



**TYPES VALIDITY OF ARBITRATION
AGREEMENT UNDER UNITED ARAB EMIRATES
LAW**

أنواع إتفاقيات التحكيم في دولة الإمارات العربية المتحدة

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Abstract of the Dissertation

The theme of this dissertation is a detailed study about the conditions required to validate any arbitration agreement under the United Arab Emirates Law. It deals with the basic characteristics and definitions of the arbitration agreement as well as how is it valid under the UAE law. This thesis will also discuss the advantages and the disadvantages of the arbitration in UAE.

The paper also aims to present the types of the arbitration agreement in UAE and the requirements of each agreement to be valid as it will also examine the existing legislation and laws along with some Court of Cassations judgments. The paper will as well mention the rules of the several arbitration institutions in UAE regarding the different types of the arbitration agreement and their requirement.

Any arbitration clause may be defective, as this paper will also state the different types of the defective arbitration clauses and how to avoid it by using standard arbitration clauses.

ملخص الرسالة العلمية

يختص موضوع أطروحة الدكتوراة هذه بدراسة تفصيلية عن صلاحية اتفاق التحكيم بموجب قانون الإمارات العربية المتحدة وتتعامل مع الخصائص الأساسية لاتفاق التحكيم وخصوصاً تعريفات أنواع اتفاق التحكيم الأربعة ومدى صلاحيتها وفقاً للقانون الإماراتي. حددت هذه الرسالة أيضاً مزايا التحكيم وعيوبه بدولة الإمارات العربية المتحدة.

هذا ويهدف البحث أيضاً إلى عرض أنواع اتفاق التحكيم بالإمارات العربية المتحدة وما يقتضيه كل اتفاق حتى يكون صحيحاً مع إلقاء الضوء على التشريع والقوانين الحالية وبعض أحكام محكمة التمييز وقواعد مؤسسات التحكيم المتعددة بالإمارات العربية المتحدة بخصوص الأنواع المختلفة لاتفاقيات التحكيم ومتطلباتها.

قد تعتري العيوب أي بند تحكيمي ، وسوف يختص هذا البحث أيضاً بتحديد الأنواع المختلفة من بنود التحكيم المعيبة وكيفية تجنب هذه البنود بوضع بنود التحكيم القياسية

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CHAPTER ONE

1.1 Introduction

Arbitration by itself is not old but it had an enormous growth and arbitration started to be more common since the adoption of the New York Convention and it grew and got more popular with the adaptation of the UNICTRAL Model law in 1985. In the Middle Ages arbitration was used in Greece and Rome in the early ages to resolve the commercial and real property disputes. In the Middle Ages, Mediterranean traders used arbitration to settle their disputes when the disputes arose far from their home or country. In Saxon times arbitration took place in England; however the courts would not enforce the arbitration awards, to solve this issue and to enforce an arbitration award the parties had to start the action by referring the dispute to the court and to receive a request from the judge to refer a part or the whole dispute to the arbitrator's award. All common-law jurisdictions received a rich legal system from England during the colonial period. Today the arbitration is developed in various common-law countries since the end of the colonial period. Many countries started slowly to set the regulations for arbitration and the power and rights of the arbitrators as the courts were also assisting in the development of the law of arbitration. Under the English Law the first step to put the rules and procedures of arbitration into statute began in 1698 with the first Arbitration Act, which was built on the premise that it was an "act for resolving the disputes between the traders and others who are willing to end controversy, suit or quarrel by arbitration whereby they oblige themselves to submit to the award or umpirage of any persons agreed by the parties"¹. This was the first step towards the current act "The Arbitration Act 1999" which brought that there are essentials to the process that has to be applied for arbitration under the English Law. As the arbitration was developing rapidly many treaties and conventions related to arbitration came into force. Any type of any arbitration agreement may be enforced, the arbitration agreement shall be valid whether for an existing dispute or any future disputes, the subject matter shall be capable under the law of the country in which the award is required to be enforced, the award shall be final in the country which it has

¹ arbitration into statute began in 1968

been made as the arbitration award shall not be subject to appeal or open to opposition and that the enforcement of the award is not contrary to the public policy or to the principles of the law in the country.

The New York Convention entered into force as it mentioned that any country that signed the convention shall enforce the arbitration awards of other countries but on the same terms and conditions in which they would enforce their own judgment. Today the New York Convention is been signed and ratified by up to 147 countries and it has been one of the most successful commercial treaties in the world². Arbitration today has been one of the most preferable methods of resolving disputes in many international jurisdictions. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules was adopted in 1976 and was revised in 2015. The UNCITRAL was revised in order to meet the changes in the arbitration practice as the revision enhanced the efficiency of the arbitration without altering the original structure. UNCITRAL Arbitration Rules deal with the arbitration procedures, liability, arbitrations, experts appointed by the arbitral tribunal and all the main laws from the commencement of the arbitration until enforcing the award³.⁴ Since arbitration grew fast as there was a lot of support from the judicial systems and the intentions of the parties to resolve their dispute through arbitration as different types of arbitration have emerged. The English Arbitration Act does not specify the type of disputes that shall be resolved by arbitration but relies upon the existence of the arbitration agreement and not relying on the type of disputes. Going to the Islamic Phase, especially in family matters arbitration was one the most popular Islamic means to resolve a family disputes. As mentioned in the Quran “If you fear a breach between them (Husband and Wife), then the appointment of arbitrator shall arise, one from his family and the other from hers”. This shows us the significant of arbitration in the old century and in many religions. The United Arab Emirates (UAE) is federal of seven emirates established in 1971. All of the emirates with exception of Dubai and Ras Al Khaimah have retained their own courts from the federal judicial system. The UAE laws are operated under a civil law system as the civil court system consists of three tiers, Court of First Instance, Court of Appeal and Court of Cassation. Sharia’a is the main source of legislation in the UAE as Sharia’a is derived from two main sources which

² International commercial arbitration – New York Convention, by Giorgio Gaja.

³ The UNCITRAL Arbitration Rules: A Commentary, By David A. Caron, Lee M. Caplan, Second Edition.

