions of contract for construction for building and engineering works designed by the employer 2nd edition 2017 (the red book) states that '*The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions). If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.*'. See also Sub-Clause 61.3 of the New Engineering Contract 3rd edition [NEC3] which states that '*The Contractor notifies the Project Manager of an event which has happened or*

1) reasonableness test under the Unfair Contract Terms Act 1977^{58 59}, wherein:

(a) subsection 2 of section 24 states ‘[i]n determining for the purposes of section 20 or 21 of this Act whether it was fair and reasonable to incorporate a term in a contract, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection shall not prevent a court or arbiter from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract’⁶⁰ the cited schedule 2⁶¹ of the act provide the guidelines for the application of reasonableness test such as it would be unreasonable term of contract if the parties to the contract are not in the same bargaining position, in that case, the courts are reluctant to interfere⁶²;

which he expects to happen as a compensation event if The Contractor believes that the event is a compensation event and The Project Manager has not notified the event to the Contractor. If the Contractor does not notify of a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.’

⁵⁸ The Unfair Contract Terms Act 1977 is an Act of Parliament of the United Kingdom

⁵⁹ See *Stewart Gill Limited -v- Horatio Meyer & Company Limited - [1992] 1 QB 600 at 608*, where the act is used for a broader scope of transactions rather than limited to sales and purchase as the guidelines

⁶⁰ Subsection 2, section 24, The Unfair Contract Terms Act 1977

⁶¹ Schedule 2 annexured to The Unfair Contract Terms Act 1977 which states ‘*The matters to which regard is to be had in particular for the purposes of sections [(1A), 7(1A) and (4),] 20 and 21 are any of the following which appear to be relevant (a)the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met; (b)whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term; (c)whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); (d)where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; (e)whether the goods were manufactured, processed or adapted to the special order of the customer.’*

⁶² See *Watford Electronics Ltd -v- Sanderson CFL Limited - [2001] 1 All ER (Comm) 696*

(b) subsection 3 that states ‘Where a term in a contract, or a provision of a notice, purports to restrict liability to a specified sum of money, and the question arises for the purposes of this Part of this Act whether it was fair and reasonable to incorporate the term in the contract, or whether it is fair and reasonable to allow reliance on the provision, then, without prejudice to subsection (2) above ,in the case of a term in a contract, regard shall be had in particular to (a)the resources which the party seeking to rely on that term, or provision, could expect to be available to him for the purpose of meeting the liability should it arise; (b) how far it was open to that party to cover himself by insurance. [internal citation omitted and square brackets replaced with commas]’⁶³.

2) whether the notice provision is considered condition precedent or not, depending on how clear and express the language of the provision, which can be summarized in the following elements:

i. clear duration with a definite start, in accordance with the judgment made in *Bremer Handelsgesellschaft mbh v. Vanden Avenne-Izegem* which stated that ‘ [i]t has been argued by the buyers, that this is a condition precedent to the sellers’ rights under that clause. I do not accept this argument. Had it been a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served and[...]’⁶⁴; and

⁶³ S. 24 (3), The Unfair Contract Terms Act 1977

⁶⁴ *Bremer Handelsgesellschaft mbh v. Vanden Avenne-Izegem* [1978] 2 Lloyd’s Rep 109

- ii. express statement on the consequences of failing to provide the notice within the time stipulated, in accordance with the same judgment in *Bremer Handelsgesellschaft mbh v. Vanden Avenne-Izegem* which stated that ‘[h]ad it been a condition precedent, I should have expected the clause to state [...] and to have made plain by express language, that unless the notice was served within the time, the sellers would lose their rights under the clause.’⁶⁵.

Based on the above and the famous case of *Multiplex Construction v Honeywell Control Systems* where *Justice Jackson* held that ‘[c]ontractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent’⁶⁶ it is clear that when a notice is regarded, as a condition precedent to proceed with the contractual right, it should be strictly followed.⁶⁷

Nevertheless, in a recent case judged by the Supreme Court of Western Australia, *Gaymark Investments Pty Ltd v. Walter Construction Group Ltd*⁶⁸, which is considered ‘a change of heart [judgment]’⁶⁹, the contractor, in a standard form of a construction contract, argued that the notice provision conflicted with the prevention principle, which is in a simple words

⁶⁵ *Ibid* refrence 69

⁶⁶ *Multiplex Construction v Honeywell Control Systems* [2007] EWHC 447 (TCC)

⁶⁷ See *Turner Corporation Ltd v. Austotal Pty (1998)* where it was held that ‘*If a builder, having a right to claim an extension of time, fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for practical completion resulted in its ability to complete by that time. A party to a contract cannot rely on preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct.*’

⁶⁸ *Gaymark Investments Pty Ltd v. Walter Construction Group Ltd* NTSC 143; (2005) 21

⁶⁹ Roger Knowles, 200 Contractual Problems and their Solutions (3rd edition, John Wiley & Sons, Ltd, 2012) 119

that a party cannot benefit from its own wrongdoing,⁷⁰ accordingly there was no date for completion and time was put at large. The employer has delayed the project and the engineer has rejected the contractor's claim for extension of time, based on the lapse of 14 days notice and applied liquidated damages. The court judged in favour of the contractor and commented on the award of liquidated damages as 'an entirely unmeritorious award of liquidated damages for delays of its own making'.

On the other hand, the UAE has a different position in reference to the amendment of the prescription time as article 487 of the CTC states that '[i]t shall not be permissible to waive a time-bar defence prior to the establishment of the right to raise such defence, nor shall it be permissible to agree that a claim may not be brought after a period differing from the period laid down by law.'⁷¹ in which it seems that the legislator intended that the prescription periods are mandatory and the parties to the contract are not free either to agree a different periods or to waive prescription requirement prior of establishment of the right, in other words during the negotiation of the contract where the rights are expected to be established during the period of contract execution. Accordingly, the contractual time-bars clauses in the UAE are void, however, *Grose* presented a different opinion, or by his words '[...]objection to such analysis[...]'⁷² that the fundamental of serving a notice to preserve a right differs from extinguishing the right, thus, the notice provision is valid. *Grose* continued the argument that if failure to serve the notice forfeiture the right rather than the

⁷⁰ See *Perini Pacific Ltd v. Great Vancouver Sewerage and Drainage District* [1967] SCR 189 where it was stated that 'Since the earliest times it has been clear that a party to a contract is exonerated from performance of a contract when that performance is prevented or rendered impossible by the wrongful act of the other party'

⁷¹ Article 487 of the UAE CTC , federal law no.05 of 1985

⁷² Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st Edn, John Wiley & Sons 2016) 227

right to commence the proceedings, as stated in the law, then there is no contradiction in the notice provision and the law, '[...]or at least, not on a literal reading of the law[...]' ⁷³, further, *Grose* stated that such an agreement will face challenges in respect of public order and Shari'a law. Furthermore and to overcome this incumber, the provision of notice should be drafted in a manner that the right would only arise in the event that notice is served in time, in this case, if the notice is not served in time, the right wouldn't exist in the first place to be extinguished and this is substantiated by 'Dubai Cassation No. 430/2000 dated 28 January 2001 in which a notice requirement in an insurance policy was upheld without any reference to the Islamic Shari'ah. Insurance policies generally make the provision of notice of a claim a condition precedent to a valid claim.' ⁷⁴. In my opinion, this argument is incomprehensive and looks into the UAE provisions in isolation. First, it is more accurate and appropriate to refer to article 473 of the CTC ⁷⁵ which mandates the concept of a rightful claim never dies, instead of referring to public order and Shari'a law. Second, the supporting evidence from Dubai court judgment is completely irrelevant in the context of the argument, as if we read article 1028 of the CTC ⁷⁶ in conjunction with article 478 ⁷⁷, I can reach to the conclusion that the concept of condition precedent, or the use of similar contractual

⁷³ Ibid

⁷⁴ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st Edn, John Wiley & Sons 2016) 228

⁷⁵ Article 473 of the UAE CTC, federal law no.05 of 1985 states '[a] right shall not expire by the passage of time but no claim shall be heard if denied after the lapse of fifteen years without lawful excuse, but having regard to any special provisions relating thereto.'

⁷⁶ Article 1028 of the UAE CTC, federal law no.05 of 1985 states '[a]ny of the following provisions appearing in a policy of insurance shall be void: (b)a provision whereby the right of the assured shall lapse by reason of his delay in giving notice of the incident insured against to the parties which should be notified or to provide documents in the event that it appears that there is a reasonable ex-cuse for the delay'

⁷⁷ Article 478 of the UAE CTC, federal law no.05 of 1985 states 'The period laid down for the prescription of claims shall commence as from the day upon which the right falls due for exercise and from the time a condition is satisfied if the right is dependent upon a condition, and from the time the entitlement is proved in claims under a guarantee of an entitlement '

tools, is implemented in the UAE law. Finally, even if it is agreed that the concept of right not being triggered is acceptable and it is within the parties autonomy,⁷⁸ it will be only applicable to the notice as a condition precedent, not the other time-bar⁷⁹ to submit the notice within⁸⁰, and this is supported in the context of article 1028 of the UAE CTC^{81 82}. I agree with *Grose* in his conclusion of this matter ‘[...] whether this is the effect of the FIDIC Conditions is a matter for determination by the Court of Merits in accordance with applicable principles of interpretation. [internal references omitted from the original text]’⁸³.

2.5 Administrating Time Bars

The title ‘administrating time-bars’ seems, from the first sight, more of a clerical subject, yet, the understanding of time-bars procedures under any legal system is crucial, otherwise, a party might lose it’s right because of its ignorance of the applicable laws of administration.

In the process of assessing the limitation periods, the following should be checked:

⁷⁸ The concept seems doubtful, but I am not sure about the integrity of the concept in the UAE legislation, as it is out of the scope of this dissertation.

