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THE PENNSYLVANIA STATE UNIVERSITY

PENN STATE LAW

**Assessing the United Arab Emirates Decisional Law on
Arbitration**

BY

MOHAMMAD IBRAHIM ABDULRAHIM ABDULLA

A DISSERTATION IN LAW

SUBMITTED FOR THE DEGREE OF DOCTOR OF JUDICIAL SCIENCE

Abstract

The process of arbitration in the UAE is at a crossroads, having reached the point at which it could be used as a tool to elevate the way in which adjudication works in the UAE, or as a tool to funnel disputes into the courts. This study presents arguments in favor of deploying arbitration to improve adjudication, and against having it become simply a method for channeling disputes into the courts. It emphasizes the importance of having both systems in place, coexisting and working together to reach the common goal of providing adjudicatory relief to individuals. Finally, this paper emphasizes the importance of using arbitration in non-commercial disputes, and discusses how it can ease the load on the courts.

This work illuminates certain court practices that affect the manner in which arbitration disputes are funneled into the courts and seeks ways to streamline this process. This dissertation also highlights various issues that have complicated the use of arbitration in the UAE, and emphasizes the importance of solving these issues before the full-scale use of arbitration is promoted.

Chapter Two examines the courts' views on arbitration, and how these views directly influence the court's decisions. Chapter Three considers exceptions to the courts' views of arbitration. Chapter Four examines certain decisions made by the various civil circuit courts in the UAE and highlights the problems that continue to complicate the use of arbitration. Finally, Chapter Five proposes a working solution for these problems.

Arbitration is no longer a tool used exclusively by commercial parties; therefore, the solution proposed in this study (while it might also affect commercial parties) is meant to encourage the use of arbitration by non-commercial parties.

Acknowledgments

In the name of God the most compassionate and merciful, all gratitude and praise be only to Him.

There is a hadith by the Prophet Mohammad said;” He has not thanked Allah who has not thanked people” Sunan Abi Dawaud 4811, which encourages Muslims to acknowledge the aid of others.

Therefore, it gives me great pleasure to recognize the help of many individuals in the production of this study. My deepest gratitude goes to my supervisor Thomas E. Carbonneau, whose guidance and assistance helped in shaping this thesis. My thanks also extend to the staff and faculty of Penn State.

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“The time has come for the Public and Private sector to work together to develop the country”

H.H. Sheikh Mohammad bin Rashid Al-Maktoum Ruler of Dubai

Chapter One

Introduction

1. Problem Statement

This dissertation assesses the views of the United Arab Emirates’ court system¹ on the use of arbitration. These views, as well as the rules of the Islamic Shari’a and various pieces of UAE legislation, have had a wide-ranging affect on the practice of arbitration in the UAE, which this paper also addresses.

The UAE is a small country located on the Arabian Peninsula, founded December 2, 1971 by the unification of seven Emirates: Abu Dhabi, Dubai, Sharjah, Fujairah, Ras Al Khaimah Umm, Al Quwain and Ajman.²

This developing country has its sights set on becoming an international hub for commerce and trade in the Middle East, and it does not want to depend on a single source of revenue. The UAE has been working to broaden its sources of income and in turn attract investors from all over the world to base operations in the UAE. The UAE’s population has been growing in the past several decades, and a growth in population in a small country of finite size may be easily understood to coincide with an increase in interpersonal disputes, which must be resolved³. Societies use many methods to resolve the disputes that arise from human transactions, such as litigation

¹ The United Arab Emirates, hereinafter “UAE”.

² The United Arab Emirates Constitution of 1971, article 1.

³ Maria Dakolias states that “economic and social progress cannot sustainably be achieved without respect for the rule of law, democratic consolidation, and effective human rights protection; each of which requires a well-functioning judiciary that can interpret and enforce the laws equitably and efficiently”, see Maria Dakolias, *court performance around the world: A comparative perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87, 87 (1999).

in front of a court. However, an increase in the number of disputes submitted to the court would ultimately require government assistance to ease this load. The increased caseload is a result of the flood of cases related to transactions between individuals⁴. These can only be resolved if the government allocates resources to the court, creates more circuits and appoints new staff. Dispute resolution methods that work side by side with the courts could also help to lighten the courts' caseloads; this is where arbitration comes into play.⁵

The UAE is a relatively newly formed state, and arbitration is a relatively new subject and field of study in the country. The practice of arbitration has yet to find a permanent foothold among the various forms of dispute resolution in the UAE, and establishing this foothold has entailed disturbing established judicial practices. However, arbitration has become a popular method of resolving disputes, especially in matters related to commerce, family and certain civil transactions. The UAE's legislature has begun to recognize the importance and increasing popularity of arbitration; it ratified the New York convention⁶ and has begun to work on an independent law that regulates arbitration.⁷ However, as of now, arbitration is still regulated through the UAE's civil law procedure of 1992.⁸

Arbitration currently seems to be used more and more often as a funnel that sends disputes into the courts, rather than being (or becoming) an independent method of dispute resolution with the authority to first hear and to then settle disputes. This is

⁴ Dakolias argues that "An effective judiciary is predictable, resolves cases in a reasonable time frame, and is accessible to the public." id at 88.

⁵ W. B. Rayner, *Arbitration: Private Dispute Resolution as an Alternative to the Court*, 22 U. W. Ontario L. Rev. 33, at 37 (1984), the author in here explains how "several American Jurisdictions attempted to channel small claims disputes into arbitration, either voluntary or compulsory." Which was in an effort to "alleviate court congestion" as he puts it.

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S 3. The UAE accessed to this convention in 2006, based on the Federal decree no. 43/2006, on 6/13/2006.

⁷ A Draft law on arbitration was published in 2010. However, it still remains pending.

⁸ Federal Law no.11 of 1992, Concerning Civil Procedures, the chapter that concerns arbitration is located and discussed in the appendix of this study, see the appendix at 247.

facilitated partly by the courts' practices and partly by the civil procedures law. The result of arbitration serving as triage, in a way, for the courts—rather than being an independent and legitimate dispute resolution method—has tended to increase the time it takes for disputants to have their cases resolved. This amounts to a delay of justice.⁹

To understand how arbitration works in the UAE, this dissertation examines the judicial institute in charge of resolving disputes and applying the law (the court). It also outlines the operations of the courts and discusses case law as it relates to arbitration.¹⁰

2. Objective of the Study

This dissertation poses specific questions that relate to a number of problems facing arbitration in the context of the UAE's legal system. How may a functioning arbitration system in the UAE be established? Must certain laws be amended? How does the appeal procedure impact arbitration? Can arbitration resolve civil transaction disputes in the UAE? Several sub-questions and factors are relevant to the above questions:

1. Is there a relationship between the courts' definition of arbitration and their decisions? Does the nature of the dispute have any bearing on the courts' decisions?

⁹ Which is a manifestation of the legal Maximus "Justice Delayed is Justice Denied", this concept has been explored by a number of authors such as Tania Sourdin & Naomi Burstyner, *Justice Delayed is Justice Denied*, 4 Victoria U.L. & Just. J. 46 (2014), the authors in here explain that this concept is not new and in fact it had been mentioned by William E. Gladston a British statesmen and a former prime minister in the late 1800's, they further state that it outdates him, and traces of this statement can be found in the bible as well.

¹⁰ Dakolias explains that "little quantitative data on judicial efficiency currently available, making assessment of judicial reform difficult." If such were the case when it comes to the court then it is twice as hard when it comes to arbitration, and the difficulty increases when trying to piece together cases relating to arbitration from the court, see Dakolias supra note 3 at 89.

decision to allow it (or not) to go to arbitration? Do the various courts in the UAE all agree in their decisions regarding arbitration?

2. Is Shari'a-based arbitration found in the UAE? Can it be used to resolve some of the issues that affect the arbitral process? Do the rules of the Islamic Shari'a affect the courts' decisions on arbitration? Are family disputes subject to arbitration under the rules of the Islamic Shari'a?

The Islamic Shari'a is one of the primary sources of law in the UAE. Therefore, it is imperative to identify the courts' position on Shari'a, and to identify whether the courts' practice towards arbitration conforms to the rules of the Islamic Shari'a.

3. Do lease disputes in the UAE fall into the spectrum of arbitration? What are the lease dispute committees in the UAE? Can they be considered arbitral tribunals? Can such schemes be adopted to resolve some of the issues that face arbitration?

Legislators in more than one Emirate established special decrees that regulate lease contracts in the UAE, and they gave jurisdiction for settling those disputes to specialized committees. The existence of these committees and their functions in relation to arbitration raises questions of whether individuals have the right to opt-out into arbitration for certain contracts.

4. How does the Civil Circuit address arbitration? Is arbitration independent from the courts' influence? Is there such a thing as a finality of awards? Does the court view arbitrators as experts and their awards as expert reports?

The way that the civil circuit addresses arbitration¹¹ highlights the problem facing arbitration in the UAE: at its core, the parties' right to arbitrate is undermined by the courts' practices, which jeopardizes the legitimacy of arbitration in the UAE. If the legitimacy of arbitration continues to be undermined, it will lose its appeal for individuals, which in turn would contribute to an ever-growing flood of disputes filling the Judges' chambers. Ultimately, individuals that choose to arbitrate may be left questioning their decision to opt-out into arbitration.

5. Is the Civil Procedures law able to regulate the arbitration process? Is there a need to have an independent law that regulates arbitration?

A draft arbitration law was published in 2010; however, to this point, it is still not enforced. It is a positive step to have an independent law that regulates arbitration, but the issues facing arbitration in the UAE are not a matter of regulation or the lack of it. If arbitration cannot reach its full potential as a dispute resolution procedure, independent regulation may be a step forward. However, without the proper foundation for this regulation, it will not flourish or achieve the goals of supporting successful arbitral practice in the UAE.

3. Significance of the Study

This dissertation includes an examination of seventy-eight cases that were issued by different high courts in the UAE, translated and analyzed the author.

The cases highlight the problems facing arbitration in general, and the problems facing civil and Shari'a-based arbitration. One of the main issues addressed is how

¹¹ The disputes that are submitted to this circuit, incorporate all civil transaction disputes, therefore, it would address disputes that relate to arbitration that raises from a civil contract according to the definition of the civil transaction law, such as construction contracts, lease disputes, family arbitration, into issues relating to the enforcement of award..etc, see general ALI ABDUL HAMID TURKI, *Al Wasit Fe Sharh Al-ijrat Al-Madaniah Al-Imaratiah* (The Intermediate to explain the Emirati Civil Procedures), (1st ed. 2009). Furthermore, some disputes that would be discussed in here would be of a purely commercial nature, due to the fact that the court

and why an individual's agreement to arbitrate ends up in litigation in front of a court, which calls their decision to opt-out into arbitration into question.

Furthermore, as long as arbitral awards are dependent on the courts' recognition for enforcement, it is necessary to understand the relationship between the courts and the practice of arbitration.

The UAE's courts are flooded with cases; arbitration could help solve this problem. Therefore, it is essential to resolve this flooding so that individuals do not come to feel that there is no difference between litigation and arbitration in the UAE, or that arbitration may never be a good choice, because resolving a dispute in the courts seems more economically reasonable and quick. Note that at present, a court's decision provides more judicial guarantees for enforcement than an arbitral award.

4. Methodology

This study analyzes issues relating to civil arbitration from the UAE's courts' viewpoint and also with respect to UAE laws. Therefore, the methodology adopted in this dissertation focuses on the decisions of the high courts and the UAE civil procedures law.

This study is a descriptive analytical study, which describes and analyzes civil arbitration. It also considers whether the courts' decisions are in conformity with the Islamic Shari'a. It examines how long it takes for a dispute concerning arbitration to be settled, and whether there is such thing as the finality of awards.

The research conducted for this dissertation compares different decisions made by the courts to determine whether there is consensus between courts on the same subject. In this way, it is an in-depth analysis of the UAE's courts'

perspective on arbitration; it does not seek to compare the UAE with other jurisdictions, except when necessary to highlight similarities or identify solutions that other jurisdictions have found.

Data Collection methods

Primary and secondary sources were consulted for this research.

1. Primary Sources:

This study investigated laws and regulations that concern arbitration in the UAE, in addition to international conventions, to gain an understanding of (1) how the UAE's judiciary interprets these sources and (2) how they (the sources) affect the judiciary's ideas about how arbitration should operate in the UAE.

2. Secondary Sources:

To understand how courts operate in the UAE, and to understand the foundations behind their decisions, this study considers selected articles and studies that explain the courts' views, and it also explores solutions proposed by those studies that may have the potential to resolve some of the questions surrounding arbitration in the UAE.

5. Limitations of the Study

While this study focuses on the decisions of the UAE high courts regarding arbitration, it cannot incorporate all decisions issued by those courts on this subject, nor can it present all the hurdles that face arbitration within the court system. Therefore this study focuses on the decisions of the civil circuit court, which excludes disputes of a commercial nature, since they fall under the jurisdiction of the commercial circuit. That said, some disputes examined by the

civil circuit include commercial issues, especially those from the earlier days, when the civil circuit examined all disputes of a non-criminal nature.

Nevertheless, the majority of disputes examined in this study are of a civil nature.

