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Terms of Reference Role under the UAE Arbitration Law

دور وثيقة المهمة في قانون التحكيم الإماراتي

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ABSTRACT OF THE DISSERTATION

TERMS OF REFERENCE ROLE UNDER THE UAE ARBITRATION LAW

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This dissertation analyses the terms of reference under the UAE Arbitration laws. The critical evaluation study will focus on the legal characteristics and role of the terms of reference. In addition to such review analysis, a comparative review analysis of the terms of reference under French and Egyptian arbitration Law is also considered.

The focal point of this dissertation is the ambiguity surrounding the terms of reference under the UAE Arbitration laws and the uncertainty this creates in arbitration proceedings with a seat in the UAE, where the procedural law is UAE law, and/or where the recognition and enforcement of an award is ultimately sought in the UAE.

This dissertation analyses a main question on the nature of the terms of reference, the arbitration devise refer into in the International Chamber of Commerce Rule in Paris. nature of the is whether arbitration deed - refer to in the UAE law translation available in the UAE market - is consider as terms of reference, the arbitration devise refer into in the International Chamber of Commerce Rule in Paris

This dissertation addresses the key ambiguities of “terms of reference” under the UAE arbitration law.. The key ambiguities identified are:-

- a. UAE arbitration law lack of reference to terms of reference: whilst Dubai International Arbitration Center refers to such terms in its translation of UAE procedural law articles 203 and 217, the UAE procedural law itself makes no such reference.
- b. Arbitration participants use of the terminology terms of reference : the terms ‘arbitration deed/instrument’ is used by participant’s interchangeably with the “terms of reference” wording.
- c. English translation differences: the terminology ‘*wathiaqt altahkim*’ referred to in the UAE procedural law in articles 203 and 217 has two translations. The first is ‘arbitration deed/instrument’ adopted by the market translation of the UAE procedural law and the second is ‘terms of reference’ adopted by the UAE and Arab leading arbitration centre, Dubai International Arbitration Center.

Finally, this dissertation produces in its annexure a suggestion of terms of reference sample in order to ensure a safe, effective and with smooth arbitration proceeding.

ملخص البحث

تناقش هذه الأطروحة و تحليل "وثيقة المهمة" من خلال قانون التحكيم الإماراتي. يركز التقييم المهني للدراسة على معالجة و تحليل خصائص و دورة وثيقة المهمة. بالإضافة الى ذلك التحليل لوثيقة المهمة, تستعرض هذه الأطروحة آراء وجهات نظر مقارنة مع قوانين التحكيم لفرنسا و مصر.

النقطة المركزية للإطروحة هي الغموض الذي يحيط بعبارة وثيقة التحكيم في القانون الإماراتي و عدم الدقة الناتجة عن الغموض هذا عند إجراء تحكيم محلي مقره في الإمارات العربية المتحدة حيث قانون التحكيم المطبق هو القانون الإجراءات الإماراتي و/أو قانون التصديق على الحكم هي القوانين الإماراتية .

تناقش هذه الأطروحة سؤال مركزي حول طبيعة وثيقة المهمة كوثيقة تحكيمية وفق التعبير المشار اليه في قوانين غرفة التجارة الدولية في باريس و هل يمكن توصيفها "وثيقة التحكيم" المشار اليها في القانون الإماراتي.

تعالج هذه الأطروحة نقاط الغموض جوهرية تتمثل ب:-

- أ. عدم إشارة قانون الإجراءات الإماراتي الى عبارة وثيقة المهمة : أن قانون الإجراءات الإماراتي لم يشير الى وثيقة المهمة بينما يورد مركز دبي للتحكيم عبارة وثيقة المهمة في معرض ترجمته للمواد 203 و 217 من قانون الإجراءات الإماراتي للإشارة الى وثيقة تحكيم.
- ب. إستعمال المشاركين في التحكيم للتعبير وثيقة المهمة: عدم الدقة من قبل المشاركين في التحكيم حيث يسترشدون بعبارة " وثيقة التحكيم" للإشارة الى "وثيقة المهمة" و العكس صحيح.
- ت. إختلافات الترجمة الإنجليزية : تعدد الترجمات لعبارة " وثيقة التحكيم" المشار اليها في قانون التحكيم الإماراتي كمستند تحكيمي حيث جاءت ترجمت هذه العبارة مرة بـ " ARBITARTION DEED/ARBITARTION INSTRUMENT " (أي إتفاق على التحكيم يلي نشوء النزاع) وفق ترجمات القانون المنشرة في الإمارات و مرة أخرى بـ " TERMS OF REFERNCE " (أي إتفاق مكمّل لشرط تحكيم) وفق ترجمة مركز دبي للتحكيم الدولي المركز الأول للتحكيم في الإمارات و المنطقة العربية.

أخيراً, تقدم هذه الأطروحة في ملحقاتها مقترح لصياغية بنود "وثيقة المهمة" لضمان حصول إجراءات تحكيم آمنة , فعالة و بحد أدنى من التعقيدات الإجرائية.

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10. Higher Federal Court – Abu Dhabi judgment 91 and 92 hearing date of 21/11/1992 (Addad 3 p 778).
11. Higher Federal Court – Abu Dhabi judgment no 11 for year 24 Kaf hearing date of 19/05/2002, Also Higher Federal Court – Abu Dhabi judgment no 22 for year 24 Kaf hearing date of 3/3/2002.
12. UAE Higher Federal Court – Abu Dhabi judgment no. 360 for year 24 Kaf hearing date of 21/12/2004.

Table of Statutes

1. Arbitration Law no. 27 of 1994.
2. Draft UAE Federal Law on Arbitration and the Enforcement of Arbitral Awards 2010.
3. Egyptian Civil Law.
4. French Commercial Transaction Code.
5. UAE Civil Law.
6. UAE Civil Procedure Code, Federal Law no. (11) of 1992.
7. UAE Civil Transaction Law.
8. UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006.

Table of Abbreviations

Arbitration Law no. 27	Arbitration Law no. 27 of 1994 concerning arbitration in civil and commercial matters
Civil Procedure Code	UAE Civil Procedure Code, Federal Law no. (11) of 1992
DIAC	Dubai International Arbitration Centre
UAE	United Arab Emirates
Civil Procedure Code	Federal Law no. (11) of 1992

Introduction

Arbitration is widely considered as having considerable advantages over traditional litigation particularly with regards to international commercial disputes.

As regards international commercial disputes¹, arbitration as a means of alternative dispute resolution (besides litigation), plays a vital role. Arbitration may take the form of ad hoc arbitration or via the rules of an arbitration centre and may be among two (or more) parties, whether natural or legal (referred to as private international arbitration), or a private party and a State or state entity (referred to as mixed arbitration), or two States or state entities (referred to as State arbitration).

Focusing on arbitrations having as a seat the United Arab Emirates, being an Islamic country having as the basis of its legal system the Shariah law hence has its roots in Islamic principles, the author deems appropriate to briefly refer to the history of arbitration in Islam. Prior to Islam (*Al Jahiliyyah*), people had no legal forum to refer their disputes to. The majority of disputes were arbitrated through the chief or head of a tribe (*Sheikh*) who acted as an arbitrator.²

Going to the Islam Phase, the Islamic rules - as a social judicial instrument - recognize arbitration as part of a dispute settlement, especially in relation to family law where ***"if you fear a breach between them [i.e. husband and wife], then appoint (two) arbiters, one from his family and the other from hers"***³. Arabs, Muslims and non-Muslims, used to refer their disputes, personal belongings, commercial transactions, debt, and natural resources to an independent third party. The Quraish tribe and Prophet ***Muhammad's*** grandfather agreed to arbitrate a dispute over the well of Zamzam located in Mecca, whereby the parties agreed to nominate a Priest from the

¹ Whether an arbitration case is of international nature or not, may be considered under the definition provided under the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, pursuant to which an arbitration is international if one of the criteria in Article 1(3) is satisfied.

² Al Ahdab, Abdel Hameed, *"Arbitration: Rules and Sources"*, Part 1, Naoufal Est. Beirut.

³ Qur'an Alnysa' [35].

Saad family, who was a lady.⁴ Although, the parties did not proceed with the arbitration, as the matter was amicably resolved while the parties were heading to the arbitrator⁵, nonetheless the importance of this lies in that an arbitration agreement was reached after a dispute was raised. This is of particular significance as it confirms that the Arabs knew, recognized, and made use of arbitration agreements and used to agree to arbitrate when there was a dispute; nonetheless arbitration as a means of resolving disputes was not used to resolve all disputes.

Ancient Arabs conducted a number of arbitration proceedings pursuant to submission agreements⁶ rather than arbitration clauses contained in a main contract, as is currently the custom in international and domestic commercial contracts, including but not limited to, construction contracts, and in particular the FIDIC standard form of contracts in their various forms. In practice and in ancient times, Romans and Arabs adopted as a custom submission agreements in referring a dispute to an arbitrator – arbiter, where they referred their disputes to arbitration after a dispute was raised.

Studying the field of international arbitration in depth, notably in international arbitration in relation to construction contracts, it is notable that the parties involved in arbitration are parties from different nationalities and backgrounds. Commencing an arbitration dispute, development of claims and presentation of parties' legal points in a dispute vary between civil law and common law jurisdictions.⁷ Due to the differences in knowledge, cultural, and local practice, arbitral parties raise a number of objections or even criticize the arbitration requirements imposed either by law, institutional arbitration rules or practice. Among others, the terms of reference is one of the requirements misunderstood and rather underestimated and subject to criticisms by parties and counsel with a common law background. A number of

⁴ Munajed.S (2008), *Islamic Arbitration in non Islamic Regulations*, The New Millennium Publishing, at p. 29.

⁵ Munajed.S (2008), *Islamic Arbitration in non Islamic Regulations*, The New Millennium Publishing, at p. 29.

⁶ *Al-Ahdab*, Abdel Hameed, *Journal of International Arbitration*, [1986] vol. 3 no. 5 Part 1, at p. 33.

⁷ Seigfried H. Elsing & John M. Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", by, *Arbitration International*, Vol. 18, No 1 – 2002.

these participants criticize the use of the terms of reference as a bureaucratic device⁸.

Parties, by their arbitration agreement, may choose any Emirate of the UAE as the arbitral seat or as the place where recognition and enforcement of a foreign award may be sought provided the defendant's assets are in any of the Emirates of the UAE. The UAE does not currently have a specific arbitration law, but rather certain provisions under Chapter III of the United Arab Emirates Civil Procedure Code, Federal Law No. (11) of 1992, and as such, arbitrations are governed at a federal level, hence unified across all seven Emirates of the United Arab Emirates. As the United Arab Emirates intend to become an international business, economic, and financial centre, its arbitration laws should be adequate in order to protect parties and their commercial interests.

The aim of this dissertation is to provide a critical analysis of the role of the terms of reference under the UAE current arbitration law. Terms of reference are commonly used in arbitral proceedings and it is a mutually agreed document among the parties to the dispute and the tribunal pursuant to which all arbitral participants agree on important aspects of the arbitral procedure to be followed in the arbitral proceedings, such as clarifying the terms of the dispute, timeline for the conduct of the arbitral proceedings until the time of rendering of the final award, rules on evidence to be submitted during the arbitral proceedings, the claim, and more. The importance of the terms of reference lie in the efficient conduct of the proceedings, and further to provide clarity. Agreeing important aspects of the arbitral proceedings prior to the arbitration commencing helps to speed up the process as important aspects are agreed among the parties beforehand rather than facing the risk of the parties disagreeing during the process, thus delaying and undermining the whole process.