⁷⁹ If it is appropriate to call it time-bar

⁸⁰ Such as 28 days in case of Sub-Clause 20.2.1 [Notice of a Claim] of the FIDIC conditions of contract for construction for building and engineering works designed by the employer 2nd edition 2017 (the red book)

⁸¹ Article 1028 of the UAE CTC , federal law no.05 of 1985

⁸² Refer also to the discussed point in sub-chapter 2.3 [*Prescription periods under civil law jurisdictions of this dissertation*] in reference to insurance contracts

⁸³ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st Edn, John Wiley & Sons 2016) 228

- (a) The trigger date of the commencement for the limitation period (i.e. when the clock will start ticking);
- (b) The nature of the transaction to identify the applicable statutory length of the limitation period in accordance with the relevant law;
- (c) The court, or tribunal, discretionary powers to extend the limitation period and, if so, the basis and events applicable to such extension; and
- (d) Circumstances wherein the limitation period would be suspended and /or interrupted.

It is important to identify the accrual date that triggers the commencement of the time limit period. In some cases, such as motor accidents, it would be fair to consider the accrual date the date of the event⁸⁴, however, in case of damages, the selection of event date will serve nothing, but, injustice. According to the UAE law⁸⁵, the time limit period for transactions of civil nature would start from the date the right falls due or a linked condition is satisfied. On the other hand, the English common law⁸⁶ the limitation period will start for contractual obligation, either a simple contract or a deed, from the date on which a cause of action accrued.

It is worth mentioning that, the *Law Commission* had proposed an amendment to the

⁸⁴ See the Motor Accidents Compensation Act 1999 New South Wales Government [NSW]

⁸⁵ Article 478 of the UAE CTC , federal law no.05 of 1985

⁸⁶ See Section 5 of the English Limitation Act 1980 which states '[a]n action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued' and Sub-Section 8.1 that states '[a]n action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued'

English common law with respect to the trigger date of the limitation period. The Commission proposed to link the accrual date to the date of discoverability of cause of action, wherein the report stated that ‘ [i]n our Consultation Paper, we set out five options to be considered as the general starting point for the limitation period [.....] whereby the starting point for the limitation period would be decided by reference to the date the claimant has or ought to have knowledge of the cause of action” [internal citation and irrelevant text omitted from original context] ⁸⁷.

The procedure to calculate the prescription period laid down by the UAE law is addressed in article 480 ⁸⁸. The basis of calculation is, as follows:

- (a) The prescription period is calculated by the number of days;
- (b) The first day where the right is considered to be due, the accrual date, is not to be taken into consideration; and
- (c) Expiration of the time prescription is at the end of the last day, and if the last day is an official holiday, the period would automatically extend to the next working day.

For the avoidance of doubt, the prescription period will not be extended for the official holidays running during the period thereof.

In the process of administrating the limitation periods, it is essential to be familiar with the

⁸⁷ Law Reform, ‘Limitation of actions’ (The House of Commons, 9 July 2001) 2 < <http://www.lawcom.gov.uk> > accessed Oct 30, 2019

⁸⁸ Article 480 of the UAE CTC , federal law no.05 of 1985 states “[t]he period for the prescription of claims shall be calculated in days. The first day of that period shall not be taken into account, and the time shall expire at the end of the last day of the period, unless that day is an official holiday in which case the time shall be extended to the following day.”

adjustment tools provided within the law. First, the extension to the limitation period, where another period of time will be added at the end of the latest expiry date of the prescribed period. The UAE law is almost silence in respect of extensions, save as, the aforementioned event of public holidays. Nonetheless, There is a complete part of the Limitation Act dedicated to the extensions,⁸⁹ where a set of provisions and stipulated for extensions in case of disability, mediation process, non-binding alternative dispute resolution [hereinafter will be referred to as ‘ADR’] process, extensions prescribed in other enactments.⁹⁰ Second, suspension of the limitation period, where a cause will put the time-bar period on hold until such cause ceases to exist. The UAE law has broadened the umbrella under which the suspension rule applies, where article 481 of the CTC states that ‘[t]he running of time for prescription shall be suspended if there is a lawful excuse whereby the claim for the right could not be made.’⁹¹ as previously stated that the words ‘lawful excuse’ is not defined under the law, and would be within the discretion of judging institute to asses what is lawful. Despite the fact that the English law does not include suspension provisions within its context, yet, it allows for standstill agreements, where the parties to the contract may by way of separate agreement suspend the time-bar period⁹². Finally, interruption of the limitation period, wherein an event will render the time interrupted and an additional new

⁸⁹ Part II of the English Limitation Act 1980 [Extension or Exclusion of Ordinary Time Limits]

⁹⁰ Refer to Section 30 of the English Limitation Act 1980 which states ‘*[t]his Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.*’

⁹¹ Article 481 (1) of the UAE CTC , federal law no.05 of 1985, as amended

⁹² See *Russell v Stone* [2017] EWHC 1555 (TCC) where the court decided that ‘[e]ach standstill agreement prevented the parties from issuing proceedings during the currency of that agreement. Therefore, the claimants could not legitimately commence proceedings before 30 November 2016 without breaching the terms of the third standstill agreement.’

limitation period will start thereafter. Under both UAE and English laws, the admission of right will interrupt the time-bar period, and the reference is article 483 of the CTC which states ‘[a]n admission by an obligor of a right, whether express or by implication, shall interrupt the time laid down for prescription.’ [translated] ⁹³ and section 29 of the English Limitation Act which lastly states ‘[...] a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.’ ⁹⁴.

3 Resorting to Arbitration

Arbitration is an alternative route of concluding a dispute by a Final binding decision, ⁹⁵ rather than the traditional judicial process, wherein the parties to a dispute agree to waive their civil rights of dispute referral to the courts and instead refer it to an independent third party. ⁹⁶ The concept of arbitrating exists from ancient times. ⁹⁷ This chapter will be

⁹³ Article 483 of the UAE CTC , federal law no.05 of 1985, as amended

⁹⁴ Section 29 of the English Limitation Act 1980

⁹⁵ Within jurisdictions adopting provisions supporting the arbitral system, for example see article 52 of UAE Federal Law No. (6) of 2018 [Arbitration Law] which states ‘*[a]n arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute res judicata, and shall be as enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court.*’

⁹⁶ Also see Arbitration definition of Chartered Institute of Arbitrators, which states ‘Arbitration is a non-judicial process for the settlement of disputes where an independent third party - an arbitrator - makes a decision that is binding’ available at ‘Definition Of Arbitration’ (Ciarb.org, 2018) <<http://www.ciarb.org/dispute-appointment-service/arbitration/what-is-arbitration>> accessed Oct 30, 2019.

⁹⁷ See Omar Alhyari, ‘Challenging Arbitral Awards under the Model Law and Arab and English laws based thereon’ (VDM Verlag Dr. Müller Aktiengesellschaft & Co. KG, Germany, 2009) 1.

investigating; (a) the knowhow to the arise of the arbitral tribunal jurisdiction over disputes; (b) arbitration agreement principles under common and civil law jurisdictions; and (c) the significance of such principles.

The first step of transferring jurisdiction over the parties' dispute from litigation to arbitrations is the signature of the arbitration agreement or a contract which allows for arbitration as an ADR,⁹⁸ by the parties. Yet, a dispute has to arise within the arbitration agreement limits, and that dispute should be referred to arbitration for the arbitral tribunal [hereinafter shall be referred to as 'tribunal'] to actually have jurisdiction over such dispute. The question in place 'can a party waive its civil right to resolve the contractual disputes through litigation, and be legally bound to arbitration, without being aware of such waiver?'. Unfortunately, and despite the fact that arbitration agreement is treated as separate agreement from the original contract between the parties,⁹⁹ a party might still be bound by arbitration simply by signing the original contract.

⁹⁸ See sub-article 5.1 of UAE Federal Law No. (6) of 2018 [Arbitration Law] which states '*[t]he Arbitration Agreement may be concluded before a dispute arises, either in the form of a separate agreement or as a clause within a contract, in relation to all or certain disputes which may arise between the Parties.*' and sub-section 6.2 of the English Arbitration Act 1996 which states '*[t]he reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.*'

⁹⁹ The matter of seperability will be further discussed

3.1 Under English Common Laws

Arbitration procedures are administrated in accordance with the English Arbitration Act ¹⁰⁰. The mentioned act comprises four parts, 110 sections, and several sub-section within. It also contains 4 schedules stipulating the mandatory provisions, repeals, consequential amendments, and modifications of the first part of the act.

The arbitration agreement is the only foundation of jurisdiction for the tribunal over any dispute. This being stated, it is essential to always keep in mind that most of the laws¹⁰¹, either civil or common, consider the arbitration agreement as a contractual agreement, the integrity of which is subjective and might be challenged. A distinguishing feature in the arbitration agreement is that the agreement, even if invalid, rise the power to the tribunal to rule on its own jurisdiction, this is an international doctrine know as ‘Kompetenz – Kompetenz’¹⁰². The concept is supported in the English Arbitration Act under section 30 where it states that ‘[u]nless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.’ ¹⁰³ the selection of word ‘rule’ instead of ‘decide’ by the English legislator highlight the intention that the

¹⁰⁰ An act by the Parliament of the United Kingdom which sets the rules of administration the arbitration agreement issued on June 17, 1996

¹⁰¹ If not all laws

¹⁰² It is a jurisprudential doctrine accepted by almost all laws, the concept arose in the Federal Constitutional Court of Germany

¹⁰³ S. 30(1) of the English Arbitration Act 1996

tribunal is only ruling ¹⁰⁴ and such rule is subject to be challenged in courts, hence, the second part of the section states ‘[a]ny such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.’ ¹⁰⁵ the rules of challenging seems a bit excessive, ¹⁰⁶ in my opinion, which will eventually render such ruling as a decision. Anyhow, this might be construed in this way because this provision is not mandatory, and the parties can exclude such power from the tribunal. ¹⁰⁷

In addition to that, the arbitration agreement will survive the destruction of the main contract, as it is considered as a separate agreement. The principle of separability was originally introduced in *Heyman v Darwins Ltd* ¹⁰⁸ and subsequently addressed the English Arbitration Act that states ‘[u]nless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement’ ¹⁰⁹. It is to some extent peculiar that this

¹⁰⁴ Bruce Harris and others, *The Arbitration Act 1996: A Commentary* (5th Edn. John Wiley & Sons, Ltd, 2014) 160

¹⁰⁵ S. 30(2) of the English Arbitration Act 1996

¹⁰⁶ See S.32(2) of the English Arbitration Act 1996 which states that ‘An application under this section shall not be considered unless (a)it is made with the agreement in writing of all the other parties to the proceedings, or (b)it is made with the permission of the tribunal and the court is satisfied (i)that the determination of the question is likely to produce substantial savings in costs, (ii)that the application was made without delay, and (iii)that there is good reason why the matter should be decided by the court.’