The lack of digital copies of cases presents a further challenge for this study. Some of the cases examined, especially those issued by the Dubai Cassation Court, very difficult to find. The court in Dubai publishes a collection of its decisions that contains certain decisions that the court believes are representative of its jurisprudence; publishing these decisions was put on hold several years ago. The Supreme Court publishes decisions online through the Ministry of Justice website, which makes things easier for researchers and law students. However, in both instances, these are selected decisions only and not a complete account of all the disputes examined by the court. Moreover, the decisions of the lower courts, such as the courts of the first instance and the appeals court, are not made available to the public or to researchers at all. I had to schedule a meeting with the head of the court of appeals in Dubai in order to gain access to, and a copy of, those decisions, and even then I only managed to secure a portion of the decisions, and I still have not gained access to the Federal Court's lower courts' decisions.

Translation is another challenge; the official language of the court and the laws in the UAE is Arabic. Translating from Arabic to English requires selecting the correct terminology. The UAE's Ministry of Justice provides a translation of the UAE's laws on its website; however, some of them lack the proper terminology. The translation of cases and legal articles discussed in this research required great time and effort.

6. Structure of the study

This paper proceeds as follows: Chapter One is an introduction that explores the goals and limitations of the study and outlines its structure.

The second chapter explores the general background of arbitration in the UAE, and it emphasizes the courts' views on arbitration and how these views affect their decisions.

The third chapter explores how the court addresses issues relating to Shari'a and arbitration in the UAE by exploring disputes that relate to Family law, as well as certain appeals to the high court regarding conflict between the Islamic Shari'a and arbitration.

Chapter Four explores the decisions of the civil circuit courts on arbitration, beginning with an introduction to the UAE's civil procedures law—this law governs the arbitration process in the UAE—and noting how this law contributes to the problems that face the practice of arbitration in the UAE. It then explores lease disputes and their relationship to arbitration in the UAE, including how they are governed and what can be learned from them. The Chapter then delves further into the decisions of the civil circuit court in cases involving arbitration.

The fifth chapter concludes the dissertation by emphasizing important findings and recommendations that may be used to improve and develop the arbitration process in the UAE.

Chapter Two

Background of Arbitration in the UAE

2.1 Arbitration in the UAE

Before beginning to examine the issues, certain preliminary points must be clarified to provide an understanding of the UAE's legal system.

2.2 The legal system in the United Arab Emirates

This section introduces the UAE's legal system and sheds light on the country's constitution and how its federal government functions. In general, the UAE is considered to be governed by a system of civil law,¹² although it is understood that some legislation is influenced to varying degrees by Islamic Shari'a law.¹³ Sharia gains its power from the UAE's constitution,¹⁴ which gives Shari'a precepts a foothold within the country's civil legal system. Therefore, the UAE may be considered to have a mixed legal system, rather than one governed by a purely civil legal code.¹⁵ Discussing the UAE's laws (both civil and Shari'a), as well as the functioning of its federal government, provides insights into how legislators and judges view arbitration; this in turn helps to clarify the courts' relationship to arbitration. Therefore, this section introduces three factors that affect the arbitral

¹² ESSAM ALTAMIMI, PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN THE UNITED ARAB EMIRATES 5, (1st ed. 2003), in which he explains that the UAE's laws were modeled after the Egyptian legal system, which in turn is influenced by the French and Roman laws.

¹³ For instance, personal status and civil transaction laws of the UAE both have provisions that are derived from Islamic Shari'a. see general Federal law No.5 of 1985 on the Civil Transaction Law of the United Arab Emirates state, issued on December 14 1985, as amended, February 14 1987, hereinafter civil transaction. And the Personal Status law was issued on 19/11/2005 and was published in the office gazette in 30/11/2005, Federal Law no.28 on personal status, hereinafter-personal status.

¹⁴ United Arab Emirates Constitution, Art. 7.

¹⁵ Willam Tetley, *Mixed Jurisdictions: common law v. civil law (codified and uncoded)*, 60 La. L. Rev. 677, 678-681 (2000), where the author goes into details about the characteristics of a mixed system.

process: (1) the legal system in general; (2) the constitution of the UAE; and (3) the federal system of the UAE.

2.2.1 The Legal System

As mentioned above, the UAE is considered part of the family of civil law countries, with the primary source of law being a statutory code. The UAE's system is based on the Egyptian model,¹⁶ and it therefore contains French and Roman influences. This is because a jurist named Abd al-Razzaq Al-Sanhuri¹⁷ was tasked with drafting the new Egyptian civil transaction law, and given that he was educated in France and Egypt, his civil code reflects a blend of French and Islamic law.¹⁸ Therefore, the UAE's legal codes are generally considered to have both Islamic and a French roots, which makes it inaccurate to categorize the UAE as either a purely civil law country or an Islamic one.

Clearly, then, the UAE's legal system is mixed for the same reasons that the Egyptian system is considered to be mixed.¹⁹ Understanding this blend in the UAE will help explain how the UAE's courts operate; one example would be that civil law as practiced in the UAE tends to focus on the rights and obligations of individuals.²⁰ This mixture enriches the theoretical basis of the legal system of the UAE; however, some of the provisions of the different sources of law (Islamic and French) contradict each other in some cases. If left unchecked, such discrepancies may become a cause of concern. The sources of the UAE's laws also are the main guides for the UAE's

¹⁶ Al Tamimi, *supra* note 12 at 5.

¹⁷ See general, GUY BECHOR, *THE SANHURI CODE, AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932 TO 1949)* (2007). In this book the author is giving an insight into the work of one of the most prominent modern Arab jurists, one who helped in drafting a number of laws and Arabian constitutions including the UAE constitution.

¹⁸ Dan E. Stigall, *Iraqi Civil Law: its sources, substance, and sundering*, 16 J. Transnat' L. & Pol'y. 1, 10-11(2006). See general, Bechor *id.*

¹⁹ Vernon Valentine Palmer, *Mixed Legal System the Origin of the Species*, 28 Tul. Eur. & Civ. L.F. 103, 119 (2013).

²⁰ Tetley *supra*, note 15 at 708. This example is crucial to understanding some of the courts practices when it comes to arbitration.

judges, who are directly affected by the mixture of source codes, as may be deduced by examining the courts' decisions.

2.2.2 The Constitution

The constitution of the UAE consists of 151 Articles²¹ and was created on December 2, 1971. This constitution was based on the desire to create unity and cooperation between the Emirates. Six Emirates²² joined the union on December 2, 1971 to form the United Arab Emirates. The following year, Ras Al Khaimah also joined the union, on February 10, 1972. The original constitution was amended in 1996.²³

When drafting the constitution, the UAE looked to the experience of its neighbors; at that time Kuwait stood out as a likely template²⁴. The Kuwaitis had relied on the Egyptian experience and modeled their constitution after Egypt's. This Egyptian influence is further exemplified when considering the people who drafted the Kuwaiti constitution, and one of the contributors to both the Kuwaiti and UAE constitutions was Prof. Abd al-Razzaq Al-Sanhuri.²⁵

The UAE choose Islamic Sharia law as one of its main sources.²⁶ Consequently, this source would ultimately have a major affect on how arbitration

²¹ United Arab Emirates Constitution supra note 2. See general NAWAF KANAN, *Al-Nitham Al-Distori w Al-Siasi Le-Dwalt Al-Emarat Al-Arabia Al-Mthadah* (The Constitutional and political System of the United Arab Emirates), (2nd ed. 2006). In which the author discusses in detail the constitutional law of the UAE.

²² Those six emirates are: " Abu Dhabi, Dubai, Sharjah, Ajman Fujirah and Um Al Quwain" in addition to those six the early meetings was attended by two other states which are Qatar and Bahrain.

²³ Al Tamimi, supra note 12, at 1.

²⁴ In this authors view the reason behind choosing Kuwait as a template, relates to the fact that they gained their independence before the UAE, and given the close cultural backgrounds of both the UAE and Kuwait. This fact is further supported by Al-Muhairi, he states that: " The Kuwaiti Constitution formed the basic model for the UAE constitution, which cited many of its articles. . . ." See Butti Sultan Butti Ali Al-Muhairi, *The position of Shari'a Within the UAE Constitution and the federal Supreme court's Application of the Constitutional Clause Concerning Shari'a*, 11 Arab L.Q. 219, 220 (1996)

²⁵ id Al-Muhairi at 220). See also Bechor supra note 17, who's theories and influence can still be felt in the UAE and most Arabian jurisdictions to this day.

²⁶ United Arab Emirates Constitution, supra note 2, Article 7.

was viewed and practiced in the UAE, especially vis a vis court decisions,²⁷ which can be traced to the Kuwaiti (and thus the Egyptian) constitution²⁸ and to Prof. Al-Sanhuri.²⁹

2.2.3 The Federal System

The UAE designed its federal system in a way that best suited its unique situation. Since each Emirate was considered a sovereign state before the unification, the UAE comprises seven individual states, each with its own ruling families and civil institutions that are now united into a singular entity. Therefore, the UAE's constitution allowed each Emirate to administrate its own local affairs, and ultimate authority in each Emirate remained in the hands of the ruler of that Emirate. These rulers have executive powers and legislative authority to rule their Emirates.³⁰ On the other hand, the federal government has sole jurisdiction over matters such as foreign affairs, so in essence, the individual Emirates have jurisdiction over matters of a regional nature within their Emirates, unless they have surrendered these to the federal government.³¹ Furthermore, the constitution gives the Emirate the right to retain its own judicial body, which has resulted in the existence of both federal and local courts. The federal courts are administered by the federal government,³² and therefore fall under the jurisdiction of the federal Supreme Court, which is based in Abu Dhabi.³³ Each local court has its own high court or court of Cassation. Both types

²⁷ Mostly in Shari'a based arbitration.

²⁸ Al-Muhairi, supra note 24, at 220.

²⁹ The influence of Egypt is not limited to the constitution but as we shall later on see it also tend to influence the way the judges rule and decide in some cases, such as the ones concerned with riba.

³⁰ Al Tamimi supra note 2, at 1-2.

³¹ id; see also, UAE Constitution, Articles 120-122.

³² As of now there are 4 Emirates that are still within the Federal Court system, which are Ajman, Sharjah, Um Al Quwain and finally Fujairah,

³³ Recently Abu Dhabi have decided to rescind from the Federal system, as of now two high Courts have their seat in Abu Dhabi, the Federal Supreme Court and the Abu Dhabi Court of Cassation, which was established on 1/9/2007.

of courts apply the federal law in addition to local laws and regulations enacted by the Ruler of the Emirate.

If a conflict should rise between federal and local laws, the federal law prevails.³⁴ However, unlike in the United States and other jurisdictions that have a similar federal system, the UAE lacks a constitutional court or a court that is superior to both the federal and local courts. The decisions of the federal Supreme Court in the UAE are not binding on the local courts—for example, the Dubai Cassation court is not bound by the decisions of the UAE’s supreme court—and the local courts often differ on certain aspects of the law. This creates a significant and interesting area of legal research and theoretical debate, but at the same time, it can have a negative affect when it comes to the applying the law. Legal practitioners must be knowledgeable about the requirements of each court and to adapt his practice accordingly; adding arbitration to this mix complicates the situation further. Therefore, there is a need to create a Constitutional Court, which would consider and resolve those diversities by creating guidelines that unify the practice of law within the UAE.³⁵

2.3 Historical Background on Arbitration in the UAE

Arbitration had begun to gain momentum and popularity within the UAE in recent years. However, upon examining the history of the region, it becomes apparent that

³⁴ Al Tamimi, *supra* note 12, at 4.

³⁵ This proposition was raised by Dr. Abdul-Wahab Abdul then head of the Federal Supreme Court of the UAE, in a workshop discussing “the challenges facing the UAE judicial scene”, which was reported in the newspaper <http://www.albayan.ae/across-the-uae/2008-05-29-1.642923>. The ministry of presidential affairs also shares the same idea of unifying the high courts, however, unlike Dr. Abdul-Wahab, who propose the creation of a new high court, they discussed whether or not its suitable for the Federal Supreme Court, to hear all appeals submitted by the federal and local appeal courts. A colleague who received it from Dr. Ashor Mabrook of Dubai Police Academy gave this document to me; sadly this document has no indication to the author’s name nor a clear way to cite it.

arbitration can be traced back to the early days of Islam, and even further back to the days before Islam, when tribes relied on arbitration and other dispute settlement methods to resolve their conflicts. The following section considers this history in three periods: (1) arbitration before the Federation (before 1971); (2) arbitration during the period between 1971 and up to 1992; and (3) arbitration since 1992.