⁸ Born,G (2012), *International Arbitration: Law and Practice*, The Netherlands: Kluwer Law International, at p. 163.

The civil law system codifies the submission agreement as an arbitration agreement, in addition to an arbitration clause. Both *submission agreements* and *arbitration clauses* are a form of arbitration agreement, with each of them having a set of differences, which shall be discussed in further detail below and which forms part of the discussion and subject matter of this paper.

As regards State transactions, McNair, K.M. Böckstiegel and I. Seidl-Hohenveldern, noted public international law authors, confirm that, among other, the existence of an arbitration clause in a contract is one element to identify a State's arbitration contract.⁹

It can be argued from the outset, that the role of the terms of reference under the UAE arbitration laws is unclear and relevant literature, court decisions, and clarifications on the arbitration provisions relating to the terms of reference under the UAE Laws are minimal, thus arguably undermining hundreds of arbitral proceedings having a UAE seat due to the existent uncertainties.

In particular, the UAE Civil Procedure Code does not use the term “*terms of reference*”, neither does it provide a definition, leading to ambiguity in arbitration proceedings. The original text of the Civil Procedure Code and DIAC rules are in Arabic. The English translation of the DIAC rules, translate the term “*wathiqat al thakim*” as “*terms of reference*”. Nonetheless, the Civil Procedure Code does not provide the same translation of the term, hence the terms of reference are not provided for in the Civil Procedure Code. This is a gap in the Civil Procedure Code leading to confusion to the arbitration participants.

This dissertation contains an introduction and detail analysis as to the provisions under the UAE applicable arbitration laws relating to the terms of reference, and will be divided into four parts. Briefly, this dissertation will examine the legal nature of the terms of reference, the requirements of terms of reference, the legal significance

⁹ Haddad.H (2003), *Contract signed between States and Foreign I Personal*, Al Halabi Publishing, at p. 27, 28 and 29.

of the terms of reference and the role thereof. Lastly, a sample of the terms of reference, as currently used in practice in the UAE, will be provided. Reference to the arbitral tribunal, party autonomy and other important aspects of arbitration affecting the final awards or undermining the arbitration proceedings, is beyond the scope of this paper and as such will be kept at the minimum. Throughout the paper, a comparative analysis will be provided comparing arbitration laws relating to the terms of reference in the UAE with the equivalent ones in Egypt and France.

This dissertation answers a number of main questions as set out below:

1. Are *terms of reference* considered as arbitration agreement, specifically a submission agreement;
2. What are the differences between the submission agreement and the terms of reference;
3. Are the arbitral parties required to sign the terms of reference under UAE arbitration laws, and whether such statutory provisions are mandatory and their consequences;
4. What would be the consequences where an arbitral party refuses to sign the terms of reference;
5. What is the effect of the terms of reference;
6. On which occasions do *terms of reference* consist of an invalid device and the consequences thereof; and
7. What is the role of the *terms of reference* when an arbitral award is to be prepared by arbitrator(s).

Methodology of Study

This study adopts a doctrinal methodology covering an in-depth research of laws, literature and arbitrations practices. The study shall consist of legal review, books written by Arabic scholars addressing a number of questions to cover more or less the arguable area embedded within the above seven questions, prior to discussing the same in line with the library review conducted and set out previously in this study.

The resources used in this dissertation vary between library access and interviews, with library access covering the e-data base of King's College London, legal and construction hand books in the English, Arabic and French languages, UK arbitration laws, English Court arbitration precedent set out in court decisions, legal journals and reviews, arbitration laws of different Arab countries, as integrated in Arab civil transactional and procedural laws, Arabs higher court orders (judgments and precedents), arbitration cases and reviews published in specialized magazine and journals in the Arabic and English languages, institutional arbitration laws, and the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006.

Chapter One

Legal Nature and Requirements of the Terms of Reference

An agreement to arbitrate may be in different forms. Parties may agree to refer a dispute to arbitration pursuant to an arbitration clause contained in a main contract or they may sign a separate agreement to refer a dispute already raised between them. Further, when parties agree to obey the terms of a standard form agreement which incorporates an arbitration clause, like the FIDIC standard form of contracts, such agreement constitutes an arbitration agreement. Arbitration agreements are recognized in international commercial arbitration, except in compulsory arbitrations under the ICSID Arbitration Rules. The current draft UAE Federal Law on Arbitration and the Enforcement of Arbitral Awards is unclear and creates confusion when it comes to identifying the legal nature of the terms of reference.¹⁰ This confusion makes it compulsory to discuss the three arbitration agreement forms as a precondition to analyze and understand the legal nature of the terms of reference.

1.1. Legal Nature of the Terms of Reference

1.1.1. Submission Agreement

The submission agreement is the oldest form of arbitration agreement.¹¹ Pursuant to the submission agreement, parties agree to refer an existing dispute to arbitration.¹² Disputes subject to a submission agreement can be narrowed or extended depending on the parties' consent to cover all matters in dispute or specific matters. In all cases, matters under dispute must be identified in the submission agreement otherwise such instrument shall be null and void. This sanction is applicable in the UAE, among other jurisdictions such as France, Egypt, Lebanon and Jordan.

¹⁰AlAhadab A (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, at p. 191.

¹¹ Abou Ghaba (2011), *The Arbitration and its effect in the dispute resolution*, Alexandria: Dar Elfeker w Alqanon, at p. 11.

¹²AlSadeq A (2014), *The General Reference of Egyptian, Arabic and International Arbitration*, Cairo: Dar Alqanoun lil Esdarat AlQanouniyya, at p. 86.

The parties to a dispute may agree to refer a dispute to arbitration even if the dispute falls into the local court's jurisdiction or the court is verifying the dispute.¹³

The laws in Egypt, the UAE and France do not specify the elements of the submission agreement nor provide a specific form of such device; nonetheless, all aforementioned jurisdictions agree that the submission agreement must be a boundary marker of the dispute. Although the submission agreement elements are codified, the international and domestic arbitration best practices aim to produce a comprehensive submission agreement to ensure a smooth process of the arbitral procedure as well as enforcement of the arbitral award. A comprehensive submission agreement usually specify the dispute between the parties along with the parties' agreement with regards to the arbitration law, arbitration language, scope of arbitrators, number of arbitrators, arbitrator nomination, parties' representatives, recourse of arbitrators, arbitral proceedings, submission time table, arbitral seat and whether the award is final and binding or not.¹⁴

A submission agreement cannot be executed prior to the existence of the dispute. This condition is the significant difference between a submission agreement and an arbitration clause which is usually agreed on to arbitrate a future dispute as this paper will clarify hereafter.

1.1.2. Arbitration Clause

The arbitration agreement is an agreement pursuant to which the parties to a dispute agree to refer their dispute in full or part to a number of arbitrators who

¹³ AlSadeq A (2014), *The General Reference of Egyptian, Arabic and International Arbitration*, Cairo: Dar Alqanoun lil Eddarat AlQanouniyya, at p. 88.

¹⁴ AlSadeq A (2014), *The General Reference of Egyptian, Arabic and International Arbitration*, Cairo: Dar Alqanoun lil Eddarat AlQanouniyya, at p. 87.

hear and determine their dispute. An arbitration clause prevents the parties referring their dispute to local courts.¹⁵

The arbitration clause is always part of a main contract; however, it may be in the form of an arbitration deed attached to the original agreement. An arbitration agreement may also be concluded within an agreement which does have an existing arbitration clause, however the signed agreement itself refers to a standard form contract and the latter contains an arbitration clause.¹⁶

The arbitration clause is considered to be a separate agreement within an agreement, under which all requirements of a valid agreement must be present, cause, subject and validity.

The concept of the arbitration clause develops from a promise to undertake an obligation (i.e. arbitrate) until it becomes a separate agreement itself.

French law used to consider the arbitration clause a promise under which the parties undertake toward each other to sign an arbitration agreement when a dispute is raised. In such case where a dispute is raised by either party in the agreement and in the event that the other party refuses to sign a detailed arbitration agreement setting out the dispute, the refusing party is liable to compensate the other party for breach of contract. This approach does not serve the arbitration goals, part of which is that arbitration is a fast track dispute resolution method.

¹⁵ Article 203 of the UAE Civil Procedure Code, Federal Law no. (11) of 1992, which is abbreviated as the Civil Procedure Code.

¹⁶ ALSadeq A (2014), *The General Reference of Egyptian, Arabic and International Arbitration*, Cairo: Dar Alqanoun lil Esdarat AlQanouniyya, at p. 86.

By the end of the First World War, the French law was revised and on 21st December 1925 added clause 631 in the French Commercial Transaction Code requiring the parties to agree on arbitration clause. Pursuant to the new approach, a party may enforce the arbitration clause in the form of an arbitration agreement and may proceed with the arbitral proceedings even if the other party refuses to participate in the arbitral proceedings.¹⁷

The Egyptian Arbitration Law no. 27 of 1994 concerning arbitration in civil and commercial matters, adopts the latest review of the French law. The said law treats an arbitration clause as an arbitration agreement; similarly, Article 203 of the UAE Civil Procedure Code, Federal Law no. 11 of 1992, allows the parties to refer their dispute to arbitration through a clause in the main contract.

1.2. Terms of Reference Nature

1.2.1. Is Terms of Reference a Submission Agreement?

The DIAC arbitration rules adopt the terms “*terms of reference*” to indicate the submission agreement as an arbitration device. Most of the arbitrations with a UAE seat are under the DIAC and DIAC respective arbitration rules, hence widely used in UAE arbitrations, whether local or international. Such arbitration rules have a big influence in the UAE and arbitration participants. This sole use by DIAC of the *terms of reference* indicating the submission agreement cannot be adopted academically to justify the use of terms of reference as equivalent to the submission agreement.

The submission agreement is an agreement between two (or more) individuals to refer a present dispute (that is, a dispute which has already arisen) to arbitration. Further, the submission agreement is a form of arbitration agreement that contains major elements governing the arbitration proceedings, including but not limited to

¹⁷ ALSadeq A (2014), *The General Reference of Egyptian, Arabic and International Arbitration*, Cairo: Dar Alqanoun lil Esdarat AlQanouniyya, at p. 78.

the nature of the dispute, applicable law, hearing schedule, parties' names and their respective contacts details, the seat, and arbitrators' fees.

The international arbitration bodies, such as the ICC, request the arbitrators to draft terms of reference to be signed later by the parties and the arbitrators. The above major elements mentioned in the above paragraph are an integral part of this arbitration device.

The majority of authors are of the opinion that terms of reference are actually a submission agreement.¹⁸ The French court also adopts the same view considering the terms of reference as an arbitration agreement. The said court ruled that in the absence of an arbitration clause, the terms of reference shall constitute an arbitration agreement in place. The exception of the above rule is when a party signs the terms of reference along with challenging the existence of the arbitration clause or arbitration agreement.¹⁹

Based on the above, below are the formal and mandatory legal requirements of the terms of reference relating to the submission agreement.