¹⁰⁷ Notice the use of the wording ‘*unless otherwise agreed by the parties*’ at the start of sub-section 30.1 of the English Arbitration Act 1996

¹⁰⁸ *Heyman v Darwins Ltd* - AC 356, [1942] 1 All ER 337 where it was stated that ‘*[w]hen an arbitration clause in a contract provides without any qualification that any difference or dispute which may arise in respect of or with regard to or under the contract shall be referred to arbitration, and the parties are at one in asserting that they entered into a binding contract, the clause will apply even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as repudiation of the contract by one party accepted by the other, or frustration of the contract*’

¹⁰⁹ S.7 of the English Arbitration Act 1996

section is a non-mandatory provision under the English common law, the reason is that the separability principle seems to be one of the arbitration agreement pillars particularly in reference to jurisdiction.

3.2 Under United Arab Emirates Laws

The UAE has recently issued the federal arbitration law ¹¹⁰ which came into effect on June 2018, the law is considered as the first stand-alone arbitration law in the UAE and it revoked the arbitration-related provision ¹¹¹ in the UAE civil procedural law ¹¹² [hereinafter shall be referred to as ‘CPC’]. The 61 provisions included under the six sectioned arbitration law provides a more comprehensive legal framework for the conduct of arbitral procedures, wherein many international concepts have been adopted, and additional statutory prescription periods have been introduced.

First, the concept of Kompetenz – Kompetenz ¹¹³ which is supported by the UAE arbitration law under article 19 that states ‘[t]he Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement or its inclusion of the subject-matter of the dispute. The Arbitral Tribunal shall rule on the plea either as a preliminary question or in a final arbitral award on the merits.’

¹¹⁴ the UAE legislator also used the word ‘rule’, similar to the English law, but, the

¹¹⁰ UAE federal law No.06 of 2018 which is published in the federal official gazette no. 630 of May 15, 2018.

¹¹¹ Articles 203 to 218 of the Civil Procedural Code Federal law no.11 of 1992

¹¹² UAE Civil procedural Federal law no.11 of 1992

¹¹³ It is a jurisprudential doctrine accepted, the concept arose in the Federal Constitutional Court of Germany

¹¹⁴ Article 19 (1) UAE Federal Law No. (6) of 2018 [Arbitration Law]

challenge is not restricted as the English Limitation Act, on the contrary, there are no preconditions for the challenge save as the time-limited of 15 days to raise the objection to court. It is peculiar that the applicability of this provision is subject to the tribunal opting to rule on its jurisdiction as a preliminary question, and not in the final award. An interesting question arises, as to why would a tribunal intentionally proceeds with the arbitration knowing that its jurisdiction might be jeopardized, and what kind of remedies, or options, are given to the aggrieved party in the event that the tribunal lacks jurisdiction. Second, the concept of separability which is introduced in the UAE arbitration which states ‘[a]n arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause if it is valid per se unless the matter relates to an incapacity among the Parties.’ [translated]¹¹⁵ unlike the English common law, it is a mandatory provision under the UAE and the parties are not allowed to opt-out of it, this is substantiated by the way of drafting and the use of word ‘shall’ in the provision context, also, supported by the second point of the same article that states ‘A plea that a contract containing an arbitration clause is null or has been rescinded or terminated shall not stay the arbitration proceedings and the Arbitral Tribunal may rule on the validity of such contract.’¹¹⁶.

¹¹⁵ Article 6 (1) UAE Federal Law No. (6) of 2018 [Arbitration Law]

¹¹⁶ Article 6 (2) UAE Federal Law No. (6) of 2018 [*Arbitration Law*]

4 Noncompliance with Arbitration Agreement Requirement

It is not unlikely to encounter a procedural precondition in the arbitration agreement, also referred as pre-arbitral steps, these steps vary depending on the preference of the contracting parties in resolving their dispute, examples of which are negotiations, non-binding ADR ¹¹⁷, or even a period of time to submit the dispute to arbitration, also called cooling-off period. Wherein the contracting parties' intention is to fulfil such a condition precedent or the action of resorting the dispute to arbitration may be rendered premature.

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Below is an example of an arbitration agreement, in the form of a clause embedded in the main agreement, including a pre-arbitral step:

'17.2 In the event of any dispute between the Parties arising out of or relating to this agreement, the Parties shall, within ten (10) Business Days of a written notice from any party to the other party hold a meeting at the Seller's head office in [Dubai], United Arab Emirates in an effort to resolve the dispute.' ¹¹⁹ and

¹¹⁷ Or binding ADR, but, not final such as the effect of adjudication in the United Kingdom

¹¹⁸ See *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC), where the judge held that 'the court proceedings stayed, until the dispute, subject matter, is decided by the Dispute Adjudication Board [DAB] as stipulated in the contract'. Also see Dubai First Instance Court judgment in Commercial Case 757 of 2016 dated 15 August 2016 where it was held that 'the Dubai Court of First Instance was of the view that the parties have agreed that certain disputes arising between them may be referred to arbitration and these are the disputes which were (1) referred to the Engineer for a decision but have not become final and binding (clause 67.1) or (2) referred to the Engineer for a decision and have become final and binding but one of the parties failed to comply with the Engineer's decision (clause 67.4). The Court, therefore, concluded that the parties' agreement was that it was essential that a dispute be first referred to the Engineer before the parties can proceed to arbitration.'

¹¹⁹ Clause extracted from Dubai Court of Cassation – full jurisdiction civil -2018/343 issued on November 15, 2018

‘17.3 Any dispute which is not resolved within twenty (20) Business Days after the service of a notice in accordance with clause 177, whether or not a meeting has been held, shall, at the request of either party made within twenty (20) Business Days of the notice being given, be referred to arbitration under the rules of the Dubai International Arbitration Centre before a single arbitrator who shall be appointed in accordance with the Rules. The parties waive any right of application or appeal to any court.’¹²⁰

It is obvious that such clauses require to be read at least twice to capture the intended procedure, if not more. In simple words, the aforementioned clauses created a dilemma, or better to say a catch 22¹²¹, the aggrieved party has only two scenarios to pursue his claim either to (a) submit his claim prior of the lapsing of the 20 days, or in the 20th day, set out for resorting to arbitration, and in this event the responding party will argue that it is premature approach to arbitration, as the claimant did not fulfil the requirement of 20 days for settling the dispute amicably; or (b) submit his claim after the said 20 days and this case resorting to arbitration is beyond the stipulated period, thus, the arbitral tribunal is rendered out of jurisdiction to arbitrate on the said dispute.

4.1 Under UAE Law

¹²⁰ibid

¹²¹ ‘A catch-22 is a paradoxical situation from which an individual cannot escape because of contradictory rules or limitations. The term was coined by Joseph Heller, who used it in his 1961 novel Catch-22’

The aforementioned example is from the first case study dispute which went through arbitration, and the enforcement of the tribunal's award was challenged throughout the entire Dubai legal system starting from the Court of First Instance, passing by the Court of Appeal, to the Court of Cassation ¹²². The claimant [hereinafter shall be referred to as 'A'] submitted his claim statement to the Court of First Instance against the defendant [hereinafter shall be referred to as 'B'] requesting the court to enforce the arbitral award issued in its favour ¹²³. The arbitral award concluded that the sales and purchase agreement, the subject matter of dispute between A and B, is void, hence B has to return the paid amount by A plus arbitration fees and interest. The court granted A the request of award enforcement as the award did not contradict any public policy and followed the procedures stipulated by the law in accordance with article 212 (5) of the CPC including submitting arbitration agreement and signing the arbitral award. B's attorney attended the sessions, however, he failed to submit the defence statement. ¹²⁴ Later, B appealed the judgment to enforce the arbitral award to the Dubai Court of Appeal based on three reasons:

- (a) The arbitration agreement is ought to be nullified on the basis that the person who signed on and behalf of B, did not have the legal capacity to dispose of the right to settle disputes through arbitration;

¹²² Cassation Court is the highest court in Dubai, UAE judicial system

¹²³ This is in accordance with the provisions of chapter 3 [Arbitration] of The UAE Civil Procedure Code, Federal Law No. (11) of 1992 which has been superseded by the UAE Arbitration law, Federal Law No. (6) of 2018, wherein the enforcement of arbitral awards are addressed to the Court of Appeal.

¹²⁴ Dubai Court of First instance case number 575 / 2017, civil full jurisdiction, issued on Dec 27, 2017

- (b) The arbitrator has erred in the procedures laid out by the law¹²⁵ by not delivering a copy of the award within five days from the date of the issuance of the same to B; and
- (c) A has breached the mechanism of settling the disputes between the parties by resorting the dispute to arbitration prematurely without fulfilling the preconditions of the arbitration agreement stated in clauses 17.2 and 17.3 of the original agreement, wherein A had resorted to arbitration prior of the lapse of the 20 days stipulated in the referred articles.