⁴ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

are Quran and **Sunna**⁵. Arbitration in UAE takes place in several main institutions such as Dubai International Financial Center court which was established in 2004 and has its own jurisdiction which is based on the common law. The DIFC has its own arbitration law as well in which the articles regarding arbitration in the Civil Code Procedure (CPC) will not apply to the arbitration taken place in the DIFC. The second institution in Dubai is the Dubai International Arbitration Center, which is a Dubai's leading arbitration institution and it was established in 1994 as the "Center for Commercial Conciliation and Arbitration. DIAC produced its own laws in 2007 and the majority of the arbitrators who are practicing in the center are from different nationalities. The Third Arbitration Center is the DIFC-LCIA Arbitration Center which was established in February 2008 and it is based in the DIFC. The DIFC-LCIA is a partnership between the London Court of International Arbitration and DIFC and the rules are adopted mostly from the LCIA with minor changes to reflect particular needs of the DIFC-LCIA. The rules are evenly applicable and compatible with both the civil and common law systems⁶. One of the rare centers in UAE which is an Islamic Center is the, The International Islamic Center for Reconciliation and Commercial Arbitration (IICRCA). IICRCA is a dispute resolution forum for the Islamic Finance Industry which is based in Dubai. The center was established mainly to assist in resolving financial and commercial disputes which may arise between financial or commercial institutions or between such institutions and their clients or third parties through reconciliation or arbitration in accordance with the principles and rules of the Islamic Sharia. In Abu Dhabi the only center for arbitration is the, The Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC) established in February 1993. There are regional arbitration centers, in Sharjah and Ras Al-Khaima, Such as Sharjah International Commercial Arbitration Center and the Ras Al-Khaima Center of Reconciliation and Commercial Arbitration. The United Arab Emirates is a fast growing country and the market is growing day by day. Many people in UAE have their own businesses and companies and as disputes occur the parties decide to resolve their dispute through arbitration as it is faster than litigation.⁷ The growth of the international trade and companies has brought a wider range of disputes as many business people in the UAE are seeking to resolve their dispute through arbitration and not litigation as their preferable language

⁵ Debating Sharia: Islam, Gender, Politics, and Family Law Arbitration, by Jennifer A. Selb, Univeristy of Toronoto Press Incorporated 2012, Toronto Buffalo London, Printed in Canada, Page 5.

⁶ http://www.afridi-angell.com/items/limg/WAR_UAE-K.-S.-Ali-A.-Massey.pdf

⁷ <http://www.wwhgd.com/newsroom-news-71.html>

is English and not Arabic. Today arbitration is one of the most a popular form of alternative dispute resolution as the courts congestions; cost and time are increasing day by day. Arbitration is one of the most formal mechanisms to resolve disputes after litigation as it may be used in both private and public sectors. Arbitration is a mechanism of resolving disputes outside of the court in which a neutral third party issues a binding decision. As we knew the history of arbitration it is important to know the types of arbitration agreements in order to arbitrate. As any other agreement, there are requirements for an arbitration agreements, advantages and disadvantages of arbitration, and types of arbitration agreements.

Like many other countries, the UAE is keen to take necessary measures in developing the arbitration field in order to resolve disputes to keep its vibrant economic and social environment developing. In order to achieve these objectives, the country uses four types of arbitration agreements to resolve a dispute.

The dissertation will discuss the types and requirements of the arbitration agreement, how they implemented in the UAE, advantages and disadvantages of the arbitration and the four types of arbitration agreement in UAE.

The methodology of this dissertation will be doctrine .Doctrinal legal research, as conceived in the legal research domain, is research about a legal principle, or legal rule etc. I used the doctrine as a legal method of analysis about arbitration agreements and explained each type. It will be focused more on books and articles regarding the arbitration law in UAE. The types will also be supported by the judicial judgments in UAE and the legislation of the UAE including the centers in which the arbitration takes place in. Doctrine method was also chosen as two types of arbitration agreement were issued from the Court of Cassation.

CHAPTER TWO

2.1 Advantages of Arbitration

Arbitration offers several attractive advantages that make arbitration a preferred mechanism for resolving a dispute than court litigation. These include:

- 1- **Confidentiality of the Proceedings:** Most parties choose arbitration over litigation because the parties are concerned about confidentiality since these issues in disputes might affect the parties reputations or trade secret. As litigation takes place in courts and in public halls as everyone will be able to attend, but arbitration is more confidential as the parties are in a private hall while the hearing is taking place. This is important where the disputes involves sensitive business information such as patents or other business practices which the parties may not want to revealed to third parties.
- 2- **Flexibility:** Flexibility of the arbitration differs from international courts to national courts. The judge in the national courts shall follow the law but in arbitration the parties have their right to discuss on the procedures, arbitration seat as the parties may also discuss which procedure shall be suitable for both. Article 15 of ICC Rules provides: “The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing that, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration”⁸. The same rules are to be found in AAA ICDR Rules Article 16(1); LCIA Article 14(2); NAI Arbitration Rules Article 23(2); UNCITRAL Arbitration Rules Article 15(1); WIPO Arbitration Rules Article 38(a)).
- 3- **Speed of the Arbitration:** Most commercial cases or business parties intend to finalize and resolve their dispute as quickly as possible to ensure the profits of the business and to keep the business going. Litigation or when a dispute is resolved by

⁸ ICC rules.

litigation the courts are usually busy with numerous amounts of cases each day as the judges take time to issue a judgment.

- 4- **Availability of specialist personnel in the settlement process:** One of the areas in international arbitration where the parties have advantage more than the court system is the extent of their power in the ability of selecting the arbitrators in resolving their disputes, of course there are many experienced and qualified judges in the national courts but the judges in the national courts deal with a wide range of cases and will need to balance the limited resources of the court system between their caseload, as they may not have dealt with any dispute arising in the context of international trade and the complexity of the cases which will definitely require a high degree of experience and knowledge from the international dimension. More often, the national judges may be influenced by the national cases and or laws than having more knowledge about other laws. The Parties in arbitration have the right to select the arbitrators in their dispute who has knowledge or experience or may be an arbitrator who is specialized in the specific dispute. The specialist might at the same time speed up as the dispute is within his experience and knowledge.⁹
- 5- **Parties have control on the procedures:** In ad hoc arbitration, the parties choose the procedure of the arbitration as the parties have more freedom to follow what they prefer and the procedures which will help them resolve the dispute faster. In institutional arbitration the parties follow the institutional rules they choose for the arbitration to take place even though they may have limited discretion to modify some of the rules.
- 6- **Neutrality:** National courts judges or most of the national court judges are usually drawn from the nationals of the state even though most of them they might not really have the knowledge, experience and the ability to handle the disputes that arise internationally in which the parties were foreigner parties and the dispute related to the international business and transactions. The national courts rules and procedures are in accordance with the law of the state in which the local judges are more familiar with. Arbitration tribunal is thought to be neutral in which neither of the party have

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<http://www.mondaq.com/x/416416/international+trade+investment+/Advantages+of+international+commercial+arbitration>

connection with the arbitrators nor the tribunal is independent from the local court and influence.