1.2.2. Terms of reference problematic in the UAE procedural law

ICC requires the existence of terms of reference to proceed with the arbitration. The terms of reference element are set out in ICC rules explanation.

Articles 203 – 217 (both inclusive) of the Civil Procedure Code do not provide a definition of the terms of reference (*'wathiqat al thakim'*²⁰). By a closer analysis of the articles, one can ascertain that the Civil Procedure Code is ambiguous as to the

¹⁸ Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at Anaain, p. 115.

¹⁹ Ibid., at p. 116.

²⁰A detailed explanation of the term is provided below.

understanding of the nature of the terms of reference and its elements and further as to the definition of the submission agreement. A reader cannot ascertain whether the terms of reference are the submission agreement and whether these two instruments are similar. This is the primary question of this paper and the paper seeks to analyze this. A person reading the Civil Procedure Code wonders if both terms are not the same or similar then what is the difference of the two terms relating to the subject matter of the dispute and the issue to be determined by the arbitrator(s).

Prior to discussing in detail the terms of reference and its nature, the translation of the Arabic words '*wathiqat al-tahkim*' refer to Articles 203 and 216 of the Civil Procedure Code into *terms of reference* in English, nonetheless, the phrase is not exclusive to the term *terms of reference*. The word *wathiqat* means "paper", while the word *al-tahkim* means "arbitration". Although the Dubai International Arbitration Centre²¹ has adopted such translation, a number of other translators prefer to use 'arbitration instrument' or 'arbitration deed' instead. All translations fit the purpose; the Civil Procedure Code indicates the requirement of "paper" as a prerequisite to the conducting of arbitral proceedings. The legal term '*wathiqat al-tahkim*' as an expression means a kind of document or paper to note certain points in relation to arbitration, which justify the differing versions relating to the translation of the term (i.e. '*terms of reference*', '*arbitration instrument*' or '*arbitration deed*').

For the purposes of this paper, the author will not exclusively adopt the translation of DIAC relating to the terms of reference referring to the Arabic expression of '*wathiqat al-tahkim*' referred to in the Civil Procedure Code. The reason is to avoid any linguistic argument, since the ICC nomination of terms of reference follow an existing arbitration agreement and shall not form itself an arbitration agreement.

²¹ The Dubai International Arbitration Centre is abbreviated as DIAC.

Article 203 of the Civil Procedure Code states that 1.... 2 3 - *The subject matter of the dispute **must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void.***, while clause 216 '1 - *The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the following circumstances:*

a - if it was issued otherwise than with an arbitration instrument or on the basis of an instrument which is invalid or has lapsed by effluxion of time, or if the arbitrator acted outside the scope of the instrument;

*b - if the award was made by arbitrators appointed otherwise than in accordance with the law, or was issued by some of them without their being authorised to make an award in the absence of the others or if it was issued **on the basis of an arbitration instrument that does not specify the subject matter of the dispute** or was issued by a person not having capacity to make an arbitration agreement or an arbitrator not satisfying the requirements of the law.*

In the respected opinion of Dr. Ahdab, the use of terms of reference/submission agreement in the Civil Procedure Code is confusing.²² At first thought, a reader may conclude that the terms of reference are used in law to refer to the submission agreement, however on other instances the terms of reference is used to refer to the arbitration agreement whether in the form of an arbitration clause or submission agreement²³. This combination creates an uncertainty of the intentions of the lawmakers in determining the nature of the terms of reference. Dr. Ahadab, in his interpretation of this uncertainty suggests reading Articles 203 and 206 twice. When reading the Articles the first time, the reader should read it in the context that the terms of reference refer to the submission agreement and when reading the Articles a second time the Articles should be read in the context that the terms of reference refer to an arbitration agreement. The conclusion of the reading the Articles is that the Articles are confusing, especially considering that Article 203 requires that “the subject [matter] of the dispute shall be specified in the terms of reference or during

²² AlAhdab A. (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, Book no. 3, at p. 192.

²³ AlAhdab A. (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, Book no. 3, at p. 192.

the hearing of the suit”²⁴ which is a further confusion relating to the terms of reference.

1.3. Terms of Reference Requirements

The requirements of the terms of reference consist of mandatory and non-mandatory requirements. The mandatory conditions are set out by the law and are the statutory requirements avoiding to determine the terms of reference as null and void. The UAE law requires terms of reference/submission agreement to be written, the subject matter of the dispute being arbitrable, signed by a person who has sufficient legal capacity, with a clear identification of the arbitration place (the seat), law of the arbitration, the arbitrators, scope of work by identifying the subject matter of the dispute and/or the relief sought. While the non-mandatory conditions are considered as best practices to ensure the smooth running of arbitral proceedings minimizing the risk of the arbitral proceedings becoming void and maximizing the efficiency of the proceedings in terms of noting the arbitration period, submission dates, parties' addresses, law on taking evidence, confidentiality, witness hearings and any other terms that participants would like to note down in conducting the arbitral proceedings.

For the arbitration agreement to be valid, whether it is in the form of an arbitration clause or a submission agreement, it must contain the necessary conditions required for a valid contract in general. These conditions are determined under the general rules of contracts in civil law pursuant to the law governing the arbitration agreement agreed among the parties. This means that the existence of the contractual principles of satisfaction, subject matter and reason and that the consent of the parties is sound by confirming that the intention of each party comes from a capacity free from omission, fraud, compulsion or exploitation. The subject matter

²⁴ Article 203(3) of the Civil Procedure Code.

of the contract must be possible, helpful, identifiable and addressable, and lawful. The aforementioned refer to the general rules relating to valid civil law contracts. Below, the conditions of a valid arbitration agreement shall be discussed in detail.

The necessary requirements of a valid arbitration agreement are:

- i. the arbitration agreement must be in writing²⁵;
- ii. the parties to the arbitration must be legally entitled to dispose the disputed right²⁶;
- iii. the disputed right should be suitable to be the subject of arbitration²⁷; and
- iv. the subject matter of the dispute must be specified²⁸.

If these four conditions, which will be studied in detail below, including the provisions of civil law rules relating to the validity of the contracts in general are satisfied, the arbitration agreement shall be considered as validly executed. Determining the place or timeline of arbitration are not prerequisites for a valid arbitration agreement. It is also unnecessary – following the execution of the new arbitration law – that arbitration (whether in the form of an arbitration clause or submission agreement) involves, a specification as to the number of arbitrators. This condition is required pursuant to Article 502(3) of procedures law does not appear in arbitration law.

This law takes into account arbitration law, even if it does not involve selection of arbitrators by the parties or determination of the method of selecting them. The Court of Cassation held that an arbitration agreement is valid despite it including a selection of arbitration, provided it is concluded before execution of Arbitration Law no. 27 of 1994²⁹. Article 1 of the promulgated law, provides for the application of its provisions to any existent arbitral proceedings at the date of the law coming into

²⁵ Article 203(2) of the UAE Civil Procedure Code.

²⁶ Article 203(4) of the UAE Civil Procedure Code.

²⁷ Article 203(4) of the UAE Civil Procedure Code.

²⁸ Article 203(3) of the UAE Civil Procedure Code.

²⁹ Arbitration Law no. 27 of 1994 is abbreviated is Arbitration Law no. 27.

force. In applying this rule, the Court of Cassation allowed the application of Article 17 of the Arbitration Law no. 27 concerning the selection of arbitrators by the court, even if the arbitration agreement is preceding the new law coming into force.

1.3.1. In writing

The arbitration agreement must be consensual and must be evidenced in writing. Hence, an arbitration agreement cannot be concluded by a silent and non-consenting party to arbitration; consent to arbitrate cannot be provided indirectly or by a silent party.³⁰ This rule set in civil law jurisdictions, which is rather archaic and does not match the modern practices of conducting business, does not match the equivalent rules of the common law jurisdictions. There is a major difference between the UAE and the Egyptian civil law jurisdictions and common law jurisdictions, whereas in the former, the writing requirement is a prerequisite, while in the latter, and specifically under UK law, a verbal arbitration agreement is considered as a valid arbitration agreement.³¹

Similar to the Egyptian jurisprudence, the UAE law, and in particular Article 203(2) of the Civil Procedure Code, provides that an arbitration agreement can only be evidenced in writing. Further, the Abu Dhabi Supreme Court has confirmed that the terms of reference shall be evidenced in writing.³²

The UAE law practice does not consider a party who remains silent on arbitration as consenting to agree to an arbitration agreement.³³ In addition to the strict statutory requirement of setting the terms of reference in writing, it must be noted that the law adopts a flexible approach in interpreting the writing element as tools validate

³⁰ Cassation Case no. 88 of 3q, hearing date 20/12/1934.

³¹ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 90.

³² Cassation Case no, 101 year 19k, hearing date 17/05/1998 , Abu Dhabi Supreme Court.

³³ Cassation Case no 92. of 2009 Commercial , hearing date 19/6/2007, Dubai Cassation Court.

arbitration agreement, and it may be assumed that eventually this flexibility covers the terms of reference as an arbitration instrument as well. The requirement to evidence the arbitration agreement in writing does not only cover signing the terms of reference, but can also be satisfied by fax letters, correspondence and emails. This flexibility is noted by the new Egyptian Arbitration Law no. 27³⁴ and also supported by the UAE law on electronic commerce providing parties with a flexible approach in consenting to arbitration by means of contract or emails.

The terms of reference can be concluded in writing either via email or an agreement signed by the parties. After setting the terms of reference in writing, the question is who should sign the terms of reference.

1.3.2. Capacity of the signatories

Capacity is the ability and competence of a person to conduct a legal action whether discharging or creating a legal right, or power, and to further understand the nature and consequences of such. Legal capacity is twofold; a capacity of existence for each human being gained prior to its birth such like a heritage right, and the right to life. The second type is capacity to perform a transaction creating a legal right or obligation. Rules relating to capacity are regulated by the applicable local laws. In Egypt, capacity is vested to any person above the age of twenty-one, while in the UAE, a female is required to obtain her husband's consent in writing prior to performing a commercial transaction of any nature.

In arbitration, the requirement of capacity to perform is mandatory under the provisions of the Civil Procedure Code, otherwise the terms of reference shall be null and void. The requirements for capacity to perform are similar to the requirements for capacity to perform to execute a contract. A person with no legal capacity to

³⁴ Iynas Abel Mooty P113

perform is not capable to enter into a valid and binding contract, whether in the form of arbitration agreement or terms of reference.

In addition, arbitration laws in Arab countries further require an additional condition to perform arbitration agreements or terms of reference, which is, that a signatory of terms of reference or arbitration agreement shall possess the right of disposal over the disputed right. In general, a right of disposal is the right of a person to sell, mortgage, or give away a right or mobile / immovable asset.

In other words, to conclude an arbitration agreement correctly between parties, the two parties must have contractual capacity as statutorily required. Law requires that any party that wants to refer its dispute to arbitration must be of a certain age to have capacity of disposing the disputed right. The capacity minimum age is determined pursuant to the personal law and according to the rules of assignment. Article 11(1) of the UAE Civil Code determines that the "[t]he law of the state of which a person has the nationality shall apply to the civil status and competence of such person..."³⁵. Nonetheless, transactions of a financial nature transacted in the UAE resulting in materializing in the UAE, if either party is foreign and his/her capacity is defective, the cause of such incapacity being not easily discovered by the other party, such cause shall not affect on the person's capacity.