The Dubai Court of Appeal issued its verdict on May 31, 2018 ¹²⁶, to uphold the Dubai Court of First Instance judgment to enforce the arbitral award. The claimant, B, pursued his appeal to Dubai Court Cassation, B contested that the judgment of the court of merits has contravened the law and was deficient in its application. the Court of Cassation rejected the appeal, and further explained the reasoning for its rejection within the context of the judgment, ¹²⁷ wherein the court held that:

- (a) The argument in respect of the signatory capacity is invalid in accordance with article 216 (b) of the UAE civil procedural law; ¹²⁸

¹²⁵ Article 213 (3) of chapter 3 [Arbitration] of The UAE Civil Procedure Code, Federal Law No. (11) of 1992 which has been superseded by the UAE Arbitration law, Federal Law No. (6) of 2018.

¹²⁶ Dubai Court of Appeal – full jurisdiction civil -2018/129 issued on May 31, 2018

¹²⁷ Dubai Court of Cassation – full jurisdiction civil -2018/343 issued on November 15, 2018

¹²⁸ The Dubai Court of Appeal has detailed the reasoning of denying such claim, however, I have not stated the full agreement as it is out of the scope of this dissertation. See the reasoning addressed in the above case.

- (b) The argument in respect of the delivering a copy of the arbitral award is invalid, as it is an error in the procedure post the award and did not affect the award itself and hence it isn't a base of setting aside the award;¹²⁹ and
- (c) The argument with respect to the premature arbitration is invalid, as the court stated that 'When interpreting the terms of the agreement, contract or its disputed terms, the Court takes the clear meaning of such terms, wherein the clear meaning is referring to the parties' clear will, not the pronounciation, the term truly expresses the intention of the parties to the contract, and the court, when interpreting the terms of the contract and the terms and conditions contained, is acting in accordance with the customs. The Court looks at the contract in its entirety and not from a certain provision without the rest of the provisions and that it has absolute authority in interpreting the provisions of the contracts to know what is meant by the facts of the case and its circumstances without censorship as long as it did not depart in its interpretation from the meaning of the words of the provisions of the contract or its condition, and the Court also decided that once the verdict reaches a correct conclusion, it is not flawed in its legal reasons or the error legal reports to which it has been referred to, as it is within the Court authority to amend any error within. What the arbitrator did in his statement of those reasons and correct this error and return it to its proper basis without having to overturn the judgment[...] It was established that on 17-3-2013 an individual arbitrator had been appointed to hear the dispute, suggesting that the appellant and the defendant had failed to settle the

¹²⁹ Ditto

dispute amicably and that the arbitration procedures had been correctly established and that they had accepted arbitration with the Dubai International Arbitration Centre in accordance with its rules and procedures. In accordance with what was agreed upon under the arbitration agreement, and if the appealed judgment reached this correct conclusion, it is not flawed by the erroneous of such legal report in place, as this court corrects this error and returns it to its proper legal basis without overturning it.’ [translated] ¹³⁰

Despite the fact that the end result of denying the appeal regarding prematurely resorting to arbitration is in accordance with my opinion on contractual time-bars in UAE, ¹³¹ the judgment reasoning for such denial is not certain and is based on a fragile legal basis, if any. The Dubai Court of Cassation started its reasoning by citing its discretionary authorities under the law:

- (a) It is within the court’s power to interpret the disputed terms of the contract according to its clear meaning, and the clear meaning refers to the clear intentions of the contracting parties, not the clear wordings;
- (b) The court when interpreting the disputed terms of the contract takes into consideration the entire contract and does not look into contract clauses in isolation; and

¹³⁰ Dubai Court of Cassation – full jurisdiction civil -2018/343 issued on November 15, 2018

¹³¹ Refer to chapter 3

(c) It is the court's power to complete what the award has failed to explain and rectify any errors within without the need to nullify such award as long as the award has reached a correct result with minor errors in the legal reasoning; and

Moreover, and after reciting the disputed clauses comprising the procedural of arbitration resorting, the court found that the circumstances that lead the dispute to the arbitration are by itself a proof that the parties have endeavoured to amicably settle their disputes, however, they did not succeed, thus, the procedures of assigning the arbitrator are correct. The court did not refer to the legal basis under the law that supports such an approach in establishing that the formation or that the procedures that led to the formation of the arbitral tribunal are correct.

The second case study is a grievance against the enforcement of an arbitral award submitted to the Dubai Court of Appeal.¹³² The court did not cite the entire arbitration agreement in its decision, yet, I could assume it is a construction contract, as the court partially cited the arbitration agreement clause where a reference to an 'Engineer' was included in sub-clause 67 (3) and goes as follows 'any dispute a) in respect of which the engineer's decision, if any, has neither become final and binding under clause 67(1) and b) nor been amicably settled during the period mentioned in clause 67(2)' [translated]¹³³. The appellant, the grievant party, [hereinafter referred to as 'First Party'] raised his plea

¹³² In accordance with Article 19 (2) of UAE Arbitration law, Federal Law No. (6) of 2018, where Court of Appeal have jurisdiction over enforcement and challenges over arbitral awards and rulings

¹³³ Dubai Court of Appeal Commercial 08/2018

against the defendant, arbitration claimant, [hereinafter referred to as ‘Second Party’]; and the tribunal.

The Second Party has initiated the arbitration process on November 26, 2017, where the First Party raised its objection to the arbitral tribunal in respect of its jurisdiction over the dispute, thus, the arbitral tribunal opted to issue the ruling over its jurisdiction as a preliminary matter, in accordance with Article 19 (1) of the UAE Arbitration Law, dismissing the First Party jurisdictional objection. Accordingly, the First Party raised its case to the Dubai Court of Appeal seeking the below:

- ‘1. a summary decision staying the arbitration proceedings pending the determination of the Grievance;
2. an order quashing the Award and ruling anew that the Arbitral Tribunal had no jurisdiction due to the alleged failure of the Arbitration Claimant to comply with the Contract and non-compliance with the pre-conditions to arbitration; and
3. an order obliging the Arbitration Claimant to pay the relevant court fees, costs and advocate’s fees.’ [translated] ¹³⁴

The court initiated its judgment by emphasizing that the arbitral tribunal exercised its right under the UAE Arbitration Law; ¹³⁵ and the First Party has successfully submitted his appeal to the court in a timely manner, within 15 days from the date of being aware of that preliminary ruling on jurisdiction in accordance with the second article of the provision

¹³⁴ Ibid

¹³⁵ Article 19 (1) of the UAE Arbitration law, Federal Law No. (6) of 2018

thereof, which clearly shows the court intention to strictly follow the new statutory time-bars introduced in the UAE Arbitration Law. The court iterated the First Party plea arguments on arbitral tribunal jurisdiction and encountered each argument.

First, stay on arbitration proceedings, the court commented that ‘[...] it is the essence of Article 19 is that the arbitral proceedings are stayed by operation of law’¹³⁶ and supplemented that ‘[...] there is nothing on record to indicate that the Arbitral Tribunal had decided to continue with the proceedings’ [translated]¹³⁷. Consequently, the First Party request is unmerited and should be disregarded.

Second, grievance merits, the contractual preconditions under the contract was not followed by the Second Party prior to commencing the arbitration proceedings, which included the following steps:

- (a) The dispute shall be determined by the impartial person named in the contract as ‘Engineer’;
- (b) Post the ‘Engineer’ determination the dissatisfied party(s) should attempt to amicably settle amicably their dispute; and
- (c) The arbitration proceedings should start after failure to reach such an amicable settlement within a specified period of time.

¹³⁶ Dubai Court of Appeal Commercial 08/2018

¹³⁷ Ibid

In the reply of the court to the aforementioned grievance merits, it observed the following points:

1. The arbitration agreement must fulfil specific practical and formal requirements in order to be valid and treated as binding on contracting parties;
2. The contract shall be honoured, as it is the common practice that the contract is the law of the contracting parties;
3. Good faith requirement shall be regarded during the performance of the contract contents; and
4. It is within the court discretionary authority to include an obvious obligation by virtue of customs, contracting nature, and law, rather than to only be restricted to express terms.

The court concluded that the contract is to be performed ‘according to the nature of the disposition and in good faith, as deduced in our discretion as fact finders.’ [translated]¹³⁸, it also added the observation that ‘parties do not dispute the fact that their agreement calls for disputes which arise between them in relation to their contract to be resolved by arbitration nor do they dispute the fact that a dispute has arisen between them’ [translated]¹³⁹. Then the court directly commented on the grievance case merits by stating the following:

¹³⁸ Dubai Court of Appeal Commercial 08/2018

¹³⁹ Ibid

1. The Second Party failure to comply with the ‘Engineer’ determination requirement was negated by the First Party breach of the terms of their contract, where a notice of change of the ‘Engineer’ should have been served to the Second Party. Thus, entitling the claimant party to proceed with arbitration; and
2. ‘the escalation of the differences between the parties and the [...] request for arbitration confirms a lack of willingness to reach an amicable settlement. To ensure the effective performance of the parties’ contract containing the arbitration clause, arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings.’ [translated] ¹⁴⁰

Therefore, the Dubai Court of Appeal dismissed the grievance appeal, and accordingly, the arbitration continued.

It seems that the judge is trying to approach the higher virtue of the law ‘serving justice’, which is contrary to *Ewan MacIntyre's* opinion that ‘The achievement of justice is not the main aim of the lawyers or of the judge. The lawyers are adversaries, arguing with every means at their disposal to win the case for the client they represent. If they exchanged clients, they would argue the opposing case with equal enthusiasm. The judge is not an inquisitor searching for truth and justice. He is there to apply the law, regardless of whether or not this leads to the fairest outcome. His job is to obey the rules and see that everyone

¹⁴⁰ Ibid

else does the same.’¹⁴¹ In that endeavour, the judge somehow created a concept of overcoming the frustrating situations induced in the case, which are according to the parties’ contract provisions, the dispute has to be determined by the ‘Engineer’ to proceed further to the next step of the contract dispute resolution mechanism, Nevertheless, it seems that the Second Party has changed the person named as ‘Engineer’ under the contract without informing the other party, First Party. This created a frustrating situation for the First Party to pursue its right.