2.3.1 Arbitration within the UAE before the Federation

Given the fact that the UAE as a state did not exist before 1971, and in order to better understand the roots of arbitration as practiced within the UAE, this section is divided into three subsections:

- 1- Arbitration before Islam
- 2- Arbitration under the rule of Islam
- 3- Arbitration as practiced in individual Emirates up until the foundation of the UAE; more specifically, during the 19th century and up to 1971.

a) Arbitration Before Islam

The roots of arbitration may be traced back as early as the beginning of human society. The origin of arbitration in early societies can be attributed to religion, customs and tradition; tribes functioned then as sovereign states do today. As societies continued to grow, so did the problems and challenges of daily life, including all of its interactions, civil and commercial.³⁶

There has always been a need for dispute resolution mechanisms. Indeed, long before the creation of public court systems, mediation and arbitration flourished in

³⁶ Arbitration roots can be traced to fourth century B.C. Greece. See, See general, SHEILA L. AGER, INTERSTATE ARBITRATIONS IN THE GREEK WORLD, 337-90 B.C. (1996), at 3. See also NAJEEB AHMAD AL-HALABI, *al-TAHKEEM QABL al-ISLAM* (ARBITRATION BEFORE ISLAM), 3 (2006), in which the author discusses the practice of arbitration before Islam in Yemen, he also states that arbitration was the dominating practice at that time.

early societies, as certainly was the case in the Arabian Peninsula. Arbitration was commonly used as the best way to handle disputes, and the use of arbitration was not limited to settling disputes between individuals. It was also used to settle conflicts that arose between disputing nations and tribes.³⁷

In general, societies in pre-Islamic Arabia were governed by the tribes, since the concept of a state in those days did not exist. A person's loyalty was to his tribe, and people were forced to abide by longstanding tribal rules and customs. Effective conflict resolution was crucial, as even the small conflict could escalate into wars between tribes that spanned entire generations.³⁸

Therefore, as the societies of pre-Islamic Arabia lacked the modern structure of a functioning judicial system (as did most societies of that era), Arabs resorted to arbitration and mediation to settle their disputes. The prominent feature of such proceedings was their simple, direct nature.³⁹

b) Arbitration After Islam

Islamic Shari'a⁴⁰ sets down rules that govern all aspects of individual conduct, including arbitration.⁴¹ Different schools of thought⁴² provide further explanation and guidelines about situations regarding arbitration and the use of different tools, as well

³⁷ See general Ager id were the author gives example of number of disputes that were resolved by arbitration in ancient Greece. See also ABDEL HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES, at 5-6 (2011).

³⁸ El-Ahdab El-Ahdab id at 5-6.

³⁹ Id. at 6. For example they require the presence of both parties of the arbitration proceedings and taking an oath to prove their claim would have been done in front of the Idols.

⁴⁰ The definition of Shari'a is discussed in detail in the chapter dealing with Shari'a, see infra 3.1 the introduction to Shari'a.

⁴¹ The way Shari'a governs Arbitration will be explained in greater detail in the Chapter discussing the issue of Arbitration and Shari'a and Family law within the UAE, see infra the Chapter dealing with Shari'a.

⁴² The different schools and their influence on the Islamic Shari'a are explained in the Shari'a chapter, see infra 3.2.

as about the sources of the Islamic Shari'a.⁴³ Also, there are a number of famous arbitration cases that happened during the Islamic era.⁴⁴

The location of the Emirates that would become the UAE meant that it came under the influence of Islam from its early days; this, along with the tribal nature of the Emirates at the time meant that Shari'a and customary laws were the norm and the source of governance.⁴⁵

c) The Nineteenth Century

This period was critical for the small coastal states of the UAE region, and it saw great changes.⁴⁶ This treaty gave the UAE its former name of the Trucial States.⁴⁷ British influence increased after the discovery of oil within the region,⁴⁸ which resulted in an increase in trade and commercial activities in the region and the increased flow of traders, especially from India.⁴⁹

However, the society of the Trucial States was small at this time, which meant that the number of disputes was minimal and conflict usually was settled through mediation.⁵⁰ The nature of disputes in this period were bound to the nature of the

⁴³ See *infra* 3.1.2, in which the different sources of the Islamic Shari'a are explained.

⁴⁴ See general *infra* 3.

⁴⁵ See general, NORAH SAQER AL-FLAHI, *THE JUDICIAL SYSTEM IN THE TRUCIAL COAST FROM 1890 AD- 1971 AD*, at 29-30 and 67-69 (2014).

⁴⁶ *Id* at 63, where the author mentions a treaty signed in 1820 AD and another in 1892 AD, as well as the treaty of 1879 AD, *id* at 28. For example, during this period, western powers established a foothold in the region, the British in particular. A treaty has been signed between the Emirate Sheikhs and the UK recognizing British presence in the region..

⁴⁷ E.g., Al Tamimi *supra* note 12, at 1; El- Ahdab & El-Ahdab *supra* note 37, at 777. Some used to call the region as Pirate Coast or the Trucial Coast, see Al-Flahi *supra* note 45 at 16.

⁴⁸ Al-Flahi *Supra* note 45 at 65.

⁴⁹ *id* at 16-28, where the author discusses the political scene in the region. Note that India at that time was considered a British colony. The oil trade and the start of WWII contributed to the establishment of a law that resulted in the creation of the judicial council of the Trucial states in 1938, see *id* at 101. Which essentially was a first attempt at modernizing the judicial situation in the region. However, this resulted in a dual judicial system, because it meant that all foreigners (British nationals and non-Muslims) would fall under UK laws, while everyone else would fall under the influence of the local ruler's judicial authority. see *id* at 102-109.

⁵⁰ If mediation failed, the disputing parties would seek a prominent figure in the society (usually someone educated or with stature; i.e. a Sheikh, Teacher, or Imam) to settle their dispute., see *Id* at 41-45.

transactions that tended to occur in the societies of the time; these differed based on the geographical location of the society.⁵¹

The above factors resulted in the limited presence of a judicial system or written laws. The existence of courts in the modern sense (physical or legislative) was limited or non-existent.⁵² Government in the modern sense did not exist until after the establishment of the federation; while some Emirates did have courts and laws in this period, they were quite limited, as noted.⁵³ Therefore, it can be concluded that arbitration was governed in this period in the same way that it had been in the previous period. The recognition of the Emirates on the international scene that occurred when they signed the unification treaty that created the UAE introduced significant changes in how these societies viewed and practiced laws.

2.3.2 Arbitration within the UAE from 1971-1992

This period saw the unification of the Emirates and subsequently the creation of the United Arab Emirates; moreover, it saw the development of state entities and the birth of a unified constitution.⁵⁴ During this time, federal courts replaced the existing judicial institutes in the five Emirates that chose to remain within the federal

⁵¹ In the coastal areas the disputes focused around the main sources of income-product related to the sea. Therefore, commercial activity was mainly fishing and pearl diving or trade with India, along with other civil disputes. Id at 54-63, where the author gives examples to how the system worked at that time and the names of famous Judges and cases that occurred at that time. Disputes that happened in the desert, mostly between Bedouin tribes living near oases or villages or moving through the Arabian Desert, were mostly related to pasture, the ownership of cattle, the borders of each tribe, and the ownership of water supplies such as wells. Id at 50-51.

⁵² At that time a disputing party seeking a resolution of their dispute would either seek a judge or an arbitrator either where ever they can be found, this might be in their homes or the rulers forts, a school or the mosque, thus procedures of submitting cases were not of existence and a record keeping of cases were not existence or limited at that time, even decisions were not written in most cases and the exception was having a written decision.

⁵³ For example Dubai created a court in 1956, see Al-Flahi supra note 45 at 110, Abu Dhabi first attempt of creating a modern court were in the 1960's and the first record of it were in 1964, id at 115, in Sharjah the British records show that a court existed in the 1960, however, cases were held before that in the rulers fort were a room in the fort were allocated for that purpose, id at 119.

⁵⁴ See generally the UAE constitution, supra note 2.

system.⁵⁵ Most laws were not enacted or were not federalized, meaning that each Emirate had to regulate its own courts and enact its own civil procedural laws. Each Emirate varied in the way it regulated arbitration; however, most Emirates shared the commonality of regulating arbitration within their civil procedural laws.⁵⁶

A significant distinction between this period and the previous one was the creation of civil institutions and authorities in an attempt to modernize the country; the courts and various judicial institutes were on the front lines of this change. This might be one reason that the use of arbitration declined during this period; namely, the courts began to gain popularity. Prior to this time, the UAE had a significant illiteracy problem, and very few people held a law degree at the time unification occurred. Thus, the UAE had to rely on foreigners and foreign experience to shape its judicial system.⁵⁷

As courts of law were introduced, the continued development of ADR as the main way to resolve disputes slowed (including arbitration); courts began to assume the entire burden of dispute resolution and adjudication.⁵⁸ This may be attributed to a number of factors; one key factor is how a judge's educational background influences decision-making process and attitude toward arbitration, which (in the UAE) has not always been positive.⁵⁹

⁵⁵ Abu Dhabi, Sharjah, Fujairah, Ajman, Um Al Quwain. However Abu Dhabi have recently rescinded from the federal system and established their own cassation court following the two other Emirates (Dubai Ras and Al Khaimah). Supra note 22-23.

⁵⁶ Such as the case in Abu Dhabi, where arbitration was regulated in the civil procedures law of 1970 in the Emirate of AD, see Federal Supreme Court of the UAE, appeal no. 254/11, issued on 20th of February 1990.

⁵⁷ Which at this stage promoted the resolution of disputes through the newly formed judicial institute. See general Al-Tamimi supra note 12 at 5.

⁵⁸ This is the moment of eclipse of arbitration described by Kellor, See, FRANCES KELLOR, AMERICAN ARBITRATION ITS HISTORY, FUNCTION AND ACHIEVEMENTS, at 5 (1st ed. 1948). Many Arabian scholars were enlisted to help build the foundations of the emerging judicial institutes in the UAE; their help meant gave them influence over how the UAE's courts would be defined and would evolve, see Al-Muhairi supra note 24 at 220, and Bechor supra note 17.

⁵⁹ Kellor explained this phenomena in the chapter talking about the historical pattern, she explained that "little effort was made to educate the public," and "Education in the knowledge or use of arbitration was unheard of, nor was there source material available, nor had teachers thought of instruction in the

2.3.3 Arbitration within the UAE after 1992 (the introduction of the federal law on civil procedures)

The continuous development of the UAE's institutions encouraged the government to improve the laws within the UAE and to unify the civil procedures in the courts; this effort was manifested in the unification of the civil procedures law. Since arbitration is considered a dispute settlement method, the drafters of the civil procedures included it in this law in order to regulate it.⁶⁰ They also included the Enforcement of domestic awards in this law,⁶¹ and also by international treaties, such as the NY convention.⁶²

This law can be traced to a number of sources, including Egypt, because Egypt was and still is at the forefront of legal research and development in the Arabic world. Many Arab nations look to Egypt for guidance as they draft their own laws; even non-Egyptian jurists look to the laws of Egypt for guidance as they judge and manage their own caseloads.⁶³

Finally, this period saw a resurgent of arbitration, which is increase and interest in arbitration, which is manifested in the number of litigation cases that

subject. Generally speaking, unawareness was the phenomenon of this early period...” *id.* at 7-8. Which in comparison is the same phenomenon experienced nowadays within the UAE.

⁶⁰ Specifically, arbitration is treated in the third chapter of the second book of the civil procedures law, and it is regulated in fifteen different Articles (203- 218), see *infra* the appendix domestic arbitration, page 247.

⁶¹ Articles (235-236), see *infra* the process of enforcement, page 268.

⁶² In the mid-twentieth century, arbitration gained momentum as a form of dispute resolution. Its status was perhaps amplified the most by the NY convention which also contributed to the image of arbitration as a primary tool for resolving disputes in the commercial realm, especially those that involved international commerce, see *Supra* note 3. The predecessor to this convention was the Geneva Protocol of 1923, Protocol on arbitration clauses 27 L.N.T.S 1923, and Convention of 1927, Convention on the Execution of foreign Arbitral awards, 92 L.N.T.S 1927, See, ALAN REDFERN & J. MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 515 (5th ed. 2009). See El-ahdab and El-ahda *supra* note 37 at 818.

⁶³ See al-Muhairi *supra* note 24 at 220, not to mention that in the UAE the judges that interpret this law are non-UAE nationals, see al-Tamimi *supra* note 12 at 6, where he states that: “Almost 90 per cent of Judges in the UAE courts are from Egypt, Syria, Lebanon, Sudan and a few from North African Countries.”

concern arbitration and the increase in the number of disputes resolved through arbitration, as exemplified by the creation of arbitration institutes such as the DIFC-LCIA⁶⁴.

2.4 Conclusion

The diverse social and legal-historical background of the UAE helped to shape the judicial system, causing it to be influenced by legal practitioners from other jurisdictions, especially from Egypt, who helped develop and shape the courts in the UAE. Understanding this background helps to explain how the UAE's courts function, and how their decisions affect the use of arbitration. The influence of the UAE's unique history can be seen in how the courts practice, especially when they either promote the practice of arbitration or deter individuals from submitting disputes to arbitration. Indeed, deciphering the courts' attitude toward arbitration is the first step in formulating solutions that may help the courts accept and even promote the use of arbitration. Thus, after explaining this historical background of arbitration in the UAE, the next section will look more closely at how the courts view arbitration.