- 7- **Enforcement:** Enforcement of the arbitration awards is one of the greatest advantages of arbitration as the parties have the right to enforce the arbitration award under the New York Convention. Most of the countries are now signatories to the Convention and many more countries intending to join is growing. Enforcing the award of one jurisdiction in another jurisdiction is possible but the ability to do is not guaranteed and the procedure is often complex and slow.¹⁰

2.2 Disadvantages of Arbitration:

1. **Cost:** The significant disadvantage of arbitration in UAE is cost. The cost of arbitration is high although it is becoming more like court proceedings in terms of how the evidence is submitted, the experts etc. Additional costs might be incurred in arbitrations as the parties choose more than one arbitrator. The venue might also be costly as in arbitration the parties are paying for the venue unless it was an institutional arbitration in which the arbitration might be held in the institutions hall unless the parties decide that the arbitration shall be conducted in another venue.
2. **Speed:** Arbitration are mostly faster than litigation but now a days where disputes are complicated and a lot of studies and investigations shall be made as well as a lot of experts are included then arbitration might in this case take more time. Arbitration usually takes more time if the parties choose that the arbitration seat is outside of the country as the arbitrators might need to visit the site especially if the dispute was construction disputes or if the parties choose the arbitration shall be conducted in a different country.
3. **The decision is binding on the parties:** Incase any of the parties didn't agree on the arbitrators decisions, the rights to appeal are limited even if the arbitrators made a mistake in the procedure or in law. However, there are a few limitations in order to challenge the arbitration award although the exact limitations are difficult to define except in general terms.

¹⁰ https://www.mayerbrown.com/files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note_Duncan_Proc-Cons-Arbitration_oct12.pdf

4. **Limits on tribunal's power to grant preventative or interim remedies:** Since the parties have the right to give the tribunal most of the powers especially in ad hoc arbitration as they can also give some of court power in the tribunal, but the tribunal do not have the power to grant penal sanctions. If the tribunal has the power to grant preventative such as the power to freeze assets, there might be a need to submit an application to the national court if the applicant believes that the tribunal order will be ignored unless it is backed up by a penal sanction. A party seeking pre-emptive remedies will need to make an application to the court as remedies may not be obtained without the court.

2.3 Agreement to Arbitrate

The agreement to arbitrate is one of the essential that might be defined as the basic of the international arbitration as it records the consent of the parties in order to submit any arisen dispute or any dispute that may arise in the future to arbitration, this process depends on the existence and the validity of the arbitration agreement. In UAE there are four types of arbitration agreements.

The DIAC and DIFC defined the arbitration agreement:

Article 1(1) DIAC rules states:

"Arbitration Agreement" means an agreement in writing by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them; an Arbitration Agreement may be in the form of an arbitration clause or in the form of a separate contract.¹¹

Article 12(1) DIFC laws:

An "Arbitration Agreement" is an agreement by the parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal

¹¹ DIAC rules.

relationship, whether contractual or not. An Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.¹²

The above provisions mention two types of arbitration agreements: the arbitration clause and the submission agreements, which could be said adopted under the UAE law. Apart from these two types we also have Arbitration by incorporation and arbitration by subrogation adopted from the Court of Cassation judgments and are being implemented and used. The CPC stipulated the Law of arbitration which will govern the arbitration procedure from Article 203 up to Article 216 as the CPC rules do not apply to arbitrations which are administrated by DIFC.

2.4 Evidencing the Arbitration Agreements

1. Evidencing of the arbitration agreement depends heavily on some requirements that must be met in order to ensure it is in compliance with the legal jurisdiction and requirements. Without those requirements, the arbitration clause cannot take place and hence the court jurisdictions will prevail. These include Writing. The arbitration agreement shall be in writing. Article 7 of the UNICTRAL Model Law provides that the arbitration agreement shall be in writing. Article II.I of the New York Convention states “ Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. Article II (2) of the New York Convention states: “The term agreement “agreement in writing” shall include an arbitral clause in

¹² DIFC rules.

a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract).¹³

Article 12(4) of the DIFC arbitration law states: “ An Arbitration Agreement is in writing if its content is recorded in any form, whether or not the Arbitration Agreement or contract has been concluded by conduct or by other means. Article 12(5) states: “The requirement that an Arbitration Agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”.¹⁴ Article 203 (2) of the UAE CPC law states “no agreement for arbitration shall be valid unless evidenced in writing”.¹⁵ The arbitration agreement in UAE cannot be concluded by a silent and non-consenting party, consent to arbitrate cannot be indirectly or by a silent party as this is the difference between the Civil Law Jurisdiction and the Common Law Jurisdiction, in Civil Law the writing is condition whereas under the UK law, a verbal agreement is considered as a valid agreement.

The Dubai court Cassation Appeal Number: 147/ 2005, regarding the arbitration agreement in writing as the court held that:

“It is established that arbitration is the public agreement of litigants that the arbitrator and not the courts shall have jurisdiction to settle their disputes, whether arbitration agreement comes in the form of a clause or an agreement. Arbitration agreement may only be established in writing, whether by an instrument signed by both parties or by letters, telegraphs and other written communications exchanged among the parties. Any referral in the primary contract to the document including arbitration clause shall be deemed as arbitration agreement; if the referral is clear and explicit to approve such condition. The impact of referral may only be achieved if it includes assignment of arbitration clause included in the document, subject of referral. However,

¹³ New York Convention.

¹⁴ DIFC laws.