It was difficult to understand the legal basis, which the judge used, for overthrowing these contract terms, particularly that the judgment did not specify the legal provisions for the same. In my opinion, the judge definitely attempted to serve justice and tried to overcome the legal hindrance stated in the parties’ contract. Yet, there are no provisions in the law to administrate such events, which may lead to different outcomes in different cases, or better to call it ‘uncertainty’.

Example of this uncertainty is the below judgment regarding the contractual preconditions for Engineer’s determination prior to perusing ADR, commonly used in construction standard form of contracts:

The claimant, the Contractor, entered into a construction contract with the defendant, the Employer, for the execution of the works, which include a factory and associated facilities, for an approximate amount of AED 48 million. The Employer refused to release the full amounts due to the Contractor, which resulted in the Contractor referring this dispute to

¹⁴¹ Ewan MacIntyre, Essentials of Business Law (3rd edition, published in 2011), 8

the Dubai International Arbitration Centre [abbreviated as ‘DIAC’]. Despite the fact that both parties signed the terms of reference after the appointment of the arbitrator, the Employer raised an objection to the jurisdiction of the arbitrator after the issuance of the arbitral award in favor to the Contractor on the basis that the parties’ contract calls for a multi-step mechanism to resolve disputes, which are (a) attempting to resolve the dispute amicably; (b) in the event that the amicable settlement is not concluded, either of the parties will refer the dispute to the person named as ‘Engineer’ in their contract for its determination; and (c) the dissatisfied party with the Engineer’s determination will seek DIAC for resolving the dispute by arbitration. The Dubai Court of First Instance recited the provisions of the parties’ contract relating to dispute resolution and commented that ‘[i]n accordance with the general principles of contract, arbitration is a contract between the parties and therefore it is permissible for the parties to this contract to include pre-conditions that must be fulfilled prior to arbitration being commenced. As such, if any of these conditions are not satisfied or fulfilled then it is not possible to resort to arbitration. This is in line with the established legal principle that the contract is the law of the parties.’[translated] ¹⁴². Thus, the court held that the arbitration was premature and the dispute should be referred to the ‘Engineer’ prior to commencing arbitration as per the parties’ contract provisions.

As the arbitration process is considered a final and binding dispute resolution mechanism under the UAE law, ¹⁴³ it is expected that the arbitrator(s) will follow the UAE courts’

¹⁴² Dubai Court of First Instance – Commercial case 757/2016 – Full jurisdiction judgment issued on August 15, 2016

¹⁴³ According to article 52 of the UAE Arbitration law, , Federal Law No. (6) of 2018 which states that ‘An arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute res judicata, and shall be as

understanding and interpretation of the UAE laws. Accordingly, the Dubai Court of Cassation findings related to condition precedent multi-tiered ADRs can be adopted by arbitrators, where the court stated that '[i]f the parties agree to follow certain specific procedures in order to resolve amicably any difference that may arise between them concerning the execution of certain work, that does not prevent them from having recourse to the courts directly on grounds that the court has a general jurisdiction to determine disputes.' [translated] ¹⁴⁴.

Hence, arise the question of 'based on the above cases can the effect of noncompliance with the time limit to commence the arbitration be concluded?'

The UAE legal system doesn't accommodate the concept of *stare decisis* ¹⁴⁵ where the judgment of higher courts, on cases with similar facts, are to be used as the basis for judgment of lower courts. It is also worth mentioning that even the UAE courts have a different interpretation of the same laws, Dubai courts standing on accumulated interests against the Federal courts standing ¹⁴⁶. Nevertheless, the UAE court judgments, particularly the higher courts, has drawn the guidelines of the expected result of the case, and based on the previous examples, we can presume that the UAE courts will be reluctant to enforce the parties' condition precedent ADRs prior to resorting the dispute to arbitration

enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court.' [translated]

¹⁴⁴ Dubai Court of Cassation case 14/2008 cited from IBA Litigation Committee, 'Multi-Tiered Dispute Resolution Clauses' (October 01, 2015) 63 <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=9C6E21DE-043C-44C9-BE75-94CADECCF470>> accessed Oct 30, 2019

¹⁴⁵ Judicial precedent which is a legal principle of 'stand by things decided'

¹⁴⁶ Where Federal Supreme Court has ruled that it is not permissible to award accumulated interests according to its decision in Case No. 11/Judicial Year 22, dated 19/5/2002, however, such accumulated interests has been allowed in Dubai courts.

especially when (a) the parties to the contract are in dispute; (b) the ADR will simply result in amicably settling the dispute; and (c) the ADR is restricted with a time-bar resulting to diminishing of the parties' right which is a concept not adopted by the UAE law or courts.

Yet, it is still uncertain how the court will analyze the circumstances of the case and interpret the parties' contractual intention in resolving their dispute, as the UAE laws are silent in that respect, and it is within the court's authority to interpret the same. The other question in place is 'what is the recourse of the claimant in the event that the arbitral tribunal ruled against their own jurisdiction over the dispute, as a result of noncompliance with arbitration commencement time-limit?'

I will use the first case circumstances to develop three hypothetical scenarios to discuss the recourse options to a claimant in the event that the arbitral tribunal ruled against its own jurisdiction:

First Scenario, if the respondent 'B' raised an objection that the arbitral tribunal had no jurisdiction over the dispute, as the claim is prematurely submitted to arbitration within a period less than the 20 days stipulated in the arbitration agreement. Accordingly, the arbitral tribunal ruled, as a preliminary question, against their jurisdiction and dismissed the arbitral proceedings. The logical recourse by the claimant 'A' is to challenge such ruling in front of the competent court, but, the UAE Arbitration Law has no provisions addressing this situation expressly.

The second scenario, if the respondent 'B' raised an objection that the arbitral tribunal had no jurisdiction over the dispute, as the claim is submitted to arbitration beyond the 20 days

period stipulated in the arbitration agreement. Accordingly, the arbitral tribunal ruled, as a preliminary question, against their jurisdiction and dismissed the arbitral proceedings. Can the claimant 'A' request the competent court to extend that limitation period? Also, the UAE Arbitration Law has no provisions administrating this situation.

In the third scenario, if the responded 'B' succeeded to render the arbitration premature, as in the first scenario, and the claimant 'A' is not able to fulfil the pre-arbitral steps due to the lapsing of the stipulated time-limit in the arbitration agreement. Can the claimant 'A' recourse his dispute directly to court? or the court will refer the party to the arbitration agreement. Again, the UAE Arbitration Law has not addressed this situation, yet, a party may attempt to use an argument based on Article 42 (3) which states 'Where the Court has issued a decision terminating the arbitral proceedings, either party may bring an action before the court originally competent to entertain it.' [translated] ¹⁴⁷.

It is important to understand that the UAE Arbitration Law has mainly been drafted based on the United Nations Commission on International Trade Law ¹⁴⁸ [hereinafter shall be referred to as "UNCITRAL"] Model Law ¹⁴⁹, and Article 16 (3) of the Model Law states that 'The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days

¹⁴⁷ Article 18(3) of the UAE Arbitration law, Federal Law No. (6) of 2018

¹⁴⁸ UNCITRAL is a subsidiary body of the General Assembly.

¹⁴⁹ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 issued United Nations Publication - Sales No. E.08.V.4 - ISBN 978-92-1-133773-0. Also accesible at NUICTRAL website <https://uncitral.un.org/en/texts/arbitration>

after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.’¹⁵⁰, wherein the resemblance with the relevant UAE Arbitration Law is clear. The *Travaux préparatoires*¹⁵¹ of the Model Law stated that it is explicitly that Article 16 (3) deals only with the positive awards on arbitral tribunal jurisdictions and it does not address the matter of challenging negative jurisdictional rulings to the competent courts. Nevertheless, the General Assembly commented that ‘it is recognized that a ruling by the arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue the proceedings.’¹⁵².

4.2 Under Common Law

On the other hand, The English Common Law has wider spectrum for parties autonomy and principle of ‘contract is the law of contracting parties’ which looks to the clauses of pre-arbitral steps from a different perspective, where the clauses of pre-arbitral steps are by default enforced, unless the challenge is based on the following key principles:¹⁵³

- (a) The clause is not drafted in an express language detailing the process of dispute resolution and contains ambiguous procedures; and

¹⁵⁰ Article 16(3) of the NICTRAL Model Law

¹⁵¹ It is a French term for "preparatory works" and it is the official record of a negotiation. It is also used as a document to clarify the intentions of a original document.

¹⁵² Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I, para. 163.

¹⁵³ IBA Litigation Committee, ‘Multi-Tiered Dispute Resolution Clauses’ (October 01, 2015) 63 <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=9C6E21DE-043C-44C9-BE75-94CADECCF470>> accessed Oct 30, 2019

- (b) The clause is obliging the parties to the contract to act in ‘good faith’¹⁵⁴ principle, either expressly or impliedly, which will eventually result in a degree of uncertainty, thus, rendering the clause unbinding to the parties ¹⁵⁵.