Under UAE law, the age someone is considered to have reached the age of maturity and shall have capacity is twenty-one lunar years.³⁶ This is the age statutorily determined for a person to be legally entitled to dispose of his/her rights. The legislator considered capacity necessary for concluding an arbitration agreement. Upon a person reaching this age, they shall have authority to dispose their rights and resort to arbitration. 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

³⁵ Article 11(1) of the UAE Civil Code.

³⁶ Article 85(2) of the UAE Civil Code.

who are legally entitled to dispose of the disputed right”³⁷. It is helpful to note that the UAE law enables the courts to grant either limited or absolute authority to a person who lacks capacity to trade if he reaches the age of eighteen Hijra years.³⁸ The legislators considered that such person has the right to dispose his money as he/she wishes, subject to certain restrictions imposed by the law, whether such disposal is useful or harmful to the person. Consequently, it may be argued that the general rules do not prevent minors who have permission to practice trade, to conclude arbitration agreements, subject to limits imposed by the law, because that person has the right to dispose such right.

1.3.2.1. Legal Capacity of individual in arbitration

1.3.2.2. Absence and Lack of capacity to sign the terms of reference

The ability to distinguish between the wrong and the right, and between what is useful and harmful (the “*Ability to Decide*”) are key elements in determining the capacity of a person to engage in an agreement or a contract.³⁹ Such *Ability to Decide* is purely a scientific mental status which varies between citizens of the same age. This constitutes an endless debate and discussion on this topic is beyond the scope of this paper. The laws in Arab countries establish that a person of a certain age could be legally eligible to practice his right to conclude a contract or to create an obligation.⁴⁰ A person of the age of twenty-one Islamic years has the *Ability to Decide* under the UAE laws, unless the person is prevented to do so by court order or laws.⁴¹ In comparing the equivalent statutory provisions of the Egyptian civil law, the

³⁷ Article 203(4) of the Civil Procedure Code.

³⁸ Article 162 of the UAE Civil Code.

³⁹ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 254.

⁴⁰ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 257.

⁴¹ Sader – “*UAE Civil Transaction Law*”, Rani Sader and Hassan Arab , at p. 45.

Ability to Decide is twenty-one Gregorian calendar years, whereas the Lebanese civil law confirms the *Ability to Decide* to be eighteen Gregorian calendar years⁴².

The general rule is that the *Ability to Decide* is granted by law to any person of age between eighteen to twenty-one years old, however restrictions to the general rule may apply to adults. Further, it must be noted that exceptions may apply even to minors who are less than eighteen to twenty-one years old.

1.3.2.2.1. Minors under seven years of age

Under the statutory requirements relating to capacity, it is a strict rule that a minor under seven years is forbidden to engage himself/herself to contract giving rise to the creation of an obligation. In such case, a transaction shall be strictly considered as null and void. In case a contract is void, a person having an interest in the transaction may request its nullification, and the court may also request the nullification of the transaction, whether the validity of the transaction is challenged by either party, or not.⁴³ The intention of the law is to protect minors from abuse and to provide a form of self protection to minors. Jointly, the UAE Civil Law (Article 159) and Egypt (Article 45(2)) confirm that a minor under seven years of age does not have the *Ability to Decide*, and such restriction may not be released or be permissible at a later stage.⁴⁴

A minor under seven years of age may not sign terms of reference or an arbitration agreement, whether directly or by proxy or guardian⁴⁵.

⁴² Mustapha Kamal Taha (part 1), *The Lebanese Commercial Law*, at p. 204.

⁴³ Article 141(1) of the Egyptian Civil Law.

⁴⁴ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 254.

⁴⁵ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 254.

1.3.2.2. Madman and Mental disorder

A madman is a person with a mental illness making the person losing the Ability to Decide.⁴⁶ A mental disorder is a dysfunction of a person's brain causing a brain failure in apprehension and distinction.⁴⁷

The consequences a transaction being concluded by a madman or a person having a mental disorder are the same; that is the transaction shall be null and void.

The arbitration is a contract between the parties (terms of reference), where the validity of the terms of reference is related to the parties' capacity. Lack of capacity under the law may only be challenged by the minor. The other party may not challenge the terms of reference due to the lack of capacity of a minor or a madman.⁴⁸

1.3.2.3. Incomplete capacity

1.3.2.3.1. Minors between seven and twenty-one years of age

A minor who is seven years of age is a person with Ability to Decide. The law considers minors of the aforementioned age range as a person with incomplete capacity with a possibility to have legal capacity to trade and manage assets subject to a court order.

⁴⁶ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 254.

⁴⁷ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 255.

⁴⁸ Cassation, Egypt, case no. 35681 Cassation no. 73 year 18, Civil Cassation, hearing of 18/11/1948.

The law protects minors of seven years of age considering that any act against the minor's interest is void, while all acts to the minor's benefits benefit may not become void. Any acts or transactions which may be questioned, whether it is useful to the minor or not, are subject to the judge's hearing the specific case discretion and determination on a case-by-case basis.

In terms of evaluating the capacity of a minor to conclude terms of reference, the law distinguishes between two scenarios, a minor with court permission to trade and manage and a minor with no such permission.

1.3.2.3.2. Minors with no permission to trade

Generally, terms of reference signed by a minor with no court permission to trade or managing its assets is void due to lack of *Ability to Decide*. Nonetheless, if a minor of sixteen years of age concludes an arbitration agreement/terms of reference which do not exceed what he earns.⁴⁹

1.3.2.3.3. Minor with permission to trade

A minor of eighteen years of age may be authorized to trade and manage its assets by a court decision or guardian's permission. Such authorization is not a direct authorization to arbitrate. It is confirmed by law that an authorization to a minor to trade is authorization to arbitrate whether such authorization is restricted or not, unless the restriction specifically prevents the minor to arbitrate.

⁴⁹ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 258.

When a minor is permitted to manage his/her assets, this does not provide a sufficient power to arbitrate. However, nothing prevents the court to grant a minor permission to arbitrate and it is wise to seek obtaining such power⁵⁰ meeting the demands of international business and commerce of the 21st century.

1.3.2.3.4. Negligent, inadvisable (careless, inattentive)

The legal system imposes restrictions on two types of persons due to lack of capacity to contract. The first type is of the kind who spends money in a senseless manner carelessly even if the money is paid for charity purposes. The second type is the type that is naïve and easily fooled due to his/her good intentions. Both types of persons have no complete legal capacity to sign an arbitration agreement and terms of reference. Where the arbitration agreement and the terms of reference have a negative effect on the individual belonging to either types of persons as aforesaid, the arbitration agreement shall be considered as void.

1.2.3. Arbitrable Subject

The subject of the arbitration is a critical aspect in the arbitration process. The subject of the arbitration agreement is normally the parties' agreement to avoid local court jurisdiction over the dispute raised between them and to adopt the arbitration as a method of alternative dispute resolution⁵¹. The subject matter of the arbitration as a dispute resolution method usually means the dispute subject to arbitration (e.g. termination of contract, claim of certain amount, claim of compensation).

⁵⁰ Moustapha Jamal and Oukasha Abdela'al (1998), *Arbitration in International Relations*, at p. 414, (A.a p 259).

⁵¹ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 413.

Similarly to the subject matter of a contract, the subject matter of the arbitration agreement, to be considered valid, must not be contradictory to the law or public order. The law gives the parties the right to resolve their dispute through arbitration, such right requiring the arbitration agreement to be in accordance with the law chosen by the parties to govern the arbitration agreement, which must be legally valid, subject to the right being exercised on the free will of the parties and by a duly authorized person.

The subject matter of the arbitration agreement as a method of alternative dispute resolution shall be specifically determined prior to commencing arbitral proceedings and the subject matter shall be capable of being reconciled, on the contrary occasion risking the annulment of the arbitral award in accordance to the statutory provisions

An agreement shall be void if there is no clarity as to its subject matter or if such does not exist. An agreement by a son to transfer future will revenue is not valid as the subject of the agreement is nonexistent. In arbitration, the arbitration agreement is valid although the subject of the arbitration proceeding – the dispute - does not exist yet. The validity is supported by law and in particular 213 UAE law. This exception is not applied to the terms of reference, where the matters in dispute must be determined in a precise manner. This is one of the key differences between the arbitration clause and the terms of reference, whether the latter is referred to as a submission agreement or interpreted restrictively as a legal instrument to note down the matters in a dispute between the parties.

The terms of reference must precisely specify in detail the matters in dispute while the arbitration clause may be valid without the existence of the subject matter of the dispute. The Higher Court in Egypt has held that the arbitration is an alternative method to resolve a dispute, such method being an exception to court proceedings and all embedded guarantees and rights offered to the parties when a case is heard

before a court. Thus, the arbitration participants must precisely specify the subject matter of the dispute in the terms of reference in order to fence the arbitrators' powers in relation to the dispute and to allow the court to monitor whether the arbitrators exceeded their powers or not.

The rule is to write down the subject matter of the dispute when commencing the arbitral proceedings and prior to the hearing of the dispute. The necessity of this lies in that the tribunal must precisely know its powers and what to rule on.

The arbitration agreement shall be null and void if there is no subject matter of the arbitration or the matter is not specified or the matter in dispute is not clear. The Egyptian Arbitration Law seems to be strict in relation to the identification of the matters in dispute and the understanding of the scope of work of the tribunal.⁵²

The arbitration agreement shall be void if the matters in dispute are not specified⁵³. Similarly, if the matters in dispute are not specified in a clear manner, the arbitration agreement will be considered of no subject, and as result the arbitration agreement shall be void.⁵⁴ Further, if the arbitrators decided on the matter in dispute, which are not clearly set and/or determined and which are not covered by the terms of reference, the award shall be void.⁵⁵

Nothing prevents the local court at any time during the arbitral proceedings to assess a party's request to determine the validity of the arbitration agreement, such

⁵² Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 417.

⁵³ Article 35 of the Arbitration Law no. 27.

⁵⁴ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 418.

⁵⁵ Abou AlAinain, M & Abdulatif, M (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1 , at p. 417.

request taking the form of a court case/hearing which may take place in parallel with the arbitration hearings or preliminary procedures.

The UAE Arbitration Law relies on the determination of the matters in dispute to assess the validity of the arbitration agreement.⁵⁶ The parties to the arbitration must identify the matter in dispute in the terms of reference or during the hearing before the tribunal⁵⁷.

The UAE jurisdictional practice allows the parties flexibility, compared to the Arbitration Law no. 27, to highlight the matter in dispute. Article 203 of the Civil Procedure Code requires a clear determination of the dispute, however, the tribunal may rule on matters in direct relation to the matters in dispute listed in the terms of reference, any question on degree of relation, whether direct or indirect, between the issue(s) determined by the arbitrators and those in the terms of reference shall be determined by the local court upon the recognition and enforcement of the award.⁵⁸

The major question is on the validity of the award where the arbitrators partly rule on a number of matters within their scope and powers and on certain matters in excess of their scope and powers on the same award. Arbitration Law no. 27 allows for the partial quash of the award if the matters determined by the arbitrators are in excess of their scope and powers and which are not related and can be separated to the matters ruled within their scope of the terms of reference.⁵⁹ The Civil Procedure Code is silent and does not provide such flexibility of partially quashing the award, while the current draft of the new UAE arbitration Law of 2010 has adopted the

⁵⁶ Article 203 of the UAE Civil Procedure Code.