2.5 What is Arbitration?

The following section examines the general principles that govern arbitration in the UAE, as seen from the courts' perspective. The section is divided into two

⁶⁴ This center was established in 2008, between the Dubai International Financial center and the London Court of International arbitration, to create the DIFC and LCIA Arbitration center, see <http://www.difc-lcia.org/overview.aspx##>, see El-Ahdab & El-Ahdab supra note 37 at 786-788. Furthermore, there are other arbitraiton institutes that are being governed by the chamber of commerce of each emirates and other arbitral institutes, see Al-Tamimi supra note 12 at 147.

parts: (1) defining arbitration from the courts perspective; and (2) providing insight into how the general principles of the courts affect arbitration.

2.6 Defining Arbitration

As every building needs a foundation, research on arbitration needs to start by defining *arbitration*. It is crucial to understand arbitration as a concept of both law and legal studies, as well as to distinguish it from other forms of dispute resolution, such as mediation and negotiation,⁶⁵ as well as litigation. This requires exploring the definition of the term from three aspects. The first concerns the views of jurists that are foreign to the UAE, in particular western legal scholars. The second explores the term from the Arab jurist's point of view and then from the perspective of Islamic Shari'a scholars. Finally, UAE legislation regarding arbitration is considered. This final viewpoint may be examined by analyzing this legislation and how UAE courts' view arbitration.

2.6.1 Foreign Jurists

Many legal scholars attempted to define the concept of arbitration according to a similar pattern. For instance, Redfern and Hunter define *arbitration* as any instance in which:

⁶⁵ Born states that: "Arbitration is only one of alternative dispute resolution (i.e., mechanisms for resolution of disputes outside of national courts). Other forms of "ADR" adopt a variety of procedural mechanisms, aimed at different types of problems and parties." He distinguishes between arbitration and mediation by stating that: "These procedures do not provide for a binding decision to be imposed on the parties; rather, they provide for a non-binding process that may (or may not) assist the parties in reaching a consensual settlement." PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS, 7, (3rd ed. 2010). The American Health Lawyer Association gave distinction between arbitration and mediation by stating that: "Unlike mediation, arbitration is a private hearing process presided over by a third party neutral (the arbitrator) or panel of neutrals which culminates in an enforceable, final decision rendered by the arbitrator or panel of arbitrators. The arbitrator is essentially a private contract judge engaged by the parties.", see AHLA Seminar Material, Long Term Care and the Law Orlando, FL February 21, 2007, written by Greg Binford. See also EMMANUEL GAILLARD & JOHN SAVAGE (eds.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 12-17 (1999), the author in here distinguishes arbitration, conciliation and mediation as well.

Parties who are in dispute agree to submit their disagreement to a person whose expertise or judgment they trust. They each put their respective cases to this person—this private individual, this arbitrator—who listens, considers the facts and the arguments, and then makes a decision. That decision is final and binding on the parties because the parties have agreed that it should be, rather than the corrective power of any state.⁶⁶

Other scholars have followed the same line of reasoning when defining

arbitration. One, for example, has concluded that:

Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.⁶⁷

Similarly, *arbitration* is defined as a means of resolving disputes in front of an independent individual who, in most cases, is an expert in the field to which the conflict pertains and is tasked with evaluating the issues of the dispute and rendering a final binding decision.⁶⁸ Arbitration is a process that individuals seek for the benefit of having an expert rule on a dispute, and out of the hope of incurring less expense than a court case.⁶⁹ The process gains authority from agreement of both parties to abide by the arbitrator's decision. The similarity between this process and litigation is that parties give up the right to having a say about the outcome of the decision.

However, arbitration differs from both mediation and negotiation in that the ultimate

⁶⁶ Redfern and Hunter supra note 62, at 1. See general, MARTIN DOMKE, GABRIEL WILNER AND LARRY E. EDMONDSON, *DOMKE ON COMMERCIAL ARBITRATION* (2013). In part one of this book titled the nature of commercial arbitration the author addresses the question of “What is arbitration?”, the author provides an extensive and detailed definition of arbitration. See also Harry Arkin, *New opportunities for arbitration in East/West Trade*, 3 *Transnat'l Law*. 495, 496 (1990), in which the defines arbitration from a commercial point of view and also paraphrase Domke to provide his definition.

⁶⁷ Gaillard & Savage, supra note 65 at 9. Another author defines arbitration as: “Arbitration is the institution by which a third party decides on a dispute between two or more parties by exercising the jurisdictional mandate conferred on him by the latter.” JEAN-FRANCOIS POUURET AND SEBSATIEN BESSON, *COMPARTIVE LAW OF INTERNATIONAL ARBITRATION*, 1, (Stephen V. Berti and Annette Ponti trans., 2nd ed.)

⁶⁸ Richard C. Downing & Patrick R. James, *Arbitration of a Securities Dispute: An Overview for the Practitioner*, 13 *U. Ark. Little Rock L.J.* 621, (1991). See general Peter Chow, *Managing and Resolving Business Disputes in China: Strategies, Pitfalls, and practical tips*, Thomson Reuters/Aspatore, 1, 2 (2009).

⁶⁹ It should be noted that not all forms of arbitration are less expensive. Forms such as commercial arbitration are costly procedures to conclude. See, e.g. Ali Assareh, *Forum Shopping and the Cost of Access to Justice-Cost and Certainty in International Commercial Litigation and Arbitration*, 31 *J.L. & Com.* 1, 44 (2012-2013), the author in this article emphasis the importance of properly identifying and choosing the forum in order to not incur extra costs.

goal and outcome of arbitration is a binding award; if the parties fail to uphold the award, it may be enforced upon them through legal means.⁷⁰

Problems arise when trying to distinguish arbitration from other dispute resolution tools. For example, considered from an international perspective, arbitration may involve different definitions of various industry terms that have been adopted by different legal systems, as well as the fast pace at which international trade has expanded and invented new tools for settling disputes.⁷¹ Altogether, the definition of *arbitration* is nevertheless similar in most legal systems. Barring minor variations, it refers to a private adjudicating mechanism whereby parties choose an expert body (i.e., the arbitrator) to settle a dispute and render a final and binding decision, based on the parties agreeing as a stipulation of the arbitration process to abide by such decision.⁷²

However, there is no definition of arbitration in most statutes,⁷³ including the United States Federal Arbitration Act,⁷⁴ the UK Arbitration Act⁷⁵ and the French Civil

⁷⁰ THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL*, 15–16 (3rd ed., 2012). See also Maya Ganguly, *Tribunals and Taxation: An Investigation of Arbitration in Recent US Tax Conventions*, 29 *Wis. Int'l L.J.* 735, 738–739.

⁷¹ Carbonneau supra note 70. at 10.

⁷² Therefore as one author suggests: “there is no universal definition of arbitration. Within different legal systems the arbitration process is carried out in different ways and subject to different legal rules...”, see ANDREW TWEEDALE & KEREN TWEEDALE, *ARBITRATION OF COMMERCIAL DISPUTES INTERNATIONAL AND ENGLISH LAW AND PRACTICE*, 33 (2010). Another author suggest that arbitration should be defined as follow: “arbitration should be defined by reference to two constituent elements which commentators and the courts almost unanimously recognize. First, the arbitrators’ task is to resolve a dispute. Second, the source of this judicial role is a contract; the arbitrators’ power to decide a dispute originates in the common intention of the parties. Thus, arbitration comprises both a judicial and a contractual element.” Gillard and Savage supra note 65 at 11.

⁷³ Peter binder states that:” The Model Law, like most conventions and national laws on arbitration, does not define the term ‘arbitration’. it merely clarifies, in its article 7(1)1, that it covers any arbitration ‘whether or not administrated by a permanent arbitral institution’....”. see PETER BINDER, *INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURSDICTIONS*, 41, (3rd. ed. 2010). Nevertheless the UNCITRAL mode law attempt to define arbitration, leaves room to improvement, Peter Binder states that:” the number of additional definitions included in some states’ corresponding provisions indicate that the term provided by the model law were not enough to satisfy many legal systems...”, see BINDER, at, 46-47.

⁷⁴ The Federal Arbitration Act, 9 U.S.C. § 1-14 (1925). Hereinafter FAA. Carbonneau states:” the court reasoned that, because the FAA did not define the term “arbitration,” any submission to a third party constituted an agreement to arbitrate. The court stated that no “magic word such as ‘arbitrate’ ... [were]

Procedures Code.⁷⁶ Therefore, the courts of any given country should step in to explain what is meant by arbitration in that country, although this likely would result in a great many different definitions of the term.⁷⁷

An example of a decision that involved confusion over the definition of arbitration can be found in a case in the US: *Harrison v. Nissan Motor Corp.*⁷⁸ In this case, the court admitted that the FAA lacked a definition of arbitration.⁷⁹ However, the presiding judge (Judge Weinstein) opined that there is no need for a formalistic definition of arbitration: “[a]t no time have the courts insisted on a rigid or formalistic approach to a definition of arbitration.”⁸⁰ Despite this, Judge Weinstein defined arbitration, and his definition was quoted by the court thusly: “[a]rbitration is creature of contract, a device of the parties rather than the judicial process. If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.”⁸¹

needed to obtain benefits of the Act [the FAA].” See THOMAS E. CARBONNEAU, *CASES AND MATERIAL ARBITRATION LAW AND PRACTICE*, 1-2, (6th. ed.)

⁷⁵ Arbitration Act, 1996, c.23 (U.K.). This act lacks a definition of arbitration as well, however, it contains a definition of the arbitration agreement, furthermore, it only applies to written arbitration agreements, see Louis Flanner, *Chapter 11: The English Statutory Framework*, in *ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND*, 208-210 (2013).

⁷⁶ CODE DE PROCEDURE CIVILE [C.P.C.] art. 1442-1507 (Fr.). According to one author: “The main sources of current French arbitration law, which have already been cited, are the provisions of articles 2059 to 2061 of the *Code Civil* and Articles 1442 to 1507 of the *Code de Procedure Civile* (cpc).” See JEAN ROUCHE, GERALD H. POINTON, *FRENCH ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION*, 9 (2ND ED. 2009). Another author suggests that domestic arbitration in France is regulated by one further source which is article 631 of the commercial code, see Christopher R. Seppala, *French Domestic Arbitration law*, 16 *Int’l L.* 749, 753 (1982). According to another arbitration in France can be defined as follow: “In France, arbitration is traditionally defined along the following lines: Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons-the arbitrator or arbitrators-who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.” Gaillard and Savage supra note 65 at 9. It becomes clear by examining these authors and the legislations in France, that this legislation lacks a definition of arbitration.

⁷⁷ Born suggests that:” This has left national courts, arbitral tribunals and commentators with the task of defining what constitutes “arbitration.” Born supra note 65 at 3.

⁷⁸ *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, (3d. Cir. 1997).

⁷⁹ *id.* at 351.

⁸⁰ *id.*

⁸¹ *id.*

This definition of arbitration is further emphasized by *AMF Inc. V. Brunswick Corp.*⁸² His view embodies the principle of freedom of contract, stating that arbitration is “[a] creature of contract,”⁸³ which suggests that the courts support an eventuality in which the parties opt into arbitration, and that there is no need for a rigid and formalistic definition to bind and limit the will of these parties. In essence, there is no limitation placed upon the will of the parties to design and shape their own arbitration regime as they see fit; rather, the only requirement is “[t]o submit the dispute for a decision by a third party.”⁸⁴ Accordingly the requirements for arbitration are: (1) a dispute (2) an agreement of all parties to arbitrate (3) the submission of the dispute to a third party for settlement. The most important element according to Judge Weinstein is the arbitrator,⁸⁵ and thus “[m]agic words such as arbitrate or binding arbitration or final dispute resolution are [not] needed to obtain the benefits of the act.”⁸⁶ In this statement, this judge and his court state a liberal view of the process of arbitration—one that is free from the bounds of formalistic procedures. Additionally, Weinstein’s view suggests that judicial hostility toward arbitration in the US has largely waned: “[j]udicial hostility to the arbitration process is, and should remain, a thing of the past.”⁸⁷ This point is further emphasized by the purposes that the US Congress was trying to achieve in enacting the FAA; namely: to “[e]liminate the hostility of American courts to the enforcement of arbitration agreements and thereby to compel judicial enforcement of a wide range of written arbitration agreements.”⁸⁸ The practice of arbitration in the US has been further developed and guided by this

⁸² Judge Weinstein wrote the opinion in *AMF Inc. v. Brunswick Corp.*, 621 F.Supp. 456, (E.D.N.Y. 1985).

⁸³ *id.* at 460.

⁸⁴ *id.* at 460.

⁸⁵ *id.* at 461.

⁸⁶ *id.* at 461.

⁸⁷ *id.* at 461. See also, *Allegaert v. Perot*, 548 F.2d 432, 438 (2d Cir. 1977).