¹⁵ Article 203, CPC.

if referral to the said document is no more than a public referral to provisions of that document without any assignment of the said arbitration agreement in a manner informing the parties of its stipulation within the document, the referral may not extend to arbitration and no arbitration may have been agreed upon among parties to the contract. It is established that if the contract has appendices or schedules, it is not provided that parties must sign them if the contract stipulates that those schedules and appendices are part and parcel of the contract signed by the parties; considering those appendices and schedules as mere detailed statement of substantial matters agreed upon among the parties. However, if such appendices included an exceptional condition like arbitration clause, such condition may not be applicable on the parties unless they have signed such appendices.”¹⁶

2.5 Validity of Arbitration Agreement

2. **Capacity:** The parties entering into an arbitration agreement must have a legal capacity in order for the contract to be valid, otherwise the contract is invalid. Capacity is an important requirement; capacity means that it is mandatory for the party to the contract to have the legal capacity to enter into any contract as well as the arbitration agreement. If the party entered into the arbitration agreement has no capacity, the provision of the New York Convention or the Model Law where applicable may be brought up either at the beginning or at the end. At the beginning, the requesting party may ask the arbitrator to stop the procedures on the basis that the arbitration agreement is void, inoperative or incapable of being performed. At the end of the arbitration, the requesting party requests from the court to refuse the enforcement of the arbitration award on the basis that one of the parties is under some incapacity and is not capable to enter into an arbitration agreement under the applicable law as stated in Article 41(2) of the DIFC law “a party to the Arbitration Agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication thereon, under the law of the DIFC”. And Article V (2) of the New York Convention states:

¹⁶ Dubai Court of Cassation, Appeal Number 147.2005 – Dated 19-12-2005

“(a) The parties to the agreement referred to article in II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law which the parties have subjected it or, failing an indication thereon, under the law of the country where the award was made.¹⁷ The rules governing the capacity of the parties depends on the law of the contract in which it differs from one country to another. The capacity of the party depends upon each law as in UAE; the party shall be above 21 and shall not have any mental disorder or mental infirmity.¹⁸ This is the age statutorily determined for a person to be legally entitled to dispose of his/her rights as the legislator considered it as an important requirement when parties enter into an arbitration agreement. This is also required under Article 203(4) of the Civil Procedure Code which states that “[a]n arbitration agreement may be made only by the parties who are legally entitled to dispose of the disputed right” Dubai Court Cassation, Civil Cassation No 209/2004, recourse no 22/2005 Jan 22,2006

1. **Special Power of Attorney:** As per the UAE law the person entering into an arbitration agreement shall have the capacity and incase any other party is willing to enter the arbitration agreement on behalf of the party shall have a special power of attorney. If the party signed the contract without a special power of attorney the arbitration agreement is invalid.

In Dubai Court of Cassation Appeal 220/2004 regarding the special power of attorney the court held that:

“ It is inadmissibility to extract the consent from the silence of any of any party while replying on the arbitration tender unless he admits his consent to enter into an arbitration agreement – the arbitration agreement shall be signed by the parties with capacity to act in the right of the assignee. The court held that even in Limited Liability Companies while entering the arbitration agreement the director of the LLC Company has the capacity to enter into an arbitration agreement for the companies name and account within the activity of the company. Any other party may enter the arbitration agreement on behalf of the director with a special power of

¹⁷ DIFC Law.

¹⁸ Article 85(2) of the UAE Civil Code.

attorney.”¹⁹

The arbitration agreement shall be well drafted as the person who signs shall have the full capacity to enter into an arbitration agreement or another party may sign on behalf of him by a special power of attorney.

Arbitrability: Subject of the dispute shall be arbitrable. The subject of the dispute shall be mentioned in the contract and specify the dispute.

1. Article 203(3): The subject of the dispute shall be specified in the terms of reference or during the hearing of the suit even if the arbitrators were authorized to act as amiable compositors; otherwise the arbitration shall be void.

In UAE not all matters are permitted to be resolved through arbitration such as :

- Disputes which are considered exclusively in the courts, such as criminal cases as it is the Public Prosecutors role who represents the country and society.
- Labor disputes related (Federal Law number 8 of 1980) to the competence of the Ministry of Labor and Social Affairs;
- Disputes that arise in relation to commercial agencies (Law number 18 of 1981) that are under the responsibility of a special commission of the Ministry of Economy and Trade;
- Disputes related to contracts with the governments of the emirates and their institutions;
- Disputes related to leasehold estates are initially considered by the real estate commissions in the municipalities of all emirates;
- Family Cases

¹⁹ Dubai Court of Cassation, Appeal No. 220/2004.

CHAPTER THREE

Types of Arbitration Agreement

3.1 Arbitration Clause

An arbitration clause is one of the types of the arbitration agreement in UAE that involves an addition clause to the existing contract which stipulates that any dispute that may arise under this contract or any dispute occurs it shall be resolved through arbitration. The clause usually states any dispute that arises shall be resolved through arbitration as the agreement to arbitrate is prior to the dispute occurs. The arbitration clause shall be valid in order to resolve any dispute through arbitration. Authority of the parties is one of the important requirements in order for the arbitration to be valid, the parties must be entitled to sign the agreement and in case a person signs on behalf of another party a specific power of attorney is required and not a general power of attorney.

In United Arab Emirates as stated in the CPC in Article 203 (1) 1 (the parties to a contract may generally stipulate in the basic contract or by a supplementary agreement that any dispute arising between them in respect of the performance of a particular contract shall be referred to one or more arbitrators and may also agree to refer certain disputes to arbitration under special conditions).

As the arbitration clause is mentioned the parties may intend to resolve the dispute either by the ad hoc arbitration or the institutional arbitration. In the ad hoc arbitration the parties have more freedom to choose the procedure of the arbitration and the clauses. The institutional arbitration the parties must follow the institutional clauses or the clauses that are recommended by the institutional and the institutional procedures.