⁵⁷ *Dubai Cassation Court, case no 265 of 2007 civil, hearing date 3/2/2008*

⁵⁸ Abdel Latif Shaban, *The UAE Arbitration Courts ('Kada'a al tahkim fi alemarat'*, Dubai: Bin Dasmal Publishing 200, at p. 124.

⁵⁹ *Clause 53.1 of the Egyptian Arbitration Law*

partial quash concept, similarly to the Arbitration Law no. 27. Until the draft of the new UAE arbitration law is issued and published, the Dubai Cassation Court has ruled to cover this gap. The annulment of part of the award due to the arbitrators ruling on matters which were not covered in the terms of reference leads to the annulment of the other part of the award within the scope of work and powers of the arbitrators, unless both parts are not related or in connection therewith, the court has utter discretion to assess and rule on the question of the connection of the parts of the award, with no higher court supervision of on such assessment and ruling.⁶⁰

The question arises on the status of the award if the matter in dispute was determined during the conduct of the arbitration hearings

Scholars are of two schools of thought in this regard, the first school supporting that the matters in dispute must be determined prior to commencing the arbitral hearing, while the second school supports that agreeing to the arbitrators' scope and powers during the arbitral hearing provides flexibility and is arbitration friendly.

The first school supports the court decisions on the matter that the issues to be determined must be determined in the beginning of the arbitral proceedings. The arbitrators must know their power and what the dispute(s) in question is/are. This school of thought relies mainly on the number of court judgments. Further, the Egypt Supreme Court revised its view with regards an issued a judgment confirming the eligibility to write down the issues to be determined during the arbitration hearing. The Supreme Court judgment held that the award shall be conclusive in terms of containing all supportive documents and legal basis to form a valid award, even though the tribunal determined during the hearing that the matters in dispute was a claim of EGP 80200/- such clarification shall not waive and replace the requirement of writing down the matter(s) in dispute in the arbitration agreement.

⁶⁰ *Dubai Court of Cassation, case no 10 of 1995 Huqooq, hearing 8/10/1995*

The second school of thought supports that there is no requirement and/or need to write down the issue(s) to be determined in arbitration during the hearing.

1.2.3.1. Dispute in place - Arbitrability of the matters in dispute

It is not sufficient to have a valid subject matter of the arbitration, as discussed above, to conduct arbitration. The Civil Procedure Code and Arbitration Law no. 27 adopt the same view, as arbitration is not acceptable unless the matters within the arbitration are capable of being reconciled.⁶¹

All civil, commercial, and administrative transactions may be the subject of arbitration, including but not limited to, oil and gas, construction, shipping, sale and purchase, however the transaction or right subject to arbitration must be of kind that is capable of being reconciled. Reconciliation is forbidden on matters contrary to public order, personal status and of criminal law nature. This shows the difference between arbitration and the court, with the latter applying solely local applicable laws, rules, and regulations to serve justice and protect society, with no limitations on the courts' powers and authorities relating to the subject matter of the dispute, while the former various foreign laws may be applied in deciding a dispute, depending on the parties' agreement. Thus, arbitration is governed by law with jurisdictional limits and supervised by the court, when appropriate. Assuming that the requirement of reconciliation is not mandatory by law, then arbitration as an alternative dispute resolution method will be similar to the court, while social security and the serving justice shall be in risk.

In the old Islamic years, all matters in dispute were subject to arbitration, including personal status and criminal disputes. Later, Islamic schools of thought started to restrict certain disputes from being heard via means of arbitration. As a general rule,

⁶¹ Article 203(4) of the Civil Procedure Code; Article 11 of the Arbitration Law no. 27.

all disputes relating to compensation and paying monies could be subject to arbitration⁶², giving as common rule of Islamic countries. The Egyptian Civil Law is clear about the matters that do not regard as appropriate to be subject to reconciliation, these matters being personal status, criminal cases, and matters against the public order. The UAE Civil Code considers, among others, that personal status and transferring of wealth and other social principal rules are of matters in the sphere of public order.⁶³ The Dubai Court of Cassation has ruled an interesting judgment, where the claimant commenced arbitral proceedings claiming termination of a sale and purchase agreement, and eventually, the arbitrators ruled that the sale and purchase agreement is void exceeding their powers to decide on a point that legally fell under the transfer of wealth category. Thus the Court of Cassation quashed the award as the arbitrator ruled on a matter that could not be reconciled which is an integral part of the public order matrix in the UAE.⁶⁴

The importance of confirming the arbitrability of the matters in dispute is related to the consequences of ignoring the value of the public order. There are three points to be covered under the importance of the arbitrability of matters. Firstly, the arbitral award will be quashed if the arbitrator rules on a point falling under the sphere of public order. Secondly, the award will be also be quashed if the matter in dispute is arbitrable, however the outcome of the award is against the public order. Thirdly, when assessing the arbitrability of a matter, the arbitrator will evaluate the subject matter from a local law perspective.

Scholars established that matters which cannot be subject to arbitration are these related to public order, personal status, and crimes and sanctions.⁶⁵

⁶² Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at p. 242.

⁶³ Article 3 of the UAE Civil Transaction Law.

⁶⁴ Case no. 14 of 2012 hearing 16/9/2012 Aqari (real estate division).

⁶⁵ Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at p. 427.

1.2.3.2. Personal Status

The UAE law⁶⁶ and the Egyptian Civil Law – Article 27 of mix courts regime of 1937 related to the personal statutes - confirm that questions in relation to personal status, including determination on capacity to sign a contract, are not subject of arbitration, except to money claim raise out such personal relation like determination of housing allowance and compensation of invalid marriage. The French law does not consider personal status as part of the public order, and rather considers it a civil transaction, and further, the French civil law considers the question of capacity, as part of the personal status, is related to public order and cannot be the subject of arbitration.⁶⁷

1.2.3.3. Criminal Offences and Sanction Matters

It is established that questions of guilty and imposing sanctions are exclusively vested on the state. The Public Prosecutor conducts investigation on behalf of the state. Such power cannot be transferred to an arbitrator.

Arbitration Law no. 27 confirms that criminal behavior and acts that give arise to punishment are not subject to arbitration as it cannot be capable of reconciliation.⁶⁸ Further, individuals have no capacity to settle criminal matters since they are not part of the criminal trial, as it is the Public Prosecutor who represents the state, whereas the victim may file a claim of damages before the civil court. Egyptian courts have repeatedly confirmed the ineligibility to conduct arbitration over criminal questions as it is a public order matter related and not subject to

⁶⁶ Article 3 of the UAE Civil Code.

⁶⁷ Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at p. 429.

⁶⁸ Clause 11 Egyptian Arbitration Law

reconciliation, the court ruled to quash an arbitral award as the subject of the arbitration was to determine a crime of murder.⁶⁹

Although the principal of non arbitrability of criminal acts is clear, scholars wonder as to the eligibility of arbitration in relation to crimes capable to be reconciled. Among other, the reconciled crime cover, where a fire was caused by negligence due to lack of maintenance or lack of cleaning, resulting to personal damage caused by mistake.⁷⁰ Having illegal power in connection to the construction site is a penalized crime that could be settled with the authorities, and such crime may be also subject to arbitration.

Scholars see that reconciled crimes are not of actual high risk that affect the society. Referring such matter to arbitration will minimize the number of criminal cases heard by criminal courts have jurisdiction to hear such criminal cases. Moreover, the scholars are of the opinion that the law prevents referring to arbitration matters that are not capable of reconciliation, while the above crimes could be subject to reconciliation, so the legal bar is removed and such matter could be arbitrable. The same scholars declare it a failure of the law so far, hoping future developments on the matter.

1.2.3.4. Public Order

An arbitral award will not be recognized if arbitrators rule against the public order. International conventions respect this element giving local courts the power to nullify the award where the award deals with matters against the public order.

⁶⁹ Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at p. 431.

⁷⁰ Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at p. 435.

Public order covers the groups of norms and values forming a society which also provide a full picture of individual life in the society and how to protect the political, social, and economic goals. A public order norm comes from a set of mandatory rules protecting the community to retain the above goals, and public order rules seem to be keen to protect individuals. Protecting the public order rule is a public responsibility, thus an action to nullify a transaction or award against the public order can be brought to court by either party or raised by the judge when a matter is referred to him.⁷¹

The legislators' intention is not clear when it comes to protecting the public order matrix in arbitration; whether the protection is to prevent the arbitrators or the parties to arbitrate over matters of public order or whether the award should not rule against public order matters. The opinions of scholars on this point are divided, where a number of scholars consider that matters of public order are not arbitrable and others consider that the nullification of the award shall be a cause of ruling against the public order. The author considers that both schools of thought are right, considering that as a general rule one cannot rule against the public order, even though matters in arbitration are not public order issues. There would be no breach to the community protection if arbitrators dealt with the public order issue and the award was not against the public order, so the legislator's concerns would be met/satisfied. The law has prevent a certain matter of being subject to arbitration, and also refer a number of matters – not matters falling under the public order – to arbitration. The author agrees with the second school of thought.

There is no exclusive list of the issues that fall under the public order sphere, hence are protected and prevented from being decided upon in an award. However, below is a non-exhaustive list of examples of matters falling under the public order sphere:

⁷¹Abou AlAinain, M & Abdulatif M. (year of publishing not available), *The Arbitration Courts ('Kada'a al tahkim')*, Cairo: Abu Al Majed Publishing, part 1, at p. 440.

1. Personal freedoms, freedom of expression and laws of the penal code;
2. The local courts jurisdictional competences, and any term to remove this is null and void;
3. Rules that regulate the currency and related to the economical principles of a society;
4. Questions on capacity are a matter of public order, and no person can withdraw, revise or create his/her own capacity. No arbitration award shall grant an individual or legal person the capacity to enter a contract or preventing him of such power. Any agreement contradicting this rule is null and void. Custody and guardianship rules enjoy the legal protection; and
5. Personal issues relating to the human being standing, for example, name and nationality. An arbitral award may not change a person's name or grant a nationality.

Chapter Two

Legal Significance and the Legal Role of Terms of Reference

2.1. Legal Significance of Terms of Reference

2.2. Are Terms of Reference a mandatory requirement under the Civil Procedure Code?

Under UAE Federal Law no. 11 of 1992 (the Civil Procedure Code), the parties may agree by means of an arbitration clause to refer their future dispute to an arbitrator or more, and such referral could be either by means of an arbitration clause in the main contract or by a separate agreement after a dispute arises.⁷²

In the event that the arbitration is conducted to conciliate a dispute, and the arbitrator(s) are clearly granted the power of conciliation of the dispute, the arbitration is conducted without any boundaries to the procedural law except having a valid written arbitration clause and the arbitrators being nominated in person either in the arbitration clause or in a separate agreement. In all other cases, the arbitration must be governed by the Civil Procedure Code and other statutory formalities shall be applicable, such as preparing terms of reference or arbitration deed.⁷³

The wording of the Civil Procedure Code is not clear on the matter of terms of reference. In this regard, the Civil Procedure Code is confusing and ambiguous in relation to the requirement, or not, of terms of reference.⁷⁴

At first reading, the impression is that the terms of reference refer to a submission agreement made by the parties after the dispute is raised (compromis), while in certain

⁷² Article 203 of the Civil Procedure Code.