⁸⁸ Carbonneau *supra* note 74 at 53.

congressional intent. Indeed, the goal of relieving the courts of some of the burden of their civil litigation caseloads evolved into a federal policy supporting arbitration.⁸⁹

However, a problem rose from such over-generalizing and unlimited support given to arbitration, which is that the scope of arbitration has been widened by some US courts to incorporate other forms of dispute resolution, such as mediation. In essence, courts are saying that the FAA will govern such disputes, and that the benefits of the Act would follow. This point is illustrated by a decision of a US court in a case titled *Richard Ellis, Inc. v. American Env'tl. Waste Mgmt.*⁹⁰ While there was a mediation clause available, the court decided that the FAA should govern the dispute, and the court's decision stated that "[b]ecause the mediation clause in the case at bar manifests the parties' intent to provide an alternative method to "settle" controversies arising under the parties' 1997 agreement, this mediation clause fits within the Acts' definition of arbitration."⁹¹

Questions arise from the previous statement: why did the court decide that mediation falls under the scope of the FAA? Answering this question reveals that the reason a mediation clause may be seen to fall under the scope of the FAA relates to the existence of a federal policy supporting arbitration⁹² and to the US Supreme court, which supports that federal policy.⁹³ The desire of the US Congress to eradicate judicial hostility toward arbitration,⁹⁴ and the purpose of establishing a policy that promotes arbitration, lies in the desire to solve a number of problems that are specific

⁸⁹ *id.* at 55.

⁹⁰ *CB Richard Ellis, Inc. v. American Env'tl. Waster Mgmt.*, 1998 WL 903495, at *1 (E.D.N.Y. Dec. 4, 1998).

⁹¹ *id.* at 6.

⁹² *id.* at 8.

⁹³ See. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).see also, *AT&T Techs. V. Communs. Workers of Am.*, 475 U.S. 643, (1986).

⁹⁴ *AMF, Inc. v. Brunswick Corp.*, *Supra* note 82 at 461. See *Carbonneau*, *supra* note 74 at 52-55.

to the US legal system, including to find an alternative to civil adjudication for individual and to reduce the number of cases heard in the courts.⁹⁵

The US and the west in general have generally taken a pro-arbitration stand, and this has had a positive effect on the way arbitration is being defined by the courts in the US, essentially when it comes to dismantling judicial hostility toward arbitration and the formalistic procedures that have restricted the development and growth of arbitration.

2.6.2 Shari'a View of Arbitration

The Islamic Shari'a definition of arbitration is similar to that of the west: an event in which an arbitrator appointed by the parties to a dispute settles the dispute.⁹⁶ The *Majallat al-Ahkam al-'Adliyyah*⁹⁷ also defines *arbitration* in this way, particularly in Article 1790,⁹⁸ which states: "Arbitration is the appointment of an arbitrator by the parties of the dispute in order to settle the dispute."⁹⁹ Shari'a views of arbitration are also non-formalistic, which, in countries that adhere in some way to Shari'a law, may help to dismantle certain bureaucratic procedures that have restricted the use of arbitration in the UAE.¹⁰⁰

⁹⁵ See Carbonneau, supra note 74 at 55.

⁹⁶ Samirah defined arbitraiton as: "the appointment of an arbitrator or more by the parties based on their free will to decide a dispute between them based on the rules of the Islamic Shari'a" see, SAMIRAH AL-ZAEEM AL-MANJID, *AL-THKEEM AL-ISLAME FE NITHAM GHIER ISLAMIE [Islamic Arbitration in Non-Islamic Systems]* 48 (2nd ed., 2013). Another author states that: "the classic Islamic jurists definition of arbitration is: "the appointment of an arbitrator by the parties to resolve their dispute" he gave a second definition by the classical jurists which states:" the appointment of an arbitrator by the parties to resolve their dispute, the arbitrator acts as a judge between the parties and as a mediator in regard to third parties." He continued to give the definition of the contemporary jurists stating that it is:" a contract between to disputing parties in which they appoint a third party as an arbitrator to resolve the dispute between them" see MSAAD AWAAD AL-JHANI, *AL-THKEEM FE AL-SHARI'AH AL-ISLAMIAH [Arbitration in Islamic Shari'a]* 33 (1st ed. 1994).

⁹⁷ *Majallat al-Ahkam al-'Adliyyah*, was the Ottoman Empire's attempt to codify its civil law. Hereinafter majallat.

⁹⁸ Al-Manjid. Supra note 96, at 48.

⁹⁹ majallat, supra note 97 Article 1790.

¹⁰⁰ El-ahdab and El-ahdab, gave a more detailed account to the views of Islamic Jurists when it comes to arbitration, they hold that some of the scholars view arbitration as: "a form of conciliation, close to equity arbitration (amiable composition), which is not binding on the parties." See El-ahdab and El-ahdab supra note 37 at 11. The second view holds that: "if one is authorized to judge, one is authorized to make judgments with a binding character. An arbitral decision settles disputes and thus must be

2.6.3 Arab Jurists' View of Arbitration

Arab jurists have defined arbitration as:

a special adjudication conducted by disputing parties and exception to the general rule that the adjudicating process falls under the supervision of the government, specifically the judicial branch; legislators have stipulated certain conditions and erected certain boundaries for this special kind of adjudication, which to enforce must run through the court system.¹⁰¹

The key feature of this definition is that arbitration is it considered as an exception to the normal course of resolving disputes or as an exception to litigation.

This can also be inferred from the definition of the Egyptian court, quoted by prof Ahamd Hindi,¹⁰² which states:

Arbitration is an exceptional mean of resolving disputes away from the normal course of adjudication and the guarantees which it provides, and the jurisdiction of the arbitral tribunal even though it is based on the law that allows it to extend its jurisdiction upon the courts...¹⁰³

The Egyptian law on arbitration, which is based on the UNCITRAL model law, and it has thus adopted the definition provided by the model law:

For the purpose of this Law, the term 'arbitration' means voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two is a permanent arbitral organization or center.¹⁰⁴

binding upon the parties..." they continue to states that " no doctrine or school has adopted a clear position in this respect and there are numerous opinions in each of the four schools of the Sunni Islamic Fiqh..." they conclude that " the two concepts known in the Shari'a have features which do not coincide with those of the two concepts known throughout the rest of the world." Furthermore, they state that " The Ottoman "Medjella," which was the first civil codification of Islamic Law, adopted another solution. It provided that arbitration was an attempt at conciliation." They also gave another view by Islamic scholars: "in the Shari'a, arbitration in equity (amiable composition) is the rule and arbitraiton in law is the exception. According to these authors, in the absence of a clear expression of the parties' will to resort to arbitration in law, one must resort to equity arbitration." see El-ahdab and El-ahdab supra note 37 at 13. Furthermore, as one author puts it: Arnitration law under Arab systems cannot be fully understood without the preliminary study of Shari'a as a common background." SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST, SHARI'A, LEBANON, SYRIA, AND EGYPT,1 (2nd ed. 2006)

¹⁰¹ WALEED MAHMOOD HAMOODAH, *AL-JAME AL-QANONI FE AL-TAHKEM* [The Inclusive Legal Text on Arbitration] 19 (2011).

¹⁰² Professor Ahmad is professor of civil and commercial procedures in Alexandria University of Egypt.

¹⁰³ AHMAD HINDI, *al-TAHKEEM DRASH IJRAI'AH* [ARBITRATOIN A PROCEDURAL STUDY] 2 (2013). Furthermore, he provides that under no circumstances arbitration can be adhesive or compulsory.

¹⁰⁴ The Republic of Egypt Law no, 27/1994 Concerning Arbitration in Civil and Commercial Matters, article 4/1. See general, Binder supra note 73 at 41.

Those two quotes provide an illustration of the Arabic view on arbitration, which can be expressed as an exception to litigation.¹⁰⁵ Once arbitration is viewed in this manner, then it will not come as a surprise that some courts have a hostile view of arbitration.¹⁰⁶ This view can be identified through the UAE courts' practices when faced with questions regarding arbitration; in essence this view argues that the practice of arbitration is flawed, because it lacks the guarantees that can be found in the comfort of the court.¹⁰⁷ A judge following this view would likely decide that arbitration is inferior to litigation, and that since it is an exception and inferior to, litigation, it should not be used. This attitude would undermine the use of arbitration, especially if courts have an even more hostile view of the practice; namely, as a sort of parasite that requires the support of the courts in order to function.¹⁰⁸ However, it should be noted that arbitration naturally cannot function if it is constantly under attack.¹⁰⁹

To better understand this view and how it came into existence, a flashback into the history of Arabic law is required, particularly with respect to the father of Arabic civil law—Prof al-Sanhuri—and the philosophy behind his Civil Code, which aimed to “[a]dvance and encourage the strong, but by deterring or ‘striking’ (to use Sanhuri’s terminology) the strong, it sought to maintain the interests of the weak, who

¹⁰⁵ Hamoodah supra note 101 at 19, and Hindi supra note 103 at 2.

¹⁰⁶ According to Paulsson: “the idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers. It is difficult for courts to achieve this kind of acceptance; public justice tends to be distant and impersonal.” JAN PAULSSON, *THE IDEA OF ARBITRATION*, 1 (1st 2d. 2013).

¹⁰⁷ See infra 2.6.5 UAE Courts view of the definition of arbitration.

¹⁰⁸ Paulsson gives an explanation to the reason behind the Arab countries hostility towards arbitration stating that: “modern Arab states, hostility to arbitration as they regained independence was not, however, so much a reflection of Muslims values as that of dual preoccupation of nation-building governments: to establish the authority of embryonic formal institutions internally, and to resist perceived foreign encroachments on sovereignty.” Paulsson supra note 106 at 12.

¹⁰⁹ Paulsson also notes that :” Competition between judges and arbitrators is indeed harmful to both. The idea of arbitration is that of freedom; judges who quash that idea and impose their power for its own sake run the risk of all despots: disaffection.” Paulsson supra note 106 at 265. Therefore, this definition of arbitration is a key factor in understanding the ideology of the courts in the UAE and by understanding it would open the door in producing solution to this problem.

was often unable to do so by himself ‘to protect him from the strong, and even from himself.’¹¹⁰ The sentiments expressed in this quotation explain why an Arabic jurist and subsequently the courts would view arbitration as an exception to litigation,¹¹¹ and further as something weak and in need of the strength of the courts in order to stand on its own. Sanhuri also advanced the idea that the parties to the arbitration were not educated in law, and therefore were weak and needed the strength and support of the court to guide them.

The Arab Jurist’s definition discussed in this section has influenced how arbitration is practiced by UAE courts, particularly given the view that arbitration is an exceptional means of resolving disputes, and that the courts are superior and should supervise the arbitration process. This stance clearly influences how UAE courts view arbitration.

2.6.4 UAE Legislators’ View of Arbitration

There is no definition of arbitration in UAE Civil Procedure¹¹², which creates a problem in the event that the award is contested in court, or if one of the parties decides to contest any stage of the arbitration process in court.¹¹³ UAE courts, however, have defined arbitration, and this definition and its implications are examined in the following section.

¹¹⁰ Bechor, supra note 17 at 154-155. In this book the author is giving an insight into the work of one of the most prominent modern Arab jurists, one who helped in drafting a number of laws and Arabian constitutions including a contribution in the UAE constitution.

¹¹¹ Which is supported by the definitions of Hindi Supra note 103 at 2, and Hamoodah supra note 101 at 19.

¹¹² or the proposed Draft Law.

¹¹³ An examination of the civil procedures law and the articles that relates to arbitration, is found in the appendix, article 203 of the civil procedures is the first article that discusses arbitration and holds the requirements of the arbitration agreement. See general El-ahdab and El-ahdab supra note 37 at 782-829. The authors in there give a detailed account of the civil procedures law with a comparison to the draft law on arbitration. Al-tamimi also gives an introductory explanation of the civil procedures provisions on arbitration, Al-tamimi supra note 12 at 14-161.

2.6.5 UAE Courts' View of the Definition of Arbitration

This section will introduce the UAE courts' view of arbitration by elucidating how judges interpret the term. Currently, since arbitration has not been defined in UAE law, legislation such as the UAE Civil Procedures Code¹¹⁴ lacks a definition of the term. As such, concluding arbitrated disputes requires further consideration of how UAE courts have defined arbitration.

The Dubai Court of Cassation has defined *arbitration* as:

an agreement between disputing parties to appoint a neutral party to settle the dispute without resorting to litigation, according to a certain agreement that defines the terms of arbitration . . . arbitration is built around two columns: the will of the parties to arbitrate, which can be concluded from the agreement, and the will of legislators to allow individuals to submit their disputes to arbitration, for without this will, it will not be possible to submit disputes to arbitration, for the enforcement of justice is a state right enforced by the courts . . . arbitration shall not be drawn only through the silence of one party to the proposal of another to submit the dispute to arbitration, for arbitration is not to be presumed.¹¹⁵

A few ideas may be concluded from this statement. First, arbitration in this statement aligns with most Arabian jurists' definitions regarding the topic.¹¹⁶ Also, it can be inferred from the court's reasoning that it views arbitration as an exception to litigation, stipulating that the court sees arbitration as "the will of legislators to allow individuals to submit their disputes to arbitration, for without this will, it will not be possible to submit disputes to arbitration."¹¹⁷ The Dubai Court of Cassation views *arbitration* as inferior to litigation in addition to being flawed; according to the Court, arbitration cannot rival the supremacy of submitting disputes to the court. In order to submit a dispute to arbitration, a clear intent to arbitrate must be established, since such intent may not be presumed.

¹¹⁴ Supra note 8, nor the proposed Draft law.

¹¹⁵ Dubai Court of Cassation appeal no. 92/2007 dated 19 June 2007.