The arbitration clause in the ad hoc arbitration shall be informative and clear as it shall indicate the following points leaving no reasonable doubt:

1. **Number of arbitrators:** Article 10 of UNICTRAL Model Law states that : the parties are free to determine the number of arbitrators. (2) Failing such determination, the number of arbitrators shall be three.) Specifying the number of the arbitrators in the contract is more advisable as the parties may choose a sole arbitrator or three (number of arbitrators must be odd numbers).²⁰ Article 206 of the CPC (2/b) states” If there are more than one arbitrator, the number shall at all time be odd. ²¹

2. **Appointment of arbitrators:** Article 11 of UNICTRAL Model Law states that :The Parties are free to agree on a procedure of appointing the arbitrator or arbitrators subject to the provisions of paragraph 4 and5 of this article and failing such submission in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6. Thus, each party appoints an arbitrator in cause of three arbitrators, the chairman may be appointed by agreement, by party-appointed arbitrators, or third party or authority. ²²Article 206 (1/A) states: An arbitrator may not be a minor, bankrupt, legally incapacitated or deprived of his civil rights due to a criminal offence unless he has been rehabilitated. Article 3 of the DIFC law states: (1) The parties are free to determine the number of arbitrators provided that it is an odd number. (2) If there is no such determination, the number of arbitrators shall be one.²³ Under DIAC rules and regulations Article 8 states: (1) The Tribunal shall consist of such number of arbitrators as has been agreed by the parties. If there is more than one arbitrator, their number shall be uneven. (2) Where the parties have not agreed on the number of arbitrators, the Tribunal shall consist of a sole arbitrator, except where the Centre in its discretion determines that, in view of all the circumstances of the dispute, a Tribunal composed of three members is appropriate.²⁴

²⁰ Article 10, UNICTRAL Model Law.

²¹ Article 206, CPC.

²² Article 11, UNICTRAL Model Law.

²³ Article 3, DIFC rules.

²⁴ Article 8, DIAC rules.

In Dubai Court of Cassation, Appeal 87/2009 regarding the appointment of arbitrators the court held that:-

“As derived from the papers and the facts, the parties into an agreement agreed in case of any dispute arises between the party it shall be resolved through arbitration. One of the parties failed to appoint an arbitrator and a case filed in order to appoint an arbitrator. The court judgment mentioned “The above objection is invalid since the provision of first paragraph of article 204 of Civil Procedures Law stipulates that: "If a dispute arises between the parties prior to the execution of an agreement between them to refer the same to arbitration, or if one or more of the nominated arbitrators refuses to act as such, withdraws, is dismissed, has his appointment revoked, or is prevented from acting due to an encumbrance, and no agreement exists between the parties in this respect, the court which has jurisdiction to consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties filed in the normal procedure for filing a suit. The number of arbitrators appointed by the court shall be equal, or complimentary, to the number agreed between the parties to the dispute". This indicates that if the agreement including arbitration clause has no provision to identify number of arbitrators, the method of their appointment and the body responsible for appointment, the court originally competent for consideration of the dispute shall appoint the necessary number of arbitrators at request of any litigant. However, if arbitration clause stipulates steps to resort to arbitration, number of arbitrators and the method of their selection, without stating the body responsible for such selection and if litigants fail to nominate arbitrators or if one of them abstains from appointment of its arbitrator, the court competent for dispute consideration shall, upon request of any litigant, appoint arbitrators in accordance with parties' agreement under arbitration clause. Clause 67 of contracting agreement; support of the case is titled "disputes settlement- arbitration" and stipulates that "all disputes and differences related to engineer's decision (if any) which didn't become final or binding as above, shall be settled by an arbitrator to be agreed upon among the parties. Failing to reach an agreement upon a specific arbitrator shall refer the disputed matter or matters to arbitration committee formed as follows: Both the employer and the contractor shall appoint a member to the committee, then the two appointed members shall agree to appoint a third member to chair the committee. If they fail to agree upon the third member

within 15 days as of date of their appointment, such third member shall, upon request of any party, be appointed by Dubai Civil Court. Awards of arbitration committee shall be final and binding on all parties".²⁵

3. **Ad hoc or institutional arbitration:** Whether the arbitration chosen by the parties is ad hoc or institutional, the parties shall clearly identify their intentions regarding the basic information's such as if it was ad hoc the parties shall mention the procedures in which they prefer the arbitrator to follow and etc. In case the parties chose institutional the parties shall clearly identify which institutions because the institutions rules and regulations will be obligatory to the party.²⁶

4. **Seat of arbitration:** The parties to an agreement have the right to choose the place in which the arbitration will take place but the parties must choose a convenient place for them, arbitrators, witness and etc. Usually it is preferable to choose the place in which the dispute arises. It is significant to rely on the seat of the arbitration on the place of the site or dispute where the entire process shall take place. Article 20 of DIAC rules states: (1) The parties may agree in writing on the seat of the arbitration. In the absence of such a choice, the seat of arbitration shall be Dubai, unless the Executive Committee determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate. (2) The Tribunal may, after consultation with the parties, conduct hearings or meetings at any place that it considers appropriate. The Tribunal may deliberate wherever it considers appropriate. (3) The award shall be deemed to have been made at the seat of the arbitration.²⁷ Under DIFC Article 27 states: (1) The parties are free to agree on the Seat of the Arbitration. In the absence of such agreement, where any dispute is governed by DIFC law, the Seat of the Arbitration shall be the DIFC. (2) Notwithstanding the provisions of paragraph (1) of this Article, the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any

²⁵ Dubai Court of Cassation, Appeal 87/2009, Dated 17-05-2009.

²⁶ International Arbitration and Forum Selection Agreement: Drafting and Enforcing, by Gary Born, Page 62.

²⁷ Article 20, DIAC.

place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.²⁸

5. **Applicable procedural law:** In institutional arbitration in case the parties did not agree to apply the rules of the arbitration or the parties approved to apply the arbitration rules but the rules are silent on certain matters then the UAE CPC shall be applied. In all cases, any arbitration takes place in UAE; it must follow the mandatory rules laid down in the arbitration chapter of the UAE CPC. This is because any arbitration award issued in UAE will not be enforceable until the UAE local courts ratifies it, and when it comes to the court the judges rules set forth in the arbitration chapter of the UAE CPC.
6. **Nature of hearing:** Usually the arbitration hearings are based on documents in which each party submits his documents to the arbitrator and the other party may reply. The parties shall mention if they are willing to have the arbitration oral or hearing of any witness or the arbitrator may as well during the arbitration procedure ask for any witness he might need in order to issue his award.
7. **Language:** Article 22 of UNICTRAL Model law States that: “(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party any hearing and any award, decision or other communication by arbitral tribunal. (2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal)”.²⁹ Article 29 of DIFC rules states that: “The parties are free to agree on the language or languages to be used in the arbitral proceedings. In the absence of such agreement, the Arbitral Tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall thereafter apply to any written statement by a party, any hearing and any award, decision or other communication by the Arbitral Tribunal. (2) The Arbitral Tribunal may order that any

²⁸ Article 27, DIFC rules.