Two examples for the unenforceability of pre-arbitral steps are:

- (a) In *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors*, where the appointed arbitral tribunal substantial jurisdiction over the dispute was challenged on the grounds of the pre-arbitral clause's existence, and the court upheld the tribunal positive rule on its jurisdiction and rejected the challenge on the basis that the pre-arbitral clause was ambiguous, and the judge stated that ‘[i] have reached the clear conclusion that Section 14.3 [pre-arbitral clause] is too equivocal in terms of the process required and too nebulous to be given legal effect as an enforceable condition precedent’ ¹⁵⁶; and
- (b) In *Walford v Miles*, where a claimant argued that the defendant should exclusively negotiate with him based on the good faith clause in their agreement. The court expressed its concern about the good faith principle and further explained that the good faith principle is not appropriate to the bargaining where each party is expected to pursue its own interest including forfeiting of the negotiation or just threatening to do so, thus, the judge stated that good faith is ‘[...] inherently repugnant to the

¹⁵⁴ Which imposes an implied obligation on the parties to act in a fair and reasonable manner.

¹⁵⁵ See *Walford v Miles*, [1992] 2 AC 128 where it was held that ‘the clause [to exclusively negotiate with on purchases] was void due to lack of contractual certainty’.

¹⁵⁶ *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch)

adversarial position of the parties when involved in negotiations’¹⁵⁷ and held that the clause is void due to uncertainty.

Accordingly, if the pre-arbitral clause is sufficiently defined and its objectives are ascertained, then the English Court or arbitral tribunal will not entertain annulment challenges. But, what if the pre-arbitral clause is a defined time-bar and the grievant party failed to comply with such period to commence arbitration? the following cases are discussing this situation:

The first case, *The Environmental Agency, the Employer, and Harbour and General Works Ltd*, the Contractor, entered into a construction agreement under the standard conditions of the Institution of Civil Engineers, the Contract, wherein clause 66 elaborates the disputes resolution mechanism, as follows:

- (a) Any disputes arising out of or in connection with certificates issued by the person named under the Contract as the Engineer shall be referred to the Engineer for decision; and
- (b) Such a decision shall be final and binding if either of the parties failed to serve a referral notice challenging the decision to (1) conciliation within one month from the Engineer’s decision; or (2) arbitration within three months from the same decision.

On Jun 29, 1998, the Engineer issued his decision in reference to five claims issued by the

¹⁵⁷ *Walford v Miles* [1992] 2 AC 128

Contractor on the principle of the claims, however, not all claims have been quantified. The Contractor referred its objection to the Engineer's decision to conciliation on Sep 23, 1998, almost two months beyond the contractual time-bar period, the Employer responded by questioning the validity of such referral notice on Sep 25, 1998, but, did not raise to the Contractor that the dispute can still be referred to arbitration until Oct 05, 2019, when the three months time-bar has already elapsed. Accordingly and on Oct 06, 2019, the Contractor issued a referral notice to arbitration, but, it was too late, or to be precise eight days late.

The Contractor applied for an extension to the commencing time of arbitration in accordance with Section 12 of the English Arbitration Act, which states the following:

- '(1) an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step—
 - (a) to begin arbitral proceedings, or
 - (b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun, the court may by order extend the time for taking that step.
- (2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available

arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied—

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question¹⁵⁸

After reviewing the merits of the case along with the statement of claim and defence, the court held that :

(a) The true construction of Section 12 of the English Arbitration Act prevents the court from intervening with the agreed contractual terms between the parties, unless, there are events beyond the contemplation or control of the parties during the time of the contractual terms being agreed. In this case, the court shall rule whether granting an extension for the contractual time-bar will be serving justice. Moreover, the court might understand that some cases, which are in the control of the parties, can raise the question of justice such as delivering the notice to the wrong address, but, merely failing to read the provisions of the contract doesn't seem to be beyond the contemplation of the parties. Accordingly, the court finds that holding the Contractor strictly to the terms of his agreement regarding the contractual time-bar

¹⁵⁸ S.12(1-3) of the English Arbitration Act 1996

does not trigger the injustice circumstance where the court intervention is required, also, the Employer is under no obligation to provide guidance to the Contractor for his contractual rights.

- (b) It is true that the arbitration agreement agreed by the parties give the arbitral tribunal jurisdiction over any matters determined by the Engineer, as argued by the Contractor, however, once the Engineer's determination becomes final and binding in accordance with the contractual terms regarding that matter, then there is no matter to be arbitrated for, even if the Engineer's determination is wrong in respect of quantification. Accordingly, the court finds no valid ground for this argument.

Therefore, the request to extend the time for commencing arbitration under Section 12 of the English Arbitration Act is dismissed.

The Contractor appealed the judgment seeking either to extend the period or to declare that no extension of time is required to commence the arbitration. However, the court of appeal upheld the previous judgment and dismissed both requests.

Despite the fact that the cases, previously discussed, had a similar circumstances, yet, the means to reach the final outcome are substantially different, where the issue in the UAE cases was whether the court will accept that the contract time limit as a time-bar and accordingly bar the claim or not, but, in the English Law case, the matter appears to be a one more step ahead, whether the court will intervene and deviate from the expressed contractual time-bar and issue an extension in order to serve justice/equity to the aggrieved party. It seems to me that the pivotal point between the UAE and English laws is the

existence of Section 12 in the English Arbitration Act, which redirected the whole claimant's arguments about the noncompliance with the contractual period to commence the arbitration.

The second case, the parties to the arbitration proceeding were contractually linked by means of a chain of back-to-back contracts pertaining voyage charters, the aggrieved party [hereinafter shall be referred to as 'Subcontractor'] issued a notice of claim against the head of the chain [hereinafter shall be referred as 'Client'] based on a statement of claim received by the company overseeing the lading of the conveyed cargo, thus, triggering a series of notices along the chain. The Client replied back stating that the notice of claim was not served within the period stated in the arbitration clause, clause 67, embedded in the contract stating that 'Any claim other than the demurrage claim under this contract must be notified in writing to the other party and claimant's arbitrator appointed within thirteen (13) months of the final discharge of the cargo and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred.'¹⁵⁹. The claimant sought the court's intervention pursuant to Section 12 of the English Arbitration Act requesting the following:

'(1) declarations that their claims against the charterers had been brought in time, notwithstanding the wording of Clause 67;

¹⁵⁹ P v Q [2018] EWHC 1399 (Commercial)

(2) in the alternative, an extension of time under s12 of the Act either to validate the notices of arbitration they had served on the defendant charterers or for such extension of time as the Court saw fit.’¹⁶⁰

The court presented its judgement by first explaining the literal meaning of the arbitration clause, where the court found that the parties’ intention was clear in respect of breaching the agreed-upon time-bar clause which includes the event where the claim will pass by the entire chain, up or down, and a party may not be aware of the claim in time. Since the said clause operates both ways, it makes a commercial sense; and it seems that the parties opted to accommodate such risk of not be aware of the claim in time.

The court added that when the parties agreed on a contractual time-bar, they must have contemplated that such time-bar might not be complied with; and even if such non-compliance ‘[...]in not unusual circumstances arising in the ordinary course of business[...]’¹⁶¹ would render the claim barred. The court cited *SOS Corporation Alimentaria SA & Anor v Inerco Trade SA*¹⁶² then adopted the concept introduced thereof by applying the test to being ‘relatively exceptional’ instead of ‘reasonably contemplated’, the court stated that the reason for the notice not being served in time is that the notice was

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² *SOS Corporation Alimentaria SA & Anor v Inerco Trade SA* [2010] EWHC 162 (Commercial), wherein the judge, stated that ‘(1)whether there were circumstances beyond the parties’ reasonable contemplation and, if so, had they contemplated them, whether they would also have contemplated that the time-bar might not apply; (2) whether the circumstances significantly contributed to the non-observance of the time limit; (3) if the circumstance was “not unlikely” or “prone to” occur, or “not unusual”, the test would probably not be satisfied, but if was “relatively exceptional” it would be outside the reasonable contemplation of the parties; (4) as to whether the parties would also have contemplated that the time-bar might not have applied in the circumstances in question, the test is whether they would contemplate that the time limit “might not” apply rather than it “would not” apply or “must not” apply. In general, time limit clauses are addressed at steps which the party in question can reasonably be expected to take within the prescribed time’

served in the last day of the contractual limitation period after the business hours of the recipient, which falls under the relatively exceptional circumstances.

Finally, the court held that it would be justice to extend the contractual time-bar period ‘if the applicant has acted expeditiously and in a commercially appropriate fashion to commence proceedings’¹⁶³.

The answer to the question laid at the top of the sub-chapter is that the English common law has anticipated such circumstance of not complying with the arbitration commencement time-bar and provided provisions to serve justice accordingly. yet, the scenario where the arbitral tribunal rules negatively to its jurisdiction is yet to be discussed.

Similar to the UAE Arbitration Law, the English Law is silent about the intervening powers by the court in case of negative jurisdictional ruling the arbitral tribunal. It is peculiar for myself why the aggrieved party should bear the end results of the arbitral tribunal errors in rendering its jurisdiction when the parties have already agreed on arbitration as their dispute resolution mechanism. Also, others have scrutinized this matter and stated that it is ‘unfortunate and frustration’¹⁶⁴.

The German Federal Court of Justice had an interesting view of the court’s powers over the negative jurisdictional award. the arbitral tribunal, in this case¹⁶⁵, denied its jurisdiction over the dispute and issue its preliminary award accordingly, however, the court found that

¹⁶³ Ibid

¹⁶⁴ Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration – An Asia-Pacific Perspective* (Cambridge University Press, 2011), 240

¹⁶⁵ CLOUT case No. 560 [Bundesgerichtshof, Germany, III ZB 44/01, 6 June 2002], also can be accessed through website <http://www.dis-arb.de/en/47/datenbanken/rspr/bgh-case-no-iii-zb-44-01-date-2002-06-06-id185>

the arbitral negative award is reviewable by the court on the basis that it constitutes an arbitral award, yet, it is subject to annulment under Article 34 of the UNICTRAL Model Law¹⁶⁶. The court also indicated that there is no ground listed under Article 34 that permits the court to set aside the arbitral award as a result of the arbitral tribunal's error in law.