⁷³ AlAhdab AH (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, book 3, at p. 191.

⁷⁴ AlAhdab AH (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, book 3, at p. 192.

Articles, the wording terms of reference covers both types of an arbitration agreement, that is arbitration clause and submission agreement.⁷⁵

Due to the ambiguity of the Civil Procedure Code relating to the terms of reference, it is not easy to clarify the actual meaning of terms of reference (arbitration instrument) referred to in Article 203(3)⁷⁶ and Article 216(1)(b)⁷⁷ of the Civil Procedure Code, whether the intention of the legislators relating to the terms of reference was to a submission agreement, arbitration clause, or an agreement signed between the parties and the arbitrators. This ambiguity is apparent in particular in Article 203(3) which indicates that the subject matter of the dispute “shall be specified in the terms of reference or during the hearing of the suit”⁷⁸ giving the parties the option to agree on the points in dispute during the arbitral proceedings.⁷⁹

The ambiguity goes in depth by reviewing the Federal Higher Court – Abu Dhabi commenting on and interpreting Article 203(3) of the Civil Procedure Code confirming the possibility of determining the disputed points during the arbitration trial before the tribunal.⁸⁰ For example, the terms of reference could reflect the parties’ intention to arbitrate the dispute between them and the points in dispute may be determined at a later stage during the arbitration hearing, such action not risking the arbitral award being nullified as a consequence.⁸¹ This judgment supports the concept of having terms of reference and/or arbitration instrument without identifying the matters in dispute to

⁷⁵ AlAhdab AH (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, Book 3, at p. 192.

⁷⁶ The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action..., failing which the arbitration shall be void.

⁷⁷ Article 216(1)(b) of the Civil Procedure Code states that *'The parties may apply for the award of the arbitrators to be nullified ... in the following circumstances: (a) ... (b) ... if it was issued on the basis of an arbitration instrument that does not specify the subject matter of the dispute ... (c) ...'*

⁷⁸ Article 203(3) of the Civil Procedure Code.

⁷⁹ AlAhdab AH (2009), *Encyclopedia of Arbitration – Arbitration in the Arab Countries*, Beirut: AlHalabi Legal Publications, book 1, at p. 193.

⁸⁰ Cassation no. 11 for the year of 22 *kaf*, hearing 19/5/2002, Abu Dhabi Federal Higher Court [at p. 42], Shaaban Abdul Latif, 2007, Bin Dasmal Publishers].

⁸¹ *Gada'a Al Tahkim'*, Shaaban Abdul Latif (2007), *The Arbitration Judgment'*, Bin Dasmal Publishers, at p. 42.

be determined prior to the arbitral proceedings, leaving such identification to be determined during the arbitration hearings.

The above judgment is not the only judgment that dealt with the matter, as there have been a number of judgments maintaining the same principle. The Abu Dhabi Federal Higher Court has confirmed in judgment no. 118 of year 23 *Kaf* – hearing date 21st January 2004 that subsection 3 of Article 203 of the Civil Procedure Code highlights the obligation to determine the matters in dispute in the terms of reference or during the arbitration hearing, and as the judgments have established, parties may generally agree in the arbitration agreement or at a later stage by means of a separate written agreement to refer the matter to one or more arbitrators, and the subject matter of the dispute may be determined in the terms of reference or during the arbitration hearing.⁸²

By reviewing the above court’s interpretation of Article 203(3), the terms “terms of reference” or “arbitration instrument” appear to be different agreements such as arbitration contracts, as the parties may sign an arbitration clause or a submission agreement and in all cases the dispute could be determine in a separate instrument/agreement or during the arbitration hearing. In the latter case, the options the parties may have a submission agreement which does not set out the dispute. Another point of confusion contradicts with Article 216(1)(b), which indicates that saying that the arbitral parties may request the nullification of an award “if [the award] was based on terms of reference in which the dispute was not specified”⁸³.

The higher courts in Abu Dhabi and Dubai have put enormous efforts to minimize the confusing effect of Article 203 of the Civil Procedure Code and bring it in line with Article 216, although the latter Article and in particular subsection (1)(b) thereof, which

⁸² Also, please see the UAE Higher Federal Court – Abu Dhabi judgment no 360 for year 24 *Kaf* hearing date of 21/12/2004.

⁸³ Article 216(1)(b) of the Civil Procedure Code.

excludes the possibility to determine the dispute during the arbitration hearing(s) and nullify the award if the related terms of reference did not contain a specification of the dispute.

The Courts have declared that matters in disputes cannot be provided under the arbitration clause simply due to the fact that at the time of entering into the arbitration agreement via an arbitration clause in a main contract, the dispute was nonexistent. The UAE Courts found a solution confirming the validity of the arbitration clause even if it does not specify the matters in dispute confirming that determination of the matter in dispute is not part of the validity of the arbitration agreement where such matter could be determined during arbitration proceedings.⁸⁴ The UAE Courts have ceased actions to nullify an arbitral award issued on the basis of an arbitration clause which does not specify contain the issues in dispute since it is not possible to specify the issues in dispute in the arbitration clause⁸⁵ as such arbitration clause is used for disputes that may arise in the future. The court's interpretation in the aforementioned case of the phrase "during the hearing of the suit"⁸⁶ indicated in Article 203(3) of the Civil Procedure Code, is that parties' main contract containing an arbitration clause is to commence arbitral proceedings and set out the matters in dispute before the tribunal either in the statement of claim or during the arbitration hearing before the tribunal.

By adopting the new interpretation of the UAE Courts, it is possible to read Article 216(1)(b) of the Civil Procedure Code as follows [the word terms of reference/arbitration instrument are replaced by the underlined wording to give the UAE court interpretation as set out in the above case⁸⁷ :

⁸⁴ Higher Federal Court – Abu Dhabi judgment no 11 for year 24 Kaf hearing date of 19/05/2002, Also Higher Federal Court – Abu Dhabi judgment no 22 for year 24 Kaf hearing date of 3/3/2002.

⁸⁵ Higher Federal Court – Abu Dhabi judgment 91 and 92 hearing date of 21/11/1992 (Addad 3 p 778).

⁸⁶ Article 203(3) of the Civil Procedure Code.

⁸⁷ This clause is not an official clause and could not be used in addressing the statutory wording. The clause was redrafted for the purposes of this paper and to give the understanding of a school of law to which this paper writer supports.

1- *The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the following circumstances:*

- a. *if it was issued otherwise than with an ~~arbitration instrument~~ Submission agreement or on the basis of an instrument which is invalid or has lapsed by effluxion of time, or if the arbitrator acted outside the scope of the instrument;*
- b. *if the award was made by arbitrators appointed otherwise than in accordance with the law, or was issued by some of them without their being authorized to make an award in the absence of the others or if it was issued on the basis of an ~~arbitration instrument~~ arbitration agreement that does not specify the subject matter of the dispute or was issued by a person not having capacity to make an arbitration agreement or an arbitrator not satisfying the requirements of the law;*
- c. *if there is a nullity in the award or a nullity in the proceedings having an effect on the award.*

2- *An [application for annulment on the grounds of] nullity shall not be barred by a party having waived his right thereto before the issue of the award of the arbitrators.*

The reference to the arbitration instrument shall be read as reference to the arbitration agreement, whether in the form of arbitration clause and issues in dispute - Default Terms of reference, or in the form of a submission agreement.⁸⁸ Another scholar, Dr. Ahdab Abdel Hamid, was a pioneer in highlighting this ambiguity. Dr. Ahdab adopted the same point of view to read the terms of

⁸⁸ *Gada'a Al Tahkim'*, Shaaban Abdul Latif (2007), *The Arbitration Judgments*, Bin Dasmal Publishers, at p. 325.

reference/arbitration instrument as arbitration agreement in the context of subparagraph (1)(b) of Article 216 of the Civil Procedure Code.⁸⁹

Pursuant to the above interpretation, and to the author's opinion, the ambiguity relating to the terms of reference/arbitration instrument is now clear and could be arbitration may be commenced by an arbitration agreement by the parties either signing an arbitration clause whether prior to or when a dispute arises, such clause being tied up by specifying the issue(s) in dispute during the arbitration hearing, or directly after the dispute arises. The parties may enter into an agreement to arbitrate a dispute under which the parties indicate their intention to arbitrate the dispute along with identifying the disputed points.

The identification of the points in dispute give the local court the tool supervise the arbitration agreement to ensure that the arbitrator didn't across his power marked by the matter in dispute agreed to by the parties.

2.3. What if a party refuses to sign the terms of reference?

Under the ICC arbitration rules, if a party refuses to sign the terms of reference, the arbitrators must refer the matter to the Court where the latter may ratify the draft terms of reference produced by the appointed arbitrators. Following the decision of the Court, the terms of reference may be considered to be valid.

⁸⁹ Dr. Ahdab, AH, *“Encyclopedia of Arbitration, Arbitration in the Arab Countries”*, Annex Book1, Al - Halabi Legal Publications , Third Edition, at p. 194.

2.4. What if a party did not attend the arbitration proceedings – who shall sign the terms of reference?

Pursuant to Article 208 of the Civil Procedure Code, the arbitrators may proceed with the arbitration in the absence of a respondent if the latter is duly notified of the arbitration proceedings. This Article allows the participants to proceed with the terms of reference signed by the claimant and the arbitrators, in the absence of the respondent.

2.5 Award Annulment due to Terms of Reference Breach

In principle, the parties give powers to the arbitrator(s) to supervise the arbitration process and procedure and also to rule over the dispute in the form of an award.⁹⁰ Thus, the parties will must be respected and not breached. If the tribunal exceeds the powers granted to it by the parties, then the entire arbitration process shall be at risk as the award may be later nullified.

In an arbitration case, the higher court in Egypt considered the tribunal were in excess of their powers when the tribunal held that a shareholder agreement was null and void in excess of their powers granted while the parties' claim concerned a matter relating to the enforcement of the shareholder agreement.⁹¹

In the event that the tribunal exceeds their powers by ruling on a matter in excess of their powers and the claimant's claim or on a matter which is not part of the claim, the award shall be set aside due to grounds of defect. In principal, and pursuant to Article 216 of the Civil Procedure Code, local courts are strict in setting aside awards issued in excess of the parties' claim.

⁹⁰ Dr. Fahi Wali (1998), *Alwasit fi kanoun elkhada'a elmadani*, Cairo: Dar Elnahdha alArabiya, at p. 54.

⁹¹ *Majjalat Almuhami almisriya*, issued on 03/01/1952 Year (33), section 8 p 1229.

The annulment of part of the award due to the breach on the part of the tribunal in exceeding their powers relating to the issues in dispute may eventually cause the annulment of the valid part of the award, unless the two parts are not linked with each other, something that may only be ruled upon by the court.⁹² Although the local court supervises the arbitration award in a friendly arbitration environment, the provisions of the UAE arbitration law do not permit the annulment of part of the award, contrary to the Egyptian arbitration law pursuant to which annulment of part of the award is permissible.⁹³ The partial award concept is adopted by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also commonly referred to as the New York Convention 1958) and the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006.