²⁹ Article 22, UNICTRAL Model Law.

documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the Arbitral Tribunal”.³⁰ In UAE there isn't any specific language the parties have to stipulate and Arabic is not a necessary language as many arbitration in UAE are conducted in English or depending on the request of the parties. The language of the arbitration must be mentioned; even if the documents were not under the chosen language the documents may be translated. Usually it is important as some documents might need a translation as it will be easier for the arbitrator to rely on one language which is suitable for all the parties.

8. Applicable substantive law: To avoid the dispute as to what law shall govern the contract itself; the parties must specify the applicable substantive law. In the absence of any express stipulation by the parties the arbitrators will look to the applicable arbitration rules and the rules of private international law of the place of arbitration. Article 33 of DIAC rules states that: (1) The Tribunal shall decide the dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Tribunal determines that the parties have made no such choice, the Tribunal shall apply the law(s) or rules of law which it considers to be most appropriate. (2) Any designation of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.³¹

9. Place of Arbitration: Article 20(1) of UNICTRAL Model Law states that: (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by arbitral tribunal having regard to the circumstances of the case, including the convenience of the party. (2) Notwithstanding the provisions of paragraph 1 of this article the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for the consultation among its members. For hearing witness, experts or the parties or for inspecting of goods and other property or documents.)³²

³⁰ Article 29, DIAC rules.

³¹ Article 33, DIAC Rules.

³² Article 20, UNICTRAL Model Law.

10. **Sovereign immunity:** Where one of the parties is a state entity or state-owned entity they may wish expressly to place a clause in the agreement whereby any possible right to claim sovereign immunity is expressly waived by that party. On the other hand, where such entity has entered into a commercial agreement sovereign immunity to avoid arbitration is unlikely to be successful defense to avoid the jurisdiction of the arbitrators.³³

³³ Foreign State Immunity and Arbitration, By Dhisadee Chamlongrasdr.

3.2 Arbitration Deed / Submission Agreement

Submission agreements are new agreements made after the dispute has arisen in which is attached to the main agreement which did not mention an arbitration clause. Most of the times the contracts are signed quickly and the parties did not agree on arbitration in their original agreements, but as the dispute arises the parties decide to resolve the matter through arbitration rather than court in which there shall be a valid Arbitration Deed.³⁴

Example: Parties (name and address of the parties), herewith agree to settle their dispute or matter (accurate description of the matter or dispute), by arbitration in accordance with the provisions and rules of (the rule which the dispute will be settled or by the institution of It is an institutional arbitration) by one or more arbitrators.

Any submission agreement should contain if not all of the basics elements of an arbitration agreement. In addition it should contain a definition or at least the dispute that shall be referred to arbitration and in addition to any informative points as it should be mentioned in the main agreement such as language, number of arbitrators, place of the arbitration centre, applicable law, governing law, mechanism to contribute the arbitral tribunal or it will be as the procedural law. Any submission agreement which does not clearly mentions the details of the dispute which shall be referred to arbitration may be declared later on as null and void. Submission agreements are less common than arbitration clause usually the original agreements stipulated the method of resolving the disputes.³⁵

In Dubai Court of Cassation Appeal No. 274 /1993, the court defined the submission agreement as: “If the parties didn't- explicitly- agree, whether under the primary contract or the appended arbitration agreement, to jurisdiction of an arbitrator or of a number of arbitrators to take temporal, precautionary or urgent procedures, their agreement to arbitration as for dispute arising out of arbitration or execution of the primary contract shall not grant the arbitrators the power or jurisdiction to take those procedures or to settle such matters and shall not prevent litigants from resorting to courts to order with procedures or to settle the said matters since courts has the general and original jurisdiction.

³⁴ Comparative Law of International Arbitration, By Jean-Francois Poudret, Sebastien Besson, Page112.

³⁵ International Arbitration, by Redfern and Hunter, Sixth Edition.

Whereas receivership, as provided by article 29 of Civil Procedures Law of urgent matters, is intended to prevent an urgent risk that may be faced by the disputed object, thence unless parties to the contract agree explicitly under the contract or under the subsequent arbitration agreement upon arbitrators ' jurisdiction to settle the matter of receivership, the dispute thereon shall not fall within the scope of arbitration an shall not go beyond court jurisdiction.”

In light of the above, it is permitted to agree on an arbitration clause in a separate agreement after the dispute arises in UAE as this is a common type of agreement. ³⁶

³⁶ Dubai Court of Cassation, Appeal Number 374/1993, Dated 29-01-1974.

3.3 Arbitration Incorporated by Reference

According to statutory provisions like section 6(2) Arbitration Act 1996 and Articles 7 (2) UNICTRAL Model Law; it is possible to incorporate the arbitration clause from one agreement to another with the intention by the parties. The incorporation of the agreement to arbitrate by reference is generally accepted in international law as well as under the UNICTRAL Model Law, which explicitly accepts this method, regardless the New York Convention does not contain explicitly regulations regarding arbitration agreement incorporated by reference. In Many jurisdictions globally an arbitration clause may be incorporated by reference in which this tendency serves to simplify and resolve the dispute arisen through arbitration in which it will also be equivalent to the requirements of the international trade why resolving the dispute. In arbitration incorporated by reference usually there is an original contract or agreement with terms and references as it will be incorporated by reference to the second contract or agreement in which those terms include an arbitration clause, or the arbitration is mentioned under the dispute resolution clause. Many contractors globally used this method while drafting the construction agreements as it saves them more and at the same time it is safer for them as the terms of the contract may be incorporated by reference to the standard types of FIDIC as it may also be useful if the parties are foreign and they are intending to resolve their dispute through the domestic law. Especially now a day's people are willing to expand their business globally and at the same time to protect their right and obligations and this type of arbitration agreement will save them more time and keep them safer. Mainly in arbitration by incorporation the parties aren't concerned with one document alone but with at least two, one contract which mentions the arbitration clause and the other one which does not contain an arbitration clause but refers under the dispute resolution clause to the first agreement.³⁷

Article 7 (2) of the UNICTRAL Model Law Provides:

³⁷ Law of International Arbitration, Module 2, by Donald Valentine, Louis Barrington and Jason MCI Arb, Page 26.