¹¹⁶ Hindi Supra note 103 at 2, and Hamoodah supra note 101 at 19.

¹¹⁷ Dubai Court of Cassation appeal no. 92/2007 dated 19 June 2007.

Arbitration as an exceptional means of resolving disputes is exemplified further by another decision of the Dubai Court of Cassation:

As has been the case in the jurisprudence of this court that arbitration is an exception to the norm—that the court has the jurisdiction to hear disputes regarding civil and commercial matters—every clause in the contract shall therefore be explained in a strict manner and in a way that will not exceed the will of the parties.¹¹⁸

The same court also gave this corresponding decision:

Arbitration is an exceptional means of resolving disputes, which is an exception to the general norm stating that the courts have the right to hear all disputes, except those mentioned in special legislation, and that the arbitration clause shall be explained and defined in a strict manner.¹¹⁹

This view of arbitration may be found as well in a decision by the Ras Al Khaimah Cassation Court,¹²⁰ which supports the same ideas and gives the same reasoning form them as provided above by the Dubai Cassation Court.

A pattern emerges upon examining the previous reasoning given by the court when faced with questions regarding arbitration; namely, that according to the views of the UAE judiciary, arbitration is an exception, and not equal, to the court's jurisdiction. Viewing arbitration in this context helps explain the reasoning behind the courts' strict methods of explaining the clause in contracts that address arbitration, and it suggests that UAE courts have defined *arbitration* in this strict manner in order to protect the rights of the parties, as well as their right to a fair trial.¹²¹

Thus, we may summarize that the purpose of arbitration according to the UAE judiciary may be stated as such: “to settle disputes by way of starting procedures in front of the arbitration tribunal Therefore, in order to do so, a dispute should have arisen before the start of those proceedings, and the purpose of the dispute

¹¹⁸ Dubai Court of Cassation appeal no. 261/2002 dated 2 November 2002.

¹¹⁹ Dubai Court of Cassation appeal no. 192/2007 dated 27 November 2007.

¹²⁰ Ras Al Khaimah Court of Cassation appeal no. 14/1 dated 11 March 2007.

¹²¹ Which also exemplifies Paulsson statement of the harmful affect of having competition between judges and arbitrators. Paulsson supra note106 at 265.

should be to protect the right of individuals or their legal status.”¹²² The emphasis in the previous paragraph is on the protection of individuals’ rights and legal status, because the court views arbitration as an uncertain and inferior alternative to litigation that may endanger the parties’ rights.¹²³ It is the role and obligation of the court and judges to prevent this risk or at least to limit it, which can only be achieved if the courts strictly regulate and monitor the process of arbitration. This attitude has contributed to a plethora of bureaucratic procedures that limit the affect and power of arbitration. While this bureaucracy has become cumbersome, the procedures have been seen to be required to ensure a fair and functioning arbitration process.

The Abu Dhabi Cassation Court has defined arbitration in a manner that is similar to how the other UAE courts define it; however, it adds certain alternative aspects, including that “in any case arbitration cannot be adhesive.”¹²⁴ The general definition of arbitration is also exemplified by another judgment of the same court, which explains the meaning of arbitration according to the Civil Procedures Code, particularly Article (203)¹²⁵:

Arbitration is a special form of judicial litigation in which the parties of the arbitration agreement resort to an arbitrator without submitting their disputes to the court in order to settle their dispute arising through a contractual relation or non-contractual relation by rendering a binding award after hearing the case and what the parties have to say.¹²⁶

In essence, the reasoning of the Abu Dhabi court in defining arbitration falls in line with that of the other UAE courts. The Abu Dhabi court then goes further and explains the Civil Procedures Code and states the reasoning of legislators.

¹²² Dubai Court of Cassation appeal no. 167/2002 dated 2 June 2002.

¹²³ Again this is also highlighted by the quote mentioned earlier by Paulsson see supra note 108, where he discusses how arbitration is being treated in the modern Arab States, Paulsson supra note 106 at 12.

¹²⁴ Abu Dhabi Court of Cassation appeal no. 554/2008 dated 25 December 2008.

¹²⁵ See the appendix domestic arbitration article 203.

¹²⁶ Abu Dhabi Court of Cassation appeal no. 519/2008 issued on the 25 December 2008.

Most importantly, all of the above courts' definitions follow the same pattern, and all view arbitration as an exceptional means of resolving disputes. They also all hold that arbitration requires special treatment from the courts in order to protect the rights of parties that decide to submit their disputes to arbitration.

2.6.6 Conclusion

To recap, the courts in the UAE are influenced by the views of the Arabian scholars on arbitration, which can be seen from the similarity in the views of the UAE courts and those scholars on the subject of arbitration. The court and scholars have been influenced significantly by the late Prof al-Sanhuri and his theory on justice. This theory holds that one purpose of justice is to achieve a balance between weaker and stronger parties, and in the case of arbitration, the weaker party needs the courts' protection.¹²⁷

The UAE courts have shown some hostility and resistance toward arbitration, which can be traced to the way the Arabic Jurists view arbitration. This view contradicts both western and Shari'a views of arbitration; these two systems tend to see arbitration as an independent form of adjudication and not as an exception to (or a degrading of) an individual's right to seek their natural judge.¹²⁸

It seems clear from the UAE courts' general definition of arbitration, as well as from their reluctance to relinquish jurisdiction over disputes, that this view will have a negative affect on the use and enforcement of arbitration. Such hostility toward arbitration is not limited to one court within the UAE, but rather occurs commonly throughout various UAE courts, as discussed above. To promote the use of arbitration within the UAE, UAE courts should abandon their practice of viewing arbitration as

¹²⁷ See Bechor, supra note 17 at 154-155.

¹²⁸ See Paulsson supra note 106 at 12.

inferior to litigation. This would allow the UAE judicial system to rely more on arbitration for dispute resolution, and not restrict the use of arbitration to commercial disputes. Allowing all forms of disputes to flow through a robust and functioning arbitral system may attract investors and to improve the UAE's economic situation by reducing the expenses of the judicial branch. Funding thus saved could be allocated for use in other areas of government and infrastructure in the UAE.¹²⁹

2.7 Examples of the Courts View on Arbitration

This section introduces selected examples that show the courts general view on arbitration, which goes against the general principles of arbitration (see below), affects the process and may cause the parties involved to chose not to use arbitration.

Generally speaking, arbitration is governed by the principle¹³⁰ that the arbitration process can provide an arbitral award issued by an impartial party without little delay or expense, and further that the parties involved have the will and freedom of contract to govern how their disputes should be conducted without court interference.¹³¹

The seven examples explained here by means of examination of the following case studies highlights this issues, furthermore they are not limited to the process of

¹²⁹ These benefits can only be achieved in the UAE if the courts and in turn the government were willing to support arbitration, as Rayner puts it: "However, government assistance may well be required to foster its use in Canada.....", Rayner supra note 5 at 73.

¹³⁰ The general principles governing arbitration can be a subject of a separate thesis and how they are applied in the UAE, thus this thesis is going to refer to a couple of authors that have discussed them in length. See General, Klaus Peter Berger, *General Principles of Law in International Commercial Arbitration How to find them - How to apply them*, vol.5-2 World Arb. & Med. Rev. 97 (2011). Where the author gives an intensive discussion of how to apply the general principles in international commercial arbitration and also discusses the principles of Translex and if the parties choose to adopt GP in their disputes. See also, Andrew D. Mitchell, *The legal basis for using principles in WTO Disputes*, vol. 10-4 J Int. Economic Law 795 (2007). Which explains the relationship between the principles and the theories that interpret them. See also Jay Ellis, *General Principles and comparative law*, vol. 22-4 Eur. J. Int. Law 949 (2011). Where she discuss why the general principles have been exploited to such a limited extent. See, Anna Mantakou, *General Principles of law and International Arbitration*, 58 RHDJ 419 (2005), in here the author explains that no person may against his will be deprived of the judge assigned to him by law in this principle a reference to another principle is made which the party autonomy, which is similar to the way UAE think.

¹³¹ *What is Arbitration?* (Jan. 5, 2014), <http://www.mediate.com/articles/grant.cfm#> .

arbitration, but rather also extends to other forms of disputes submitted to the courts within UAE.¹³²

2.7.1 Understanding the Facts of the Case and Weighing the Evidence

In one case,¹³³ the court was faced with a question about the facts of the case and how to weigh the evidence, and it answered the following:

the trial court has the right to understand the facts of the case and to weigh the evidence submitted to it, for if the court bases its understanding on solid evidence, then its decision will not form the base of the review.”¹³⁴

This statement (quoted directly above) implies a principle that the reasoning of the trial courts is not subject to review. It suggests that high court decisions are by definition based on solid reasoning, because the high courts in the UAE (in this case, the Supreme Court) are courts of law, not trial courts; therefore, while they may review faults in the application of the law, they will not review the merits of any particular case. Moreover, these courts will not discuss evidence more than once or hear pleas regarding the facts.¹³⁵ Viewed in the context of arbitration, the statement quoted above suggests that the case at hand was one that concerned a specific kind of arbitration—Shari’a-based arbitration.¹³⁶ While Shari’a-based arbitration is a highly favored form of arbitration and even favored by the courts in the UAE, it did not escape the affects of this view.

If arbitration seen as equal to court proceedings, then this rule would be applied to the reasoning of the arbitrator and the arbitral award.¹³⁷ It seems likely that the

¹³² Nevertheless, these issues even the ones of a general nature, when adding arbitration to the mix only adds to the difficulties faced by the parties that choose arbitrate.

¹³³ Federal Supreme Court of the UAE appeal no. 264/24 dated 26 June 2004.

¹³⁴ *id.*

¹³⁵ Articles 173–188 of the civil procedures, explain the procedure of appealing cases to high courts in the UAE.

¹³⁶ See *infra*, Shari’a based arbitration, cases involving family law disputes, appeal no.264/24.

¹³⁷ As supported by civil procedures law Article 216, which lists the circumstances in which a request of nullification can be made.

UAE courts does not apply the same principles to arbitration that it does to court proceedings, because courts in the UAE view arbitration as an exception.¹³⁸ This would cause the court to refrain from hearing any arguments based on the merits of a case, if the case were related to litigation, while it would hear such arguments if it involved arbitration. Thus, in order to promote the presence and status of arbitration in the UAE, this rule should be put into practice and not simply be a line item in legal writings or the civil procedures law. For such a change to occur, courts must view arbitration as equal to a court proceeding.

2.7.2 The Court's Lack of Obligation to Wait for the Arbitral Award before Commencing the Litigation Process

Another peculiar rule regarding arbitration in UAE courts emerged in a decision of the Dubai Cassation Court. The court decided that, despite the facts that an arbitration proceeding had commenced, when one of the parties decided to litigate the same decision, the court was not obliged to stop its proceedings and wait for the arbitrator to decide to issue an award, since the arbitration at hand was also being arbitrated by the court. In its decision, the court stated that:

Article 213 of the Civil Procedures Law¹³⁹ states that the court's authority in the case of an arbitration processed by the court does not end if the arbitration proceedings have not yet commenced. Rather, it continues until the award has

¹³⁸ Supra 2.6.5 UAE courts view of the definition of arbitration.

¹³⁹ Article 213 of the civil procedures states: "1. In the case that arbitration proceeds through the court, the arbitrators should deposit the decision with the original arbitration record, the reports, and the documents in the clerk's office of the court authorized principally to examine the action within fifteen days following the decision's delivery; the arbitrators should deposit a copy of the decision in the clerk's office to deliver them to each party within fifteen days from depositing the original, and the clerk's office shall compile a report with that deposition to manifest to the judge or division manager, depending on the circumstances, in order to appoint a session within fifteen days in order to authenticate the decision; the two parties shall be notified therewith. 2. If arbitration was appellate case, then the deposit shall be in the clerk's office authorized principally to examine the appeal. 3. As for the arbitration occurring between the litigant parties outside the court, the arbitrators should deliver a copy of the decision to each party within five days from the delivery of the arbitration decision, and the court shall examine the authenticity or nullity of the decision according to the request of one of the litigant parties through the usual procedures of the action prosecution."

been issued and ratification of the award is in process. Therefore, the court is not obliged to stop its proceedings, even when the issuance of an award by an arbitrator is already underway.¹⁴⁰

The above suggests that the court's view on an arbitration that was commenced in the court is that it is still part of the jurisdiction and authority of the court.¹⁴¹ The court still holds authority over the proceeding, even though the parties agreed to submit their dispute to arbitration, and the court continues to have a supervisory role over the arbitration.

The court views the plea by the one of the arbitrating parties as a form of obligation. In fact, the plea is an extra incentive to the court to reopen and rehear the case, despite the parties having agreed to submit their dispute to arbitration. The court seems to view such action as a form of preserving and protecting justice. As discussed earlier, arbitration is an exception to proper legal proceedings in the view of the UAE courts, and in order to preserve justice, the court feels obliged to answer the party that seeks to submit its dispute to litigation, and to grant that party the opportunity to litigate again.¹⁴² By pursuing this notion of justice, the court loses on the practical side.¹⁴³ This protocol perpetuates disputes, which contradicts one part of the ideal justice that the court seeks to preserve. Furthermore, one of the reasons that parties seek arbitration is the swiftness and finality that comes with an arbitral award, which is lost when an arbitral decision is appealed and the dispute returns to litigation.¹⁴⁴

¹⁴⁰ Dubai Court of Cassation appeal no. 167/2002, issued on the 2nd of June 2002.