Nevertheless, Singapore in its latest amendment on their International Arbitration Act¹⁶⁷ has encountered the matter of negative jurisdictional rulings. The amendments were proposed by the Law Reform Committee of the Singapore Academy of Law based on the followings:

- (a) The principle of opting to international arbitration is based on distancing the parties' dispute from their own national courts; and
- (b) It is injustice and inconsistent to allow judicial review for only positive jurisdictional ruling and not negative.¹⁶⁸

The aforementioned amendments were implemented by the International Arbitration (Amendment) Act 2012 (No 12 of 2012), which was passed on April 09, 2012, and came into force on June 01, 2012.

Section 10 of the mentioned Singaporean Arbitration Act states the following:

¹⁶⁶ Article 34 of the UNICTRAL Model Law regarding the application for setting aside as exclusive recourse against arbitral awards.

¹⁶⁷ Singapore International Arbitration Act (Chapter 143A) revised edition 2002.

¹⁶⁸ See The Report Of The Law Reform Committee on Right To Judicial Review of Negative Jurisdictional Rulings issued by the Singapore Law Reform Committee on Jan 2011. Also, can be accessed through website <https://www.sal.org.sg/Portals/0/PDF%20Files/Law%20Reform/2011-01%20-20Judicial%20Review%20of%20Negative%20Jurisdictional%20Rulings.pdf>

- ‘(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.
- (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
- (3) If the arbitral tribunal rules (a) on a plea as a preliminary question that it has jurisdiction; or (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.
- (4) An appeal from the decision of the High Court made under Article 16(3) of the Model Law or this section shall lie to the Court of Appeal only with the leave of the High Court.
- (5) There shall be no appeal against a refusal for grant of leave of the High Court.
- (6) Where the High Court, or the Court of Appeal on appeal, decides that the arbitral tribunal has jurisdiction (a) the arbitral tribunal shall continue the arbitral proceedings and make an award; and (b) where any arbitrator is unable or unwilling to continue the arbitral proceedings, the mandate of that arbitrator shall terminate and a substitute arbitrator shall be appointed in accordance with Article 15 of the Model Law.
- (7) In making a ruling or decision under this section that the arbitral tribunal has no jurisdiction, the arbitral tribunal, the High Court or the Court of Appeal (as the case may be) may make an award or order of costs of the proceedings, including the arbitral proceedings (as the case may be), against any party.
- (8) Where an award of costs is made by the arbitral tribunal under subsection (7), section 21 shall apply with the necessary modifications.
- (9) Where an application is made pursuant to Article 16(3) of the Model Law or this section (a) such application shall not operate as a stay of the arbitral proceedings or of execution of

any award or order made in the arbitral proceedings unless the High Court orders otherwise; and (b) no intermediate act or proceeding shall be invalidated except so far as the High Court may direct [...].'¹⁶⁹.

It is fascinating how Section 10 fills the gaps that had been created due to various circumstances of disputes.

5 UNICTRAL Model Law and the United Arab Emirates Law Deficiencies

During the period of my research, I have encountered several circumstances where the relevant state law is silent or has been unfairly interpreted by the judicial body. It raises some sort of uncertainty, hence, the unwillingness of the contracting parties to select the said jurisdictional law as the governing law for its arbitration. Therefore, this sub-chapter will be discussing this matter in brief as a material for further research.

Nowadays, it is a common practice in many industries to allow for a notice time-bar clause in their contract, particularly regarding extra cost or time, which is the contractual time-bar. One of the reasons behind such restrictions is to provide the other party with sufficient time to assess its situation for better mitigation plans. The English Common Law has provided a set of rules to justify the reasonability of the allowed time to bar the recourse actions. the

¹⁶⁹ S.10 of Singapore International Arbitration Act (chapter 143A) revised edition 2002.

UAE Law has adopted a similar concept under Article 886 (1) ¹⁷⁰ of the CTC which expressly state that the executor of an itemized list contract shall lose his right to recover extra costs in the event of failure to immediately notify the other party for the substantial excess of the agreed quantities. After analyzing such a provision, I can find that the barring effect exists, however, the selection of the words ‘substantial’ and ‘immediately’ dilute such a strict approach and leaves the contracting parties with the uncertain questions of ‘when is immediate’ and ‘what is substantial’.

In addition to that, the only Article ¹⁷¹ in UAE Law that directly addresses the matter of contractual time-bars is related only to insurance contracts. The Article provides that any insurance contract that contains a clause barring the right of the assured party by means of delay in serving the incident notice shall be void as long as the assured party can provide a reasonable excuse for the delay. It is clear that the UAE legislator has withdrawn the binding effect of the time-bar clauses in the insurance contracts and retained such power with the judicial body. But, is it a distinguishing feature in insurance contracts? And if not, why not for all types of contracts? The answer might be that this provision has been exactly copied from the Article 750 (2) of the Egyptian civil transaction code which states that ‘a provision whereby the right of the assured shall lapse by reason of his delay in giving notice of the incident insured against to the parties which should be notified or to provide documents in

¹⁷⁰ Article 886 (1) of the UAE CTC , federal law no.05 of 1985 which states that ‘ *If a contract is made under an itemised list on the basis of unit prices and it appears during the course of the work that it is necessary for the execution of the plan agreed substantially to exceed the quantities on the itemised list, the contractor must immediately notify the employer thereof, setting out the increased price expected, and if he does not do so he shall lose his right to recover the excess cost over and above the value of the itemised list.*’[translated]

¹⁷¹ Article 1028 (b) of the UAE CTC , federal law no.05 of 1985

the event that it appears that there is a reasonable excuse for the delay’[translated] ¹⁷² which has been issued on 1948, at that time the time-bar clauses were only used in insurance clauses and not so common in other industries ¹⁷³.

Time is a linear vector that is going in one direction, so far, and it is crucial to be able to identify its starting point to determine the ending. There is only one provision ¹⁷⁴ in the UAE CTC that prescribes the way to identify the starting point of any time-bar, wherein it is the point of time when the right becomes due, or if a condition is linked to the right when such condition is fulfilled. The provision seems to be drafted for a limited specific type of transaction, for example, in the event that a patient is subjected to medical malpractice, how can I make use of the said provision to identify the starting point for the statutorily prescribed period to take legal action? A better position is laid by the English Common Law where its provisions ¹⁷⁵ provide the term ‘from the cause of action accrued’ and it takes into consideration where the aggrieved party is ought to have knowledge of the cause of action. It is worth mentioning that the UAE courts are applying a similar approach as the English courts, but, the door for enhancement should be always open in expectation to overcome the unknown circumstances which might lead to injustice. An interesting question arises at this point, what if an aggrieved party is suing for the defamation against a magazine, which is still publishing the post-forming the defamation act, is the starting point for taking legal action is when the claimant should become aware of the defamation, or the accrual of

¹⁷² Article 750 (2) of Egyptian Civil Code issued under law number 131 the year of 1948

¹⁷³ For example, the FIDIC conditions of contract for construction for building and engineering works containing the time-bar clauses was first introduced in 1987

¹⁷⁴ Article 478 of the UAE CTC , federal law no.05 of 1985

¹⁷⁵S.5 and 8 (1) of the English Limitation Act 1980

defamation is still ongoing up to the last magazine issued ? and how to read this in conjunction with the UAE laws.

The time-bars, as any period, can be extended, suspended, or interrupted according to the provisions of the applicable law. Under the applicable UAE provision,¹⁷⁶ the time-bar will be suspended if a lawful excuse prevented the claimant from pursuing his right. The common practice, in the event of a dispute, is to immediately rush to the contractually agreed dispute resolution recourse prior to the lapse of the time-bar thereof, which is usually barely sufficient in many standard forms of contract, therefore, many disputed companies, nowadays, are entering into a standstill agreements wherein they agree to suspend the prescribed time for a certain period to restructure their position on the subject matter of the dispute by collecting enough information, thus, a better dispute approach strategy might be achieved instead of rushing to ADRs. So, what is the UAE Law standing regarding such a standstill agreement? Will it be considered as a lawful excuse or will be considered as an alteration to the prescribed periods by law, which is prohibited?¹⁷⁷

The application of the condition precedent clauses is one of the essential elements in a multi-tier dispute resolution approach, wherein the contracting parties agree on a strategic way to settle their disputes. It includes a tier of the cooling-off period to enable both parties to endeavour an amicable settlement within a certain time limit, where breaching such period

¹⁷⁶ Article 481 (1) of the UAE CTC , federal law no.05 of 1985, as amended which states that ‘The running of time for prescription shall be suspended if there is a lawful excuse whereby the claim for the right could not be made.’ [translated]

¹⁷⁷ See Article 486 (1) of the UAE CTC , federal law no.05 of 1985, as amended which states that ‘It shall not be permissible to waive a time-bar defence prior to the establishment of the right to raise such defence, nor shall it be permissible to agree that a claim may not be brought after a period differing from the period laid down by law.’ [translated]

and moving up to the next dispute resolution tier will only render you action premature. The UAE Law addressed the obligation to fulfil the contractual conditions linked to any right for the statutorily prescribed time to start,¹⁷⁸ which impliedly may be considered as a condition precedent, yet, there is no express provision with a similar effect. The UAE court has adopted the condition precedent concept,¹⁷⁹ but, not in a full manner, as it seems that the courts are reluctant to oblige the parties to fulfil the requirement of the cooling-off period and consider that it is a redundant prolongation to the dispute resolution proceedings.¹⁸⁰

The parties' decision of opting to arbitration is a critical choice not only for the contracting parties but also for the legislators. Thus, the arbitration agreement is distinguished with the concepts of '*Kompotenz – Kompetenz*' and separability, and it is to the extent that the arbitral tribunal might arbitrate on the existence of the contract which is including the arbitration clause. In my opinion, such choice has to be highly respected, however, and due to the unawareness of some arbitrators to the local laws in respect of contractual time-bars such as the UAE standing to such matter. The aggrieved party finds itself left with either a barred right or back to the traditional judicial system for recourse. Unfortunately, the UNICTRAL Model Law and the UAE Laws have only dealt with the matter of the court's intervention to positive jurisdictional awards and ignored the more crucial matter which is challenging erroneous negative jurisdictional awards.