“The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract”³⁸

Article 2 (2) of the New York convention and Art. 7 of the Model law, section 5 of the 1996 English Arbitration Act provides as follows:

1. 5 (1) – The provision of this part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this part only if in writing.
2. There is an agreement in writing.
3. If the agreement is made in writing (whether or not it is signed by the parties)
4. If the agreement is made by exchange of communications in writing, or
5. If the agreement is evidenced in writing
6. Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
7. An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
8. An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
9. References in this part to anything being written or in writing include its being recorded by means.³⁹

Requirements of Arbitration Incorporated by Reference

Arbitration by incorporation shall include the following in the arbitration main agreement or contract:

³⁸ Article 7 , UNICTRAL.

³⁹ Article 2, New York Convention.

1- The reference to the arbitration agreement shall be explicitly written

As any arbitration agreement shall be written to be valid, the reference to the arbitration agreement shall be explicitly written, provided that the reference is such as to make that clause part of the contract. In case the reference to the arbitration agreement wasn't written, the reference will be considered as invalid. The contract that references the arbitration clause shall be in a written agreement containing a clear arbitration clause, or a set of arbitration rules and laws which will govern the arbitration as well as the arbitration procedures or to an individual written agreement.⁴⁰

2- The document which we referred to shall be clearly identified

The wording of the document in which it will refer to shall expressly mention to incorporate arbitration clause from another agreement as general wording or terms and regulations. The parties shall clearly identify the document in which they are referring to or if they are referring to a standard contract.

3- The reference shall be under the dispute resolution clause

The reference shall be under the dispute resolution as in case dispute arises between the parties it shall be resolved through arbitration. In order to clarify that in case any dispute arises it shall be resolved through arbitration or as mentioned in the reference to the main agreement in case if the main agreement mentioned of the procedure of the arbitration, number of arbitrators, language and etc. or if it is referred to a standard term such as FIDIC.⁴¹

Incorporation by reference in UAE Law

The principle of arbitration clause in contract by reference to another document containing an arbitration clause has been followed by the courts in UAE. The UAE new draft law recognized the validity of the arbitration agreement made by reference, it stipulated that a reference in a

⁴⁰ International Commercial and Marine Arbitration, by Gerogios I. Zekos, Published 2008, Page 407.

⁴¹ International Commercial Arbitration: Important Contemporary Questions, by A.J. Van Deg Berg.

contract to any document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make the clause a part of the contract.⁴²

In Dubai Court Cassation Case No. 462/2002, the court issued a judgment in which it implemented a new type of arbitration agreement in UAE to be valid. The case was about a dispute occurred between the contractor and the employer and to be resolved through arbitration based on FIDIC general terms as the court held in the case that:-

“It is established that it is enough in contracting agreement to stipulate that in case of any dispute between the contractor and the employer on contracting agreement, it shall be settled according to contracting general terms (FIDIC); to indicate that parties agreed upon referring to arbitration the disputes arising out of liabilities stipulated by this contract without any need to provide, in contracting agreement, for details of such condition”.⁴³

⁴² <http://www.tamimi.com/en/magazine/law-update/section-8/july-august-3/when-can-an-arbitration-clause-be-incorporated-by-reference-in-the-uae.html>

⁴³ Dubai Court of Cassation, Appeal Number 462/2012, Dated 02-03-2003.

3.4 Arbitration by Subrogation

Subrogation is when a person is substituted in the place of another person with reference to a lawful claim or right. In Arbitration by subrogation a party may transfer his right to another party as that party will have equivalent rights as the right of the party. The consent of the subrogated party is an important requirement in arbitration by subrogation as the arbitration term will be obliged on the party and in case any dispute arises from the contract it shall be resolved through arbitration. ⁴⁴

There are two types of subrogation:

- 1- Legal subrogation: This type of subrogation arises by operation of law. It is an equitable subrogation that can take an effect with or without the existence of agreement. However, it cannot be used to displace a contract agreed upon by the parties as it can also either be modified or terminated by a contractual agreement between the parties.
- 2- Conventional subrogation: Conventional subrogation is a right agreed from a contract where an individual satisfies the debt of another as a result of contractual agreement which provides that any claim which exists as a security for debt will be kept for the benefit of the party who pays the debt. ⁴⁵

If two parties enter into a contract which includes an arbitration clause and one of those parties decides to assign its obligations and rights to this third party subject to its approval and acceptance. In practice, usually this process takes the form of tri-par-tite agreements, where as the original two parties and third party agrees that the latter subrogates one of those two parties in the original agreement.

In Dubai Court Cassation Appeal Number 148/2008, the court issued a judgment regarding an arbitration by subrogation to be implemented in UAE when a party was subrogated in an insurance case as the court held that:-

The Electronics Company “Company A”.

The Second Company “Company B”.

⁴⁴ <http://www.clydeco.com/insight/updates/view/subrogation-in-the-gcc>

⁴⁵ <http://subrogation.uslegal.com/conditions-of-subrogation/>

The Insurance Company “Company C”.

Company “A” had a warehouse in order to keep the electronic products. Company “A” entered into an agreement with company “B” regarding the necessity securities for the warehouse and a guard for the warehouse. Company “A” entered into an agreement with company “C” for insurance for the warehouse.

The products in the warehouse were stolen and company “C” compensated Company “A” the loss. Company “C” filed a case against company “B” as the neglect occurred from the security guard as the theft was able to enter the warehouse and steal the products.

Company “B” raised the arbitration defense at the first hearing before the court and company “C” refused the defense as there is no arbitration agreement between the both companies.

Company “B” raised the defense before the court mentioning where as company “C” replaced or subrogated Company “A” then the arbitration clause between both companies shall be binding to company “C”

The UAE confirmed the defense and issued a judgment in case any claim against company “C” and Company “B” was raised shall be reviewed by arbitration.⁴⁶

⁴⁶ Dubai Court of Cassation, Appeal Number 148/2008.

CHAPTER FOUR

Pathological Arbitration Clauses

Defective arbitration clauses are very rare and uncommon. Defect in the clauses usually appear when there is fault or error in the contract or while drafting the arbitration clause.