It must be noted that the UAE draft arbitration law of 2010 adopts the concept of annulment of part of the award. The new draft law is indeed a step forward in unifying the UAE arbitration laws to the international laws and conventions, nonetheless, it has not been published yet in the UAE Official Gazette, hence not in force yet. Should the current bill become in force as a statute in the near future, this would be a positive step forward in constituting the UAE as an international arbitration hub.

2.6. Role of the Terms of Reference as conclusive of an Arbitration Agreement

2.6.1. Arbitration Contract

The arbitration contract is an agreement signed between the parties on one side and the arbitrator(s) on the other side to allow the arbitrators to decide on the dispute.

⁹² Dubai Court of Cassation, case no 10 of 1995 , date 8.10.1995.

⁹³ Article 5 of the Arbitration Law no. 27.

An arbitration contract is different from the arbitration agreement executed between the parties to refer their dispute to arbitration.⁹⁴

In the arbitration contract the parties to a dispute seek a decision by the arbitrator(s) on the issues in dispute, while the arbitrator(s) seek the resolve the dispute in return of cash remuneration.⁹⁵ Exceptionally, an arbitrator may accept to rule for free. It should be noted that the UAE arbitration laws do not forbid free of charge arbitration.

Despite the arbitration agreement being governed by Articles 203 to 216 of the UAE Procedural Code, the arbitration contract falls under the general terms of UAE Civil Transaction Code.⁹⁶

A valid arbitration contract must contain the general requirements statutorily required for the validity of a contract, as discussed in detail above. Additionally, there is a further special requirement specific related to the validity of arbitration contract⁹⁷ as discussed in detail below.

The arbitration contract shall be a result of the parties and arbitrators free will to enter into such arrangement. Although the parties' capacity to enter in an arbitration agreement is conditional, that is, each party individually reserves the right of disposition in relation to the disputed matters, the arbitrator must be

⁹⁴ Abdel Tawab Ahmad (2009), *The Arbitration Agreement and its related challenges (Itifaq altahkim w aldoufou almotaaliqa bihy)*, Alexandria: Dar Aljamiya Aljadeeda, at p. 179.

⁹⁵ AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 131.

⁹⁶ AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 131.

⁹⁷ Article 206(1) (1 - It shall not be permissible for a minor or a person under a legal disability or a person deprived of his civil rights by reason of a criminal penalty or an unrehabilitated bankrupt to be an arbitrator.)and Article 207(1).

entitled to use all his civil rights and not prevented from practicing any right and not convicted by a criminal offence. Further, the 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”⁹⁸. Comparing these requirements to the parties’ capacity to enter into an arbitration agreement, a party to the arbitration may be a minor, subject to court approval, while under Article 206(1) of the Civil Procedure Code, an arbitrator cannot be a minor under any circumstances, even where the arbitrator is considered by a court order to act as an adult.⁹⁹

The subject matter to the arbitration contract must be legal, while the interest of the arbitration contract differs between the signatories. The arbitrators' interest is to deliver a final award and be compensated for their work, while the parties' interest is to resolve the dispute.

The arbitration contract is an agreement of consideration where each party provides a return toward his obligations. The parties will have an award in consideration of paying money to the arbitrators, in return the arbitrator receive their compensation as a result of issuing a final award. As a possible exception, an arbitrator may provide his services for free, something which is not forbidden by law.¹⁰⁰

As principal, the arbitrators' remuneration is consensual to be agreed on in the arbitration contract. Further, the UAE law allows the arbitrator to impose on any of the arbitration party to bear the cost in full or in part. The arbitrator may also issue an award on costs. The court may upon a party’s application to remove all or any of

⁹⁸ Article 206(1) of the Civil Procedure Code.

⁹⁹ AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 132.

¹⁰⁰ AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 133.

the arbitrators. In 1997, the Abu Dhabi Supreme Court confirmed the local courts' power to assess and revise the arbitrators' remuneration.¹⁰¹

Professor Ahmed Abu Elwafa is of the opinion that arbitrators should not be entitled of their remuneration in the event that the court annuls the award due to the arbitrator's fault or negligence.¹⁰²

The UAE arbitration law imposes a further requirement for the validity of the arbitration contract under Article 207 of the Civil Procedure Code. The arbitrator's acceptance of his appointment as arbitrator must be evidenced in writing or noted in the minutes of the arbitration sessions.

In the event that the arbitration case is referred to the arbitrators through the court, it is sufficient that the arbitrators note down their consent during the hearing. The purpose of this requirement is for confirmation purposes that the arbitrator will conduct the arbitration case.

The arbitration contract is mainly entered into in ad hoc arbitrations, however, it could be entered into in institutional arbitrations, depending on the parties' will, that is, whether they appoint the centre to be as case manager to the dispute were the arbitrators already appointed by the parties.

¹⁰¹ Abu Dhabi Higher Court, Case no. 365 judicial year 17, issued on 09.03.1997.

¹⁰² AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 1325.

2.6.2. *Effects of the Arbitration Contract*

The arbitration contract creates a legal binding framework between the arbitrators and the parties. The contract also creates a number of major effects that come into place once the contract is signed.

When the arbitration agreement is signed, the arbitrators shall have the power and capacity to act as arbitrators where the parties turn to be claimant and respondent. The arbitrator may be subject to claims under negligence or fault.

In the event that arbitration is ordered by the court, the arbitration contract is not required as the arbitrators' powers are granted by the court judgment.¹⁰³ However, for the purposes of best arbitration practices, it is recommended to enter into an arbitration contract even under court ordered arbitration, as it sets out a clear view of the arbitrators' obligations as it provides the possibility to the arbitrators of having a professional indemnity insurance to cover any damages that may occur as a result of the arbitrators' negligence, gross fault, or regular fault.

2.6.3. *Arbitration Center in the arbitration contract*

The arbitration could be either ad hoc or institutional. In principle, in ad hoc arbitrations, the arbitration contract is executed between the parties and the arbitrator as individual. In such an event, the arbitrator acts an arbitrator along with managing the case file, unless the parties agree otherwise.

The case is different when the parties in their arbitration agreement refer the dispute to an arbitration centre (institutional arbitration). In such case, the referral

¹⁰³ AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 1328.

clause to the center creates a binding arbitration contract between the parties and the centre.

A question that arises is whether a centre may act as the arbitrator. It is established that an arbitrator is always appointed in his personal capacity¹⁰⁴, and it is not permissible for an arbitrator to delegate his authority to a third party.

In institutional arbitration, where the centre is authorized to appoint the arbitrators, the arbitration contract could be in two forms:-

1. The first form is where the parties agree in their arbitration agreement to refer their dispute to a specific centre relying on the center's history and reputation. In such case, the parties trust the expertise of the centre in appointing qualified arbitrators with relevant qualifications and experience to hear the dispute. The centre determines the arbitrator's remuneration in advance pursuant to its respective rules. Although the centre has a separate arrangement with the arbitrator to calculate the arbitrator's remuneration, the parties to the dispute have no involvement in such arrangement giving full power to the centre to manage the arbitration and to appoint the arbitrator(s). In this option, the arbitrators may not sue a party of the dispute for nonpayment of the arbitrator's costs due to privity of contract.
2. The second form, the centre is limited to facilitate the arbitration by regulating the arbitration, arranging for the parties' meetings and hearing venue, without having the power to nominate the arbitrator(s). In such scenario, the arbitration contract shall appoint the arbitrator(s) and agree on a specific arbitration centre to facilitate the arbitration.

¹⁰⁴ AlSarhan Baker (2012), *UAE Arbitration Law (qanoun altahkim alemarti)*, Sharjah: AlMaktaba Aljamiya, at p. 139.

2.7. Default terms of reference:

Pursuant to the Dubai High Court of Cassation decision no 265 of 2007 issued on 03.03.2008, the court confirms the non necessity of the terms of reference/arbitration deed when the matters in dispute are listed during the arbitration proceeding. To my opinion, I believe that setting up matters in dispute during the arbitration submission or hearing is consider to be as default terms of reference or the minimum requirement of terms of reference. However, it is not practically sufficient to rely on this theory as a number on critical arbitration element shall be missing (i.e. arbitration rule, seat, language).

2.8. Detailed terms of reference

The terms of reference play another significant role allowing the court to supervise the procedure of the arbitration. Article 216(1)(a) give the court the power to nullify an award if the award was issued without terms of reference or if the terms of reference were invalid. Under the same Article, the court could also nullify the award where the arbitrators are in breach of the terms in reference by exceeding their limit set in the arbitration instrument.¹⁰⁵ The court monitors the arbitration process strictly when it comes to the interpretation of the dispute, as arbitration is an alternative dispute resolution method where the arbitrator is strictly bound to the arbitration mission based on the parties' claims.

Below are terms of reference (best practice)

Ideal terms of reference shall contain a number of elements as follows:

- (a) The parties' names and designation

The claimant shall initiate a proper arbitration proceeding by providing a correct address of the defendant, similar to the local proceedings. When the

¹⁰⁵ Article 216 (a), also

defendant's address is provided by the claimant, the latter shall bear in mind that such address will be part of the recognition and enforcement order issued by the local court eventually. The important point is that the defendant is not under obligation by the arbitration laws to provide a proper address, however by virtue of signing the terms of reference, the defendant confirms such address belong to him. The address shall consider the proper name of the parties, license number if a company if a party to the proceedings, physical location of the parties, contact number (phone, fax, telex), email addresses, full name and designation of the parties' representatives with their respective email addresses and contact details.

Any incorrect letter or typing mistake in the any of the parties' name would force the local court to nullify the award. This risk is high when the name is translated to another language, thus the author recommends using the parties' names as indicated in their official identification papers, or trade license if a company is a party to the proceedings, with a clear reference to the number of the official license or the passport/identification document.

- (b) The Parties' address for the notification and correspondence during the arbitration.

To ensure a smooth process of the arbitration, the parties must provide clear and proper addresses for notification and exchanging letters, memos or lodging complaints. The parties' representatives may choose different addresses or in addition to the parties' actual address as designated address to exchange memos and notifications.

- (c) A brief of the parties' claim, the quantum and the required decision to be issued by the arbitrator.

Based on the parties' submissions, the tribunal produces a dispute brief. There is no measure of the brief size or contents. Practically, the brief

should cover the facts of the dispute produced by both parties and their respective claims.

The brief could also contain the initial decisions required to be taken in due course during the arbitration process. There is no specific draft required for the brief, and the tribunal is flexible to prepare a draft acceptable by the parties and parties' representatives, although in practice this is not easy with sophisticated legal representatives aiming to benefit under unclear terms of reference in order to seek award annulment before the local court.

In all cases, it is crucial to quantify the claim in a sum of money, especially those that were not quantified in the parties' respective claims.

- (d) A list of issues to be determined, unless the tribunal considers this task is not required.

The points in dispute or issues to be determined are considered to be one of the major issues in conducting the task of preparing terms of reference.

Identifying the list of the points in dispute is controversial, and could make a party refuse to sign the terms of reference or in the best case scenario, delay the arbitral proceedings.