¹⁷⁸ Article 478 of the UAE CTC , federal law no.05 of 1985, as amended

¹⁷⁹ Dubai Court of First Instance – Commercial case 757/2016 – Full jurisdiction judgment issued on August 15,2016

¹⁸⁰ See Dubai Court of Cassation – full jurisdiction civil -2018/343 issued on November 15, 2018 and Dubai Court of Appeal Commercial 08/2018 which stated that '[...]arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings' [translated]

6 Conclusion

The logic behind barring a genuine claim due to the passage of a pre-determined period of time seems unfair, from the first glance, especially to non-legal practitioners. Nevertheless, and quite just the opposite, it is an equitable way to serve justice through (a) valuing the public interest and stability of the community by means of balancing the extent of the limitation period wherein an aggrievance can be pursued and a defence can be maintained; (b) inciting the claimants to raise their claims in time, and not to abuse time for other agendas; and (c) providing security to the business owners from the continuing fear of being sued at anytime. There are two types of time-bars statutory and contractual, the later is an essential part to the subject matter of this research and the former is briefly explained for better understanding of the legislator's point of view in respect of the reasons leading to establishing limitation period length; applicability to adjust through extension, suspension, or interruption; the methods of calculation including the pinpointing of the starting date; and the appropriate mechanism of usage.

The enclosure of the time limit provisions in many types of standard and nonstandard contracts is a common practice in many industries, such as construction, and it is used to administrate the rights and obligations under such contracts. The time limit provision can be either a regulatory time or time-bar to a contractual right, such as the time-bar clause of serving notices under the FIDIC contracts and the regulatory time clause for submitting a

claim thereof.¹⁸¹ It is important to understand that the time provision has to include a clear, express, undoubted, and precise time; and express consequences in the event of failure to abide with such time period to be regarded as a time-bar provision.

The UAE legal position towards the applicability of contractual time-bar provisions is uncertain only in reference to its' express laws. Despite the fact that the UAE law states the following:

- (a) each contracting party shall perform its side of the bargain;¹⁸²
- (b) the existing of the contract represents the parties' consent and intention to its' content¹⁸³ as long as it is not contradicting with the law and/or public order;¹⁸⁴ and
- (c) express wording of the contract shall not be further interpreted.¹⁸⁵

which seems to be impliedly acceptance of the contractual time-bar provisions. Nevertheless, the judicial system has adopted a different approach of being reluctant to uphold such provisions, which has been supported by several legal practitioners, such as

¹⁸¹ See Clause 20 of the FIDIC conditions of contract for construction for building and engineering works designed by the employer 2nd edition 2017 (the red book) wherein there is a clear consequences of failure to submit notice within the agreed on time, however, there is no consequences for not submitting the claim itself within time.

¹⁸² Article 243 (1) of the UAE CTC, Federal Law No. 5 of 1985 which states that '[w]ith regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which he is obliged to do under the contract.' [translated]

¹⁸³ Article 257 of the UAE CTC, Federal Law No. 5 of 1985 which states that '[t]he basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract.' [translated]

¹⁸⁴ Article 126 of the UAE CTC, Federal Law No. 5 of 1985 which states that '[t]he following may be the subject matter of a contract:[irrelavent text omitted] (d) any other thing which is not prohibited by a provision of the law and is not contrary to public order or morals.' [translated]

¹⁸⁵ Article 265 (1) of the UAE CTC, Federal Law No. 5 of 1985 which states that '[i]f the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties.' [translated]

Bevan Farmer of Addleshaw Goddard Law Firm ¹⁸⁶ and Ahmed Ibrahim of Fenwick Elliot ¹⁸⁷, based on the arguments that contractual time-bar provisions are considered as below:

- (a) against the principle of good faith between the parties; ¹⁸⁸
- (b) the unlawful exercise of rights; ¹⁸⁹ and
- (c) unjust enrichment. ¹⁹⁰

In my opinion, the aforementioned arguments are valid, but, inconclusive, as they are indirect, with implicit meaning, and most importantly ignoring an express article of the UAE law which void any time-bar clause included in any insurance contract ¹⁹¹. It is clear that the legislator objected the concept of contractual time-bars, and it seems that it was only expressly stated for insurance contracts due to the fact that this clause was based on the Egyptian law ¹⁹² issued on 1948 where time-bars are commonly used by insurance providers.

¹⁸⁶ Bevan Farmer and Denis Moriarty, 'Notice provisions and time bars in construction and engineering contracts' (Addleshaw Goddard Law Firm - Constructive Comments - GCC Edition - Issue 1, Jan 16, 2017) <<https://www.addleshawgoddard.com/en/insights/insights-briefings/gcc-insights/constructive-matters-gcc-edition-issue-1/notice-provisions-and-time-bars-in-construction-and-engineering-contracts/>> page 3 accessed on Oct 30, 2019

¹⁸⁷ Ahmed Ibrahim, 'Aims of New Standards Forms' slide 56-58 (Oct 27, 2018) (Presentation at the British University of Dubai for Construction Law II course MSc in CLDR)

¹⁸⁸ Article 246 (1) of the UAE CTC, Federal Law No. 5 of 1985 which states that '[t]he contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.' [translated]

¹⁸⁹ Article 106 of the UAE CTC, Federal Law No. 5 of 1985 which states that '(1) A person shall be held liable for an unlawful exercise of his rights.(2) The exercise of a right shall be unlawful: [irrelevant text omitted] (c) if the interests desired are disproportionate to the harm that will be suffered by others [irrelevant text omitted]' [translated]

¹⁹⁰ Article 318 and 319 (1) of the UAE CTC, Federal Law No. 5 of 1985 which state that '[n]o person may take the property of another without lawful cause, and if he takes it he must return it.' [translated] and '[a]ny person who acquires the property of other person without any disposition vesting ownership must return it if that property still exists, or is like or the value thereof if it no longer exists, unless the law otherwise provides.' [translated]

¹⁹¹ Article 1028 (b) of the UAE CTC, federal law no.05 of 1985

¹⁹² See article 750 (2) of Egyptian Civil Code issued under the Law no. 131 the year of 1948.

Private transactions, including the international commercial ones, are based on the interaction between the contracting parties, wherein a required service, good, or other things that are of value is exchanged with the appropriate remuneration or equivalent services, goods,..etc. The contracting parties are always looking for a relatively quick, inexpensive, and effective way to wrap up any dispute in a discretionary manner to move on to their next transaction with the expectation that the state law will respect their agreement and enforce it accordingly. Every judicial system has its pros and cons, but, the main reason for opting out of the judicial system is its limitation in respect of disputes with international nature. On the other hand, arbitration has provided a rather flexible way to conclude the contracting parties' disputes, a reason why arbitration is the selected dispute resolution mechanism in many standard types of contracts, if not all. It is also expected that the states' legal system will provide a suitable legal framework for the arbitration process.

The UAE has drastically improved the working framework for arbitration by the issuance of the new arbitration law ¹⁹³ prevailing the obsolete procedural provisions in the law ¹⁹⁴ which caused a lot of redundant legal debates in interpreting the old provisions of the law, where the international arbitration community has already concluded such matters. The conditions pertaining to the commencement of arbitration, whether a cooling-off time limit or other alternative dispute resolution mechanism, are essential to the operation of the arbitration agreement, the source of arbitral tribunal jurisdiction over disputes, and are expected to be upheld by the state judicial system. Unfortunately, the UAE Laws are silent with respect to

¹⁹³ UAE federal law No.06 of 2018 which is published in the federal gofficial gazette no. 630 of May 15, 2018

¹⁹⁴ Articles 203 to 218 of the UAE Civil Procedural Law , Federal Law no.11 of 1992 ['CPC']

condition precedent clauses and the concept of premature arbitration, also, the UAE courts have an unclear position regarding this matter, where it seems that the courts are willing to uphold ADRs such as an expert decision or adjudication, but on the other hand, not willing to respect the agreed-on time limit to reach amicable settlement, for example. Thus, not giving any legal value to such period and causing no consequences of not abiding by it.

It is important to differentiate between arbitration clauses limited by a period to commence arbitration proceedings, wherein the failure to abide by such period may render the dispute outside of the arbitration agreement jurisdiction, and arbitration clauses having a time-barring effect to the pursual of the right itself. In both cases, the UAE courts will overlook such clauses and negate any effect thereof, however, the arbitral tribunal might rule against its jurisdiction in the former case, negative jurisdictional award. In such event, the aggrieved party will not be able to recourse to arbitration again and its only option will be recouring to the state courts and, in my opinion, it is frustrating to forfeit the aggrieved party's right to arbitration due to ignorance of the arbitral tribunal of the UAE laws. Unfortunately, the UAE arbitration law has failed to address the matter of challenging the negative jurisdiction awards.

The effort and time consumed by the legislators to identify law gaps, predict scenarios, and look ahead to adverse effects of law provisions during its drafting in an attempt to reach perfection are clear and highly appreciated by the society. However, the current pace of development in all aspects of life is beyond the imagination of anyone and it is essential to keep up in such race, '[i]f not the first, then the second and last will have the same fate'

[translated] ¹⁹⁵. In my opinion, the law should not be rigid and imagine if the scientific society were not rigid about the matter of earth being a sphere, the entire world would have been in a different position now. Accordingly, and in pursuit of keeping up with the international arbitration pace, I recommend the establishment of a legal reform commission in the UAE, as an endeavour of having more dynamic laws compatible with UAE position as an arbitration hub in the region.

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