¹⁴¹ In essence, this rule highlights the courts practice when it comes to court-annexed arbitration. Levin defines court-annexed arbitration as a mandatory arbitration and the arbitrators are typically assigned by a third party and the award is not binding and is typically assigned by a statute, and in some cases subsequent to filing a case. See, A. Leo Levin, Symposium: reducing court costs and delay: court-annexed arbitration , 16 U. Mich. J.L. Reform 537, 538 (1983).

¹⁴² Supra 2.6.5 UAE Courts view of the Definition of arbitration.

¹⁴³ which is an application the legal Maximus "Justice Delayed is Justice Denied", see Sourdin & Burstyn supra note 9 at 46.

¹⁴⁴ See Born supra note 65 at 13, were the author discusses the finality of the award. And Carbonneau supra note 74 at 11, were the author states that "The reduction of litigious obfuscation results in an economy of time and money."

2.7.3 An LLC¹⁴⁵ Manager's Powers Regarding the Conclusion of an Arbitration Agreement

This ruling relates to LLCs, and more precisely to the agreement to enter into arbitration of the managers of LLCs¹⁴⁶. The court allows such agreements if they are rendered by the manager¹⁴⁷; a court decision explained this by stating that:

According to the view of this court and to Article 237¹⁴⁸ of company law, the manager of a limited liability company has total authority to manage the company, including his or her ability to agree to arbitrate on behalf of the company. This fact does not change, though Article 58/2¹⁴⁹ of the Civil Procedures Code states that it is not valid without special authorization, the declaration of the right prosecuted or the disclaiming of such a right, the reconciliation or arbitration therein, the approval of the oath, or the direction, repulsion, or release of litigation . . . for this article falls to the actions of the agent in a dispute in the court and is not concerned with the authority of the limited liability company.¹⁵⁰

This legal fact is a key instrument in understanding the UAE courts and how they function. Though the courts view arbitration as a flawed form of dispute settlement that requires the court's strict supervision, they are nevertheless obliged to obey the law. Certain statutes, such as the one at stake in this case, deter the courts from intervening. In this case, had there been no legislation governing the matter, the court

¹⁴⁵ Limited Liability Company.

¹⁴⁶ The importance of this example is highlighting the affect of the courts view on arbitration on commercial disputes.

¹⁴⁷ Which is the companies manager.

¹⁴⁸ Federal Law No. 8 concerning commercial companies, Article 237 states: "Unless the powers of the manager are fixed in the company's statutes, the company's manager shall have full powers to carry out the management affairs of the company, and his [or her] actions shall be binding on the company, provided that they are substantiated by the capacity under which he [or she] acts. Provisions pertaining to liabilities of directors of a joint-stock company shall apply to the said manager, and any condition stipulated in the company's statutes to the contrary shall be null and void."

¹⁴⁹ Article 58/2 of the civil procedures law.

¹⁵⁰ Dubai Court of Cassation appeal no. 462/2002 dated 2 March 2003. According to this judgment, agreements to arbitrate that are concluded by the managers of an LLC would be permitted and would not fall under the exclusion of the Civil Procedures Code, Article 58/2. In essence, such agreements are an exception to an exception, for arbitration itself is considered an exception by the UAE courts—which may explain the affect of the courts view on arbitration, and why a case such as this one managed to reach the Cassation court. Following the court's jurisprudence, it is safe to assume that an agreement such as this one, i.e., one that was concluded by an LLC manager, would be nullified, and that accordingly, this manager should not be permitted to arbitrate disputes. However, since an article in the law allows such action, the court's hands are tied and they may not interfere in the arbitration process

would almost certainly would have ruled in favor of nullifying the agreement concluded by the manager of the company. This result implies that certain statutes exert a deterring effect on the courts. However, this deterrent factor must be somewhat limited, given that this case did actually reach the Cassation court. This raises the question of how such a case get to the Cassation court, when there is a provision in the law that gives the manager of an LLC the power to enter into an arbitration agreement.¹⁵¹

The simple answer would go back to they way in which the UAE courts define arbitration; namely, they view arbitration in a narrow way that limits any provision in any given law that would have the affect of increasing the influence of arbitration.¹⁵²

2.7.4 The Ability to Appeal Decisions That Concern Jurisdictional Issues

Another ruling that is relevant to the question of arbitration opines that decisions that concern the court's jurisdiction are appealable, as stated in a decision by the Dubai Cassation Court:

According to the judgment of this court and according to Article 151 of the Civil Procedures Code,¹⁵³ the court is not allowed to appeal decisions issued by hearing the case and cannot end the dispute until a decision has been rendered, except for temporary and/or urgent decisions concerning the termination of the dispute, the decisions that concern enforcement, and the decisions on jurisdiction. According to the court's view, the decision to refuse to hear the case based on the existence of an arbitration clause is a decision concerning the jurisdiction of the court, and therefore any dispute concerning this plea is appealable.¹⁵⁴

¹⁵¹ which is according to article 237 of the commercial companies law, supra note 148.

¹⁵² Supra 2.6.5 UAE courts view of the Definition of arbitraiton.

¹⁵³ Article 151 of the civil procedures state: "It is not possible to appeal the decisions delivered during the progression of the action since the litigation has not been terminated therewith, except for the delivery of the decision terminating all the litigation, and that with the exception of the temporary and summary decisions, decisions issued for staying the action, decisions liable to obligatory execution, and sentences issued deciding the lack of jurisdiction, unless the court has the authority to judge in the action."

¹⁵⁴ Dubai Court of Cassation appeal no. 152/2004 dated 27 February 2005.

This decision again stems from the way the UAE courts define the process of arbitration. By means of this principle (embedded in the quote cited directly above), the court opens a door to appealing arbitration when that arbitration affects matters concerning jurisdiction. Though the court decided to dismiss the case based on the existence of an arbitral clause, this decision was found to be appealable. The court followed the same pattern of reasoning when deciding this case—reasoning by which the court justified its interference in and supervision of the arbitration process.¹⁵⁵

In this case study, the decision at hand addresses labor arbitration, which tends to involve cases in which the court feels obliged to interfere in order to protect the party (usually the employee) that is considered to be weaker.¹⁵⁶ Given that the employee is about to enter into arbitration, which the courts view as a dangerous mechanism of settling disputes, the court is more likely to step in and scrutinize the issues and legal clauses brought to bear.¹⁵⁷ The court's action in this case led both parties in the arbitration agreement to lose time and bear additional expenses. Then, after a long process, the court dismissed the case based on the existence of an arbitration clause. However, the court's decision did not change the fact that the Cassation Court's principles enabled such an appeal, which in the end benefitted neither party, nor did it uphold or preserve justice in the way the court system has expressed it means to do. The author of this paper would argue that the court used the time of the litigants in

¹⁵⁵ This attitude towards arbitration is best explained by Paulsson, he states that: "In communities where the government sees its role as the realization of a social program demanding discipline and conformity, court judgments are occasions to implement collective policies. In contrast, where the government perceives itself principally as the custodian of a pacific environment, permitting a wide range of individual strategies for self-fulfillment and community participation, judgments serve to resolve individual conflicts without forcing them onto a Procrustean bed of predetermined policy." Paulsson supra note 106 at 7.

¹⁵⁶ Which again is a direct influence of the teaching of prof. Sanhuri. See. Bechor supra note 17 at 154-155.

¹⁵⁷ Which again is an illustration of the Arab jurists view on arbitration, Hindi supra note 103 at 2 and Hamoodah supra note 101 at 19.

this manner because, once again, of its view that arbitration is an exception to litigation.

2.7.5 Issues Related to the Arbitration Clause also Relate to the Court's Jurisdiction

The following ruling relates to one discussed earlier:

The plea to the court to dismiss the case based on the existence of an arbitration clause is one that relates to jurisdiction, since it intends to nullify the jurisdiction of the court. The decision of the court to dismiss the plea or to decide upon the subject matter is a decision that implies the court's competence¹⁵⁸ in hearing the case and that the case cannot be appealed on its own, as long as the decision does not settle the dispute, unless the court is not competent to hear the dispute.¹⁵⁹

This decision embodies another principle concerning the court's jurisdiction and implies that an arbitration clause does not necessarily preclude parallel proceedings. More precisely, having such a clause does not deter the court from scrutinizing the arbitration clause in order to nullify it, which raises certain issues. For one, how can resources be balanced between the court and the arbitration tribunal? Is it fair and just to ask the party upholding the arbitration clause to fight on two fronts? Does the allowance of parallel proceedings contradict the principle of freedom of contract?

Additionally, this decision is not appealable on its own, which creates two further scenarios. First, if the court decided to dismiss the case based on the existence of an arbitration agreement or clause, that decision may be appealed, because the decision would end the dispute as long as the dispute related to the clause or the agreement to arbitrate. Second, if the court decides to hear the case, then that decision (to hear) would not be appealable until the court rendered a decision on the case itself, which

¹⁵⁸ In a meeting with Dr. Ali Al-Imam of the Dubai Cassation Court, in which I asked him about the principle of *kompetenz-kompetenz*, to which he expressed his reservations regarding the principle. see general Carbonneau supra note 74 at 30-31, where the author discusses this principle.

¹⁵⁹ Dubai Court of Cassation appeal no. 56/2005 dated 10 October 2005.

only then may become subject to enforcement. The result of both scenarios is the ability to appeal such a decision regardless of the outcome of the case.

The court understands that it creates further opportunities for appeal; in the court's view, this is necessary to preserve justice. However, despite the notion of justice that the court aims to achieve by allowing parallel proceedings, time and money are likely often being wasted.¹⁶⁰ Furthermore, when one party must tackle two fronts at the same time, this most likely will result in resources being rerouted from the party seeking arbitration into other fronts, which contradicts the notion of justice typically endorsed by the court and in turn the parties freedom of contract¹⁶¹. This is yet another instance that demonstrates the view of arbitration as an exception, given that even the arbitration clause is subject to the courts' jurisdiction and scrutiny.

2.7.6 The Need of Causation as a Criterion for Accepting an Appeal

The Dubai Cassation Court also requires the appealed decision to be based on causes; an appeal request to the court would be cause to dismiss the appeal, as has occurred in at least one decision, which states the following:

When filing an appeal to the Cassation Court, the causes of the appeal shall be attached . . . the failure of which would be cause to dismiss the appeal. . . . According to Article 177 of the Civil Procedures Code¹⁶² and the jurisprudence of this court, when filing an appeal, the cause shall be attached by the appellant. Furthermore, the appellant shall explain those causes in an

¹⁶⁰ Furthermore, when one party must tackle two fronts at the same time, this most likely will result in resources being rerouted from the party seeking arbitration into other fronts, which contradicts the notion of justice typically endorsed by the court. This is yet another instance that demonstrates the view of arbitration as an exception, given that even the arbitration clause is subject to the courts' jurisdiction and scrutiny.

¹⁶¹ See general Carbonneau supra note 74 at 24-25, where the author discusses the freedom of contract. And Hindi supra note 103 at 2-3, where the author defines this concept from an Arab jurists point of view and supports it by two decisions of the Egyptian constitutional court.

¹⁶² Article 177/4-5 of the civil procedures states: "4. The plead should include, besides information related, the opposing parties' names, competences, addresses of each one listed the docket of the decision against which the appeal has been prosecuted, the date of its issue, the date of its notification, if the notification has already taken place, and an explanation of the reasons upon which the appeal was based and the appeal's requests. 5. If the appeal has not occurred in the manner mentioned above, it shall not be accepted, and the court shall automatically decide its disapproval."

adequate manner that does not leave room for doubt, given the fact that the appellant explained his or her causes in a general form is not enough to accept the appeal.¹⁶³

For the Court of Cassation to accept an appeal, the appellant must to explain the causes for the appeal upon filing. The court explains the minimum requirements of the parties that must be stated in the appeal:

to show the insufficiency of the claim of the parties and its effect on the decision by the arbitrator and the failure to uphold the arbitration proceeding and the areas in which the arbitrator failed to apply the arbitration proceedings and the areas in which the arbitrator exceeded the scope of arbitration.¹⁶⁴

Having causation as one of the criteria necessary for an appeal to be accepted is not a strange concept nor is it limited to appeals that are related to arbitration.¹⁶⁵ This principle, in essence, is meant as a filter to limit the number of appeals submitted to the court. However, the court has set the bar very low for accepting appeals that are related to arbitration; this will, in practice, render this principle useless. The reason the courts are willing to accept almost any arbitration-related appeal is to attempt to provide proper justice, i.e., the kind of justice they believe arbitration cannot provide since it is an exception to litigation.

2.7.7 New Pleas to the Court

Another rule states that:

New pleas in front of the appeal court shall be dismissed. For example, if the appellant requested from the first court that the arbitration shall be according to a certain agreement and then requested from the appeal court that the arbitration shall be according to the construction contract . . . according to

¹⁶³ Dubai Court of Cassation appeal no. 265/2008 dated 3 February 2008.