There are different types of defective arbitration clauses:

1. Invalidity

Invalidity in the arbitration clause can be distinguished as substantial and procedural. Substantial reason of arbitration agreement of invalidity is equivalent to the reasons of the invalidity of any contract such as problems with the expression of the parties in their intentions or incapacity of the party, illegality of the content and defects of the form of an arbitration clause; this shall be proved with regard to the arbitration clause itself but not to the main contract. The procedural reasons are only specific to the arbitration agreements.

2. Inconsistency

Where there is a clear inconsistency in the arbitration clause most national arbitrators and courts attempt to give meaning to it in order to give an effective intention if the parties are intending to submit the dispute to arbitration. This type of defectiveness may lead the court to uphold a clause that carries an effective intention of the parties which may not be the arbitration clause in which the mechanism to solve the dispute will be through court procedures and not arbitration.

An arbitration clause is affected by inconsistency when the dispute resolution clause in the main contract contains both the parties' agreement to arbitrate, and the designation of a national court competent to resolve contractual disputes. Below are some examples: "[any dispute or difference shall [...] be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules. [...] The Courts of England shall have exclusive jurisdiction over [contractual disputes] to which jurisdiction the parties hereby submit".

3. Incapable

An arbitration clause is considered to be incapable when the parties don't clearly express their intent in the method to use in order to settle the disagreements will be arbitration or in which cases and matters especially if the parties are willing to settle several disputes through arbitration and other disputes through court procedures.

Although the arbitration is still valid if any defects occurs but it will be difficult to apply in practice.

Example: "Any dispute which may arise upon this agreement shall resolve through arbitration. The arbitration shall take place in DIAC in Abu Dhabi".

Arbitration clauses that are incapable of being performed through force major include situations where clauses contain the names of arbitrators but to the date of arbitration one of them has died, or when the appointing authority or an arbitral institution designated by the parties has ceased to exist. There are numerous examples: the choice of an institution or a person as appointing authority which cannot do so under its by-laws, or is not obliged to do so and prefers not to be involved in such matters; where an arbitrator appointed in the arbitration agreement dies before the arbitration is to start.

4. Inoperative

Arbitration agreement is inoperative when parties intentions is expressed clearly but some other, external, factors make it inoperable (parties themselves, by their behavior, repudiate arbitration agreement, for example, by referring the case to the state court; the period of limitation of actions has expired; the period for referring the case to arbitration, agreed by the parties in the agreement, has expired). An arbitration clause is inoperative when it refers to an arbitral institution which is incorrect or the chosen institution has ceased to exist: "London Arbitral Chamber".⁴⁷

⁴⁷ file:///C:/Users/SONY/Downloads/Dissertn.%20-%20Sara%20-%20Pathological%20Arb.%20Clause%202008%20(1).pdf

In order to avoid the arbitration clause defects, the arbitration clause shall be drafted based on the standard clause and add the other relevant information's or per the institution or the law of the country.

Example: ICC's standard arbitration clause:

ICC Arbitration

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

In UAE there are different institutes which drafted a standard arbitration clause such as: ⁴⁸

1- Dubai International Arbitration Center (DIAC)

The Dubai International Arbitration Centre (DIAC) recommends parties, desiring to resolve their disputes under the DIAC Arbitration Rules, to include the below-stated arbitration clause in their agreements:

“Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising there from or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules (“the Rules”), by one or more arbitrators appointed in compliance with the Rules.”⁴⁹

2- Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC):

“ All disputes arising from the interpretation; implementation or termination of the agreement/contract herein shall have to be conclusively settled via arbitration in accordance with provisions on arbitration provided in the Abu Dhabi Commercial Conciliation and Arbitration Center's Procedural Regulations and through an arbitration board comprising one' three or more

⁴⁸ ICC Arbitration Law.

⁴⁹ DIAC Rules.

arbitrators who shall be nominated and summoned up in accordance with the rules and procedures provided in the Center's Procedural Regulations"⁵⁰

⁵⁰ ADDCAC rules

CHAPTER FIVE

Conclusion

In light of the above, arbitration by itself is not new but it found an enormous growth from the New York Convention and at the same time was also stipulated long time ago in Sharia'a and Quraan. Arbitration is one of the fastest growing mechanisms of dispute resolution as in UAE many business people and companies to resolve their dispute through arbitration in order to preserve their rights as there are several institutions which the parties may choose for arbitration to take place such as DIAC, DIFC, ADDCAC and many others in different emirates. Arbitration has many advantages as a mechanism to resolve dispute as an alternative dispute resolution beside the court as it is flexible in which the parties may choose their own procedure, specialist arbitrator to resolve the dispute, confidentially as arbitration is more private than litigation and the arbitration award is final and binding on the parties. The disadvantage of Arbitration in UAE is mainly the cost as the costs of arbitration in UAE are high in which is mostly equivalent to the cost of court. Under the UAE law, the arbitration agreement requires to be in writing as the capacity of the person shall be permissible for him to sign or enter into contracts and the person signing on behalf of the party shall have a special power of attorney. Those are the three main requirements for an arbitration agreement to be valid. The most common arbitration agreement in UAE is the arbitration clause as it is drafted in the main agreement and now a day's disputes are rising and the parties have to think about the how to resolve the disputes. The second type of the arbitration agreement is the submission agreement or arbitration deed in which there is another agreement submitted later which mentions an arbitration clause and this is less common in UAE than the arbitration clause. Usually this type of agreement is used after the dispute has arisen and the parties intend to resolve their dispute through arbitration as the arbitration wasn't included in the main or original agreement. Arbitration by incorporation by reference is mainly used in UAE for construction projects while building big projects or for foreign people who are willing to expand their business. Some people in UAE use this type of arbitration agreement when they intend to franchise the foreign shops in order to protect their rights. In UAE arbitration by incorporation by reference and arbitration by subrogation are adopted from the courts judgments and this is why many people rarely have an idea about them as they are not common and they are

not mentioned under the UAE laws. Arbitration by subrogation is mostly used in maritime cases, aviation industries and insurance where insurance contracts need to be executed in the event of an incident or accident. Mainly if the parties choose to resolve their dispute through arbitration in UAE, any of the four agreements are valid and the arbitration award may be enforced.

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