The main purpose in crystallizing the list of the points in dispute is to make the tribunal's mission clear and reduce the risk of having them ruling beyond their scope of work. Moreover, it assists the tribunal to assess the number of hearings that may be required to complete their work and the time required for a final award to be issued.

(e) Name(s) of the arbitrator(s), title(s), address(es)

The arbitrator must provide the parties and the parties; representatives with their respective name(s), title(s) and address(es).

(f) Arbitrators' acceptance of appointment to conduct the arbitration

As required under the provisions of Article 207(1) of the Civil Procedure Code, the arbitrators must accept their appointment as arbitrators in writing. Thus, it is implied that the terms of reference confirm the arbitrator's intention in accepting his appointment as arbitrator in hearing the dispute. Such confirmation is of vital importance as should no such confirmation be in place, a party may apply to the local court to annul the award.

(g) Seat of the Arbitration

The terms of reference must contain have a reference to the seat of the arbitration as a condition to have the legal framework of the arbitration. The seat of the arbitration determines the jurisdiction of the local court.

(h) The arbitration rules

The parties may agree to the arbitration rules in the terms of reference by agreeing to have the arbitration proceedings pursuant to a specific arbitration institution's rule.

Chapter 3 - Conclusion

The role of the terms of reference under UAE current arbitration laws, that is under the Civil Procedure Code, is indeed confusing to all concerned parties; from legal scholars who have opposing views as to the terms of reference, to tribunal involved, counsel and parties. The current laws do not provide sufficient flexibility nor clarity and legal certainty, as required and being of vital importance in international commercial arbitrations.

The UAE is under immense expansion infrastructure wise, with foreign, and arguably local, investments worth of billion and trillion US Dollars, and tens of mega construction projects involving main contractors, and on many occasions, various subcontractors, that could go wrong and find recourse in arbitration. For this reason, adequate statutory provisions relating to arbitration should be in place. The terms of reference are considered by many persons involved in arbitrations as vital, without which thousands, and depending on the claim millions, of counsel and tribunal fees being wasted due to a final award being annulled, and by others, being considered as an unnecessary document. The Civil Procedure Code does not provide sufficient clarity as to whether it is a mandatory statutory requirement, risking the validity of the final award.

Additionally, in the author's opinion, the Civil Procedure Code is not clear as to the distinction between the terms of reference and a submission agreement, thus creating uncertainty in legal terms. In practice, in the UAE, certain participants refuse to sign terms of reference arguing that the terms of reference is not a mandatory requirement as per current UAE arbitration laws, thus risking the validity of the final award, or arguably used as a tactic for the purposes of having grounds to challenge the validity of the final award to their advantage.

The role of the terms of reference under applicable UAE laws is not clear and this creates legal uncertainty, especially in a part of the world where major arbitral disputes are commenced, mostly construction disputes where large amounts of

money are at stake. Arguably, the draft UAE federal arbitration law sheds some light and provides more legal certainty as to the role of the terms of reference in the arbitral process, nonetheless, despite being first drafted in 2008, the draft arbitration law still remains a bill, about seven years after being first drafted. When the UAE federal arbitration law is enacted and comes into force, it would be a positive step forward proving legal certainty as to the terms of reference.

ANNEXURE

Terms of Reference Sample

Below a template of terms of reference is produced, which is in line with the UAE laws requirement and meeting the practicality to conduct a smooth arbitration, always subject of participants good will.

IN AN ARBITRATION – Case No

Before [insert arbitration institution name (i.e. ICC, DIAC, AAA,...)]

BETWEEN

..... (United Arab Emirates)

CLAIMANT

-v-

(1) (United Arab Emirates)

(2) (United Arab Emirates)

RESPONDENT

TERMS OF REFERENCE

A. Names and Description of the Parties

1. The Claimant is [*insert claimant name and details pursuant it commercial licence details*], of Unit, Floor, Tower / building (adjacent to the), , PO Box, Dubai, United Arab Emirates.

2. The Respondent is [*insert respondent name and details pursuant it commercial licence details*] of Unit, Floor, Tower / building (adjacent to the), , PO Box, Dubai, United Arab Emirates.

Jointly refer to as (**'Parties'**)

B. Addresses for Notifications or Communications to the Parties

3. The Claimant is represented in this Arbitration by (1) [*insert the names and details of the claimant's legal representative*] (i.e. Mr., (2) Mr. and (3) Mr. of [*insert the name of the law firm , consultancy/claims firm, or in-house counsel*], located in, PO Box, Dubai, United Arab Emirates: Telephone: +971 4 ; Fax: +971; E-mail:)

4. The Respondent are represented by [*insert the names and details of the claimant's legal representative*] (i.e. Mr. ; (2) Mr. Of [*insert the name of the law firm , consultancy/claims firm, or in-house counsel*] Unit; Floor; Tower/building; Area, PO Box, Dubai, United Arab Emirates: Telephone: +971 4; Fax: +971 4; E-mail:)

C. Summary of the Claims and Defences

5. The claims and defences of the parties are set out in the Claimant's Request for Arbitration and Statement of Claim both dated [*insert a date*], the Respondent's Answer dated [*insert a date*], and the Claimant's Submissions on Jurisdiction dated [*insert a date*] . Those claims and defences are summarised in this Terms of Reference but are more fully set out in Parties' submissions the tribunal.

6. The claims relate to an agreement made on [*insert a date*] ("the Contract") in relation to [*insert project details*] (i.e. a residential/Commercial/Mix tower located at Plot , located in Dubai) ("the Project").

Claimant's Claims

7. In summary the Claimant claims, AED [*insert a number*], and an interest at a rate of 12% starting from [*insert a date*].

8. The Claimant 's claims are as follows:
 - (1) Amounts due under the Contract of AED [*insert claim amount*];
 - (2) Variations in the amount of AED [*insert claim amount*];
 - (3) An extension of time for [*insert the number of days*] days for delay caused by the Respondent;
 - (4) Prolongation costs in the amount of AED [*insert claim amount*] for the duration of the extension of time;
 - (5) Head Office Overheads in the amount of AED [*insert claim amount*];
 - (6) Amounts in respect of settled claims from sub-contractors in the amount of AED [*insert claim amount*];
 - (7) Deductions made by the Respondent in the amount of AED[*insert claim amount*];
 - (8) Withheld retention monies in the amount of AED [*insert claim*

amount]; and

- (9) Payments for sub-contractors in the amount of AED [*insert claim amount*]

Arbitration Agreement

9. The Parties hereby agree to submit their claims and counterclaims highlighted in these terms of reference to the arbitration under ICC rule as revised in these terms of reference, if any. [***the parties may also refer or rely to arbitration clause previously executed by the party under their main contract***]

Respondents' Defences

10. The Respondent contend that Claimant [*insert respondent's position to the claim*]
11. The Respondent requests the following relief:
- (1) An order dismissing the Claimant's claim;
 - (2) A declaration that the Claimant is not entitled to the claimed amount or any part thereof;
 - (3) An order that the Claimant pay all costs of this Arbitration including the fees and expenses of the Arbitral Tribunal and the ICC and the costs and expenses of the First Respondent's representatives; and
 - (4) Any other order as the Arbitral Tribunal deems fit.
12. The Respondent reserves the right to revise the relief sought.

The Respondent' Claims

13. The First Respondent reserves the right to bring a counterclaim in the course

of the proceedings.

The Claimant's Response to the Respondents' Defences and Claims

14. The Claimant contends that *[insert claimant's response to the respondent position in paragraph 10 above]* ;

D List of Issues

15. The issues to be decided are all such issues as are necessary to determine the claims of the Claimant, the defences of the Respondent and all other matters referred to above. Without prejudice to that, the following issues may have to be decided but not necessarily all of these or only these and not necessarily in the order set out:

Preliminary/Jurisdictional Issues

To List preliminary Issues.....

Claims and Defences

To parties' claims and defences in details

E The Arbitral Tribunal

16. On *[insert a date]* the ICC International Court of Arbitration confirmed the arbitration tribunal member
17. Mr. *[insert a name]* (Chairman) and Mr *[insert a name]* (Co-Arbitrator) and Mr. *[insert a name]* (Co-Arbitrator).

18. All communications with or copied to the Arbitral Tribunal shall be sent to:
- (1) *[Insert Chairman contact details]*, (i.e. United Kingdom. Telephone: +44 (0) ; Fax: +44 (0); E-mail:)
 - (2) *[Insert the first Co-Arbitrator contact details]*, (i.e., Dubai, United Arab Emirates. Telephone: +971 4; Fax: +971 4; E-mail:.....)
 - (3) *[Insert the second Co-Arbitrator contact details]*, (i.e....., Dubai, United Arab Emirates. Telephone: +971 4; Fax: +971 4; E-mail:.....)
19. All communications sent or copied by one party to the Arbitral Tribunal shall be copied and sent at the same time and by the same method to the other parties. A copy of all communications with the Arbitrators shall also be sent to Counsel in charge of the file at the Secretariat, ICC International Court of Arbitration, 33 -43 avenue du Président Wilson, 75116 Paris, France. Telephone: +33 1; Fax: +..... ; E-mail:.....

F Place of Arbitration, Language and Applicable Rules of Law

20. The parties have agreed under Clause of the Contract that the Place of Arbitration is the Emirate of Dubai, with a suitable venue to be determined by the Arbitral Tribunal. The award or awards and all decisions or directions of the Arbitral Tribunal shall be deemed to have been made at the Place of Arbitration.

21. The parties have agreed that the language of this Arbitration is English.
22. The parties have agreed that the law governing the Contract is the laws of the Emirate of Dubai and the applicable laws of the United Arab Emirates.

G Applicable Procedural Rules

23. The parties have agreed that the procedural rules applicable to this Arbitration are the ICC Rules of Arbitration in force as from January 1, 2012.
24. The Chairman shall have authority to issue and sign procedural directions on behalf of the Arbitral Tribunal.
25. The Tribunal may determine any issue as to the relevant law on the basis of written or oral submissions of the Parties and the legal authorities submitted by the Parties to the Tribunal, without the need for either Party to call expert evidence on the law.

H Other provisions

26. The parties expressly agree, in accordance with Article 40 of the ICC Rules, that the arbitrators, any person appointed by the arbitral tribunal and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law. The parties agree, jointly and severally, to indemnify each of the arbitrators and the other parties referred to in this paragraph against any such liability, including liability for any costs, fees or legal fees incurred in any court or other proceedings involving any or all of them arising out of or in connection with this Arbitration.

27. The proceedings in this Arbitration, the submissions and the evidence prepared for this Arbitration, the positions of the Parties, and any awards shall be kept confidential by the Parties, provided that each Party may disclose such matters as necessary to the advisers of the Party under an obligation of confidentiality and as necessary for enforcement purposes.
28. In accordance with Article 30 of the ICC Rules, the time limit within which the Arbitral Tribunal must render its Final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or by the Parties of the Terms of Reference. The International Court of Arbitration may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.

These Terms of Reference were signed on [*insert the date*] in Dubai, United Arab Emirates

.....

for and on behalf of the Claimant

.....

for and on behalf of the Respondent

.....

Chairman

.....

First Co-Arbitrator

.....

Second Co-Arbitrator

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