¹⁶⁴ Id.

¹⁶⁵ Turki explains the requirements needed to accept a suit in the UAE, he discusses this in length and the introduction to this discussion can be found in his book, see Turki supra note 11 at 603-606.

Article 165/2 of the Civil Procedures Code,¹⁶⁶ new requests in front of the appellate court shall be dismissed by the court.¹⁶⁷

This principle entails the parties' right to appeal and primarily aims to preserve the hierarchy of appeal.¹⁶⁸ Furthermore, in order to not forfeit the chance to plead the case again, the court of appeals is obliged to dismiss any new requests.¹⁶⁹ In the event that the court fails to dismiss any new requests, then its decision would become void and therefore subject to nullification.¹⁷⁰ Even though new pleas shall be dismissed if they are presented to the appeals court, they may become subject to a separate suit submitted to the court. This possibility becomes a real concern for parties submitting their dispute to arbitration, which may mire them in a revolving cycle of litigation due to the courts need to preserve justice and their view that arbitration is inferior to litigation, which justifies the court action to prioritize the individual right to appeal, a right that undermines the arbitral process.

2.7.8 Conclusion

The principles discussed here are merely the tip of the iceberg when it comes to arbitration in the UAE. As aforementioned, the principles are not limited to arbitration; the seven cases mentioned here represent examples of how the courts views about arbitration affect their decision making process. The reason for choosing these seven cases is that they address general principles of the court as they relate to arbitration.

¹⁶⁶ Article 165/2 civil procedures states that "2. The court shall examine the appeal on the basis of what is submitted thereto of the evidences, pleas and new aspects of defense and what had been submitted, before that to the court of first instance."

¹⁶⁷ Dubai Court of Cassation appeal no. 342/2007 dated 4 March 2008.

¹⁶⁸ See general Turki supra note 11 at 379-384.

¹⁶⁹ i.d. at 380.

¹⁷⁰ Which is considered one of the general principles and the parties are not allowed to waiver, i.d. at 381.

These principles furthermore provide a general idea of the hurdles facing arbitration in the UAE. The UAE courts' protectiveness of individual rights is the cornerstone of their reasoning when justifying their resistance to arbitration; this is exemplified by the courts' view of the definition of arbitration as an exceptional means of resolving disputes, which suggests that arbitration lacks the tools necessary to protect the parties in the adjudicating process. The need to protect the weaker party in a dispute may be traced back to Professor Sanhuri¹⁷¹ and his theory about the balance of power and justice, which in turn exemplifies the role played by Egyptian scholars in shaping up the identity of the UAE courts. Understanding these concepts helps to explain and decipher the courts' rationale with regard to arbitration, and becomes a key factor when recommending that the courts accept and support the use of arbitration.

¹⁷¹ See. Bechor supra note 17 at 154-155.

Chapter Three

Shari'a Law and Arbitration in the UAE

In the UAE, arbitration law and its practice cannot be isolated from Shari'a law. All legislation in the UAE—as in all Islamic countries—must comply with the provisions of Shari'a law, or else it becomes null and void.¹⁷²

The UAE Constitution considers the Shari'a the primary source of lawmaking power,¹⁷³ as stated in Article 7 of the UAE's Constitution: "Islam is the official religion of the Federation and the Muslim Shari'a is "a main source of its legislation."¹⁷⁴ As a result, any legislation that counters a provision of Shari'a law should not be incorporated or enforced by UAE law enforcement entities. By extension, UAE courts are governed and bound by Shari'a law and Islamic jurisprudence—*fiqh*—in applying procedural and substantive law to decide all legal matters. To what extent, then, are the courts in fact applying Shari'a and Islamic provisions in practice?¹⁷⁵ Is the influence of Shari'a on arbitration decreasing in the UAE?

This chapter begins with an introduction to Shari'a law, explaining how it functions and how it is situated in the UAE legal system. The chapter establishes the premises for an in-depth comparison of the Islamic arbitration system versus the modern practice of arbitration, particularly in UAE courts. After establishing the position of Islamic Shari'a within the UAE, the chapter explores the various forms of arbitration that are influenced by Shari'a.

¹⁷² United Arab Emirates Constitution, Article 7. See general Al-Muhairi supra note 24 at 219-220. See also El-ahdab and El-ahdab supra note 37 at 782.

¹⁷³ Al-muhairi supra note 24 at 219.

¹⁷⁴ United Arab Emirates Constitution Article 7.

¹⁷⁵ Saleh supra note 100 at 342. In here the author explains the practice of Sahri'a arbitration in Egypt and how it started to have a secondary role as a result of commercial pressure.

3.1 Introduction to Shari'a

The following subsections describe and distinguish *Shari'a* and *Islamic law*, discussing whether Shari'a is synonymous with Islamic law, and how these concepts function in the UAE.

3.1.1 Defining Shari'a

In Arabic, *Shari'a* refers to “the path or the way”¹⁷⁶ or “the path to be followed, or clear way to be followed.”¹⁷⁷ As an official path designed by God for humans to follow, Islamic Shari'a governs all sides of Islamic life, and it establishes rules and requirements that guide each Muslim's daily life and overall conduct.¹⁷⁸ The Shari'a is distinct from *fiqh*, or Islamic jurisprudence, which is only part of the Shari'a. *Fiqh* consists of scholarly Islamic interpretations of the Shari'a's primary and secondary sources.¹⁷⁹ More literally, *fiqh* means “precious understanding,” although it also signifies knowledge of the Shari'a's practical provisions, as derived from detailed sources.¹⁸⁰

Essentially, the Islamic Shari'a is a doctrine that governs the entire life of a Muslim; therefore, it is important to understand Shari'a in order to understand the mindset of a middle-eastern judge or jurist.¹⁸¹ This understanding will help contextualize Shari'a-related decisions made by the courts, as well as other forms of arbitration.

¹⁷⁶ Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Concept*, 59 Vand. L. Rev. 609, 627 (2006).

¹⁷⁷ Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. Islamic L. & Culture 27, 35 (2002). See also, Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 Wis. Int'l L.J. 108, 118 (2010)

¹⁷⁸ Ahmad Alkamees, *International Arbitration and Shari'a Law: Context, Scope and Intersections*, 28 J. Int'l Arb. 255, 256 (2011).

¹⁷⁹ Id. At 256.

¹⁸⁰ Omar Bin Saleh Bin Omar, *Al-Madkhal ila Al-Fiqh Al-Islami* [Introduction to Islamic Jurisprudence Studies] 15 (2nd ed. 2006). See also Trumbull, *supra* note 176 at 628.

¹⁸¹ See generally, Saleh *supra* note 100 at 1, where the author gives an extended explanation of the importance of the role of Shari'a in Arabian societies.

3.1.2 Sources of Shari'a

For *fiqh* and in general, the sources of the Shari'a are diverse and require categorization. According to Omar bin Omar, each source should be grouped as a primary or secondary source, as a reason, or as an agreement or disagreement.¹⁸² The sources examined in this chapter will be grouped chiefly as either primary or secondary sources.

Primary sources of the Shari'a include the **Quran**—the Muslim holy book—and the **Sunnah** of the Prophet Mohammad: his teachings, sayings, actions, decisions, and judgments.¹⁸³

Secondary sources of the Shari'a are far more numerous:¹⁸⁴

Those sources are used by Muslim scholars to either confirm or disregard a certain issue from an Islamic perspective, and arbitration is confirmed by both the primary sources (Quran and Sunnah) and the secondary sources.¹⁸⁵ The Sunnah and the secondary sources also confirm the viability of arbitration; examples of this will be discussed in the second section of this chapter when the Principles of Islamic

¹⁸² *Id.* At 191-192.

¹⁸³ Alkhamees, supra note 178, at 256. See also Saleh supra note 4, at 10.

¹⁸⁴ The secondary sources categorization varies based on how jurists perceive them, in any case the secondary sources function as a tool of reasoning and forming legal views. See Saleh, Supra note 144, at 11, which are **Ijma** refers to scholarly or expert consensus on a certain matter in Islamic jurisprudence. See Bin Omar supra note 180 at 206. See also Alkhamees, supra note 178, at 256. See Saleh supra note 100, at 11. **Qiyas** are analogies used to make judgments and interpret implications for issues left unresolved by the Shari'a's primary sources. BIN OMAR, supra note 180 at 210. See also Alkhamees, supra note 178, at 256, See Saleh supra note 100, at 11 **Istishab** refers to the rationale that a circumstance is presumed to perpetuate until evidence can be found that proves that the circumstance or its perpetuation is impossible. For instance, if a person buys a good, he or she is considered to own that good until his or her ownership can be shown to have ceased. see BIN OMAR, supra note 180 at 240. **Istihsan** refers to the reversal of a clear *Qiyas* to an ulterior *Qiyas* or analogy, or the reversal of a general rule to an exception, based on evidence requiring such a reversal. *Id.* at 215, **Shara mn Qblna** refers to the decisions or rules submitted by God to other religions before the existence of Islam that have not been altered (e.g., provisions in Christianity and Judaism). *Id.* at 236 **Al-Masalih al-Mursala**, or public interest, refers to issues left unresolved by the Shari'a. **Urf** refers to customs and common usage. *Id.* at 225. See also Alkhamees, supra note 178, at 256. **Sd Al-thra** refers to the prohibition of certain actions that, although *mbaha* (allowed), may facilitate *haram*—a sinful act forbidden in Islam. *Id.* at 232.

¹⁸⁵ The Quran mentions arbitration in verse 35 of Surat Al-Nesaa' which states: "If a couple fears separation, you shall appoint an arbitrator from his family and an arbitrator from her family; if they decide to reconcile, GOD will help them get together. GOD is Omniscient, Cognizant." See RASHAD KHALIFA, QURAN THE FINAL TESTAMENT, 84 verse 35 (1989).

Arbitration are explained.

3.1.3 The Shari'a Definition of Arbitration

The Islamic Shari'a defines *arbitration* as an event in which an arbitrator appointed by the parties of a dispute settles that dispute.¹⁸⁶ The *Majallat al-Ahkam al-'Adliyyah*¹⁸⁷ also defines *arbitration* in this way, particularly in Article 1790,¹⁸⁸ which states: "Arbitration is the appointment of an arbitrator by the parties of the dispute in order to settle the dispute."¹⁸⁹ EL-Ahdab defines it as a

procedure where the parties to a dispute empower an arbitrator to resolve their claims; however arbitration is the expression by virtue of which a party suggests it and the other party accepts, i.e. such procedures is based on the parties' agreement.¹⁹⁰

The above discussion makes clear that arbitration as discussed in the Islamic Shari'a takes the form of a contract.¹⁹¹

3.2 Islamic *Madhahib*, or Schools of Thought

The Islamic *Madhabs* are an essential tool or understanding and deciphering the Islamic Shari'a. These schools represent different approaches to solving Shari'a questions,¹⁹² and the followers of the schools rely on the sources for Islamic Shari'a when answering a Shari'a-related problem. The differences among these schools derive from how they interpret and allow the use of the secondary sources in their attempts to solve legal issues.¹⁹³

¹⁸⁶ Al-Manjid, supra note 96, at 48.

¹⁸⁷ supra note 97.

¹⁸⁸ Al-Manjid. Supra note 96, at 48.

¹⁸⁹ *Majallat al-Ahkam al-'Adliyyah* article 1790 supra note 99.

¹⁹⁰ EL AHDAB & EL AHDAB supra note 37 at 7. The author in here gives a number of examples from Islamic Authors on the definition of arbitration.

¹⁹¹ Id. at 7.

¹⁹² SALEH, supra note 100 at 7.

¹⁹³ Id, at 7.

The following schools of thought, or *madhahibs*,¹⁹⁴ are important for providing interpretations of Shari'a rules,¹⁹⁵ because UAE legislators gave these schools a legal shape when they included an Article in the Civil Transactions Code that guides judges when faced with Shari'a questions. The Article states:

In the absence of a text for this Law, the judge shall adjudicate according to the Islamic Shari'a, taking into consideration the choice of the most appropriate solutions in the schools of Imam Malek and Imam Ahmad Ben Hanbal and, if not found there, then in the schools of Imam El Shafe'i and Imam Abou Hanifa, as interest so requires. Where no such solution is found, the judge shall decide according to custom, provided it is not incompatible with public policy and morals. In the case that the custom is restricted to a specific Emirate, it shall be effective therein.¹⁹⁶

This implies that judges in the UAE, in the absence of guidance from the legislature in the form of substantive law, are bound by the teachings of these four schools in the order noted in the Article quoted just above. If no solution is present within the teachings of the schools, then a judge must seek a solution from customary law. Some questions arise. How did the legislature choose the order of the schools? How and from where would a judge derive a solution from the Madhib? And finally, how does this affect arbitration? Answering the first question requires a knowledge of how the UAE as a political entity was formed and how it functions.¹⁹⁷ The reason the schools are divided relates to the fact that different Emirates follow different Madhibs. The Maliki school¹⁹⁸ is given high regard, because it is the established

¹⁹⁴ There are a great number of Madhibs in the Islamic Shari'a, therefore this study would be limited to discussing the schools mentioned by the UAE legislator. The schools discussed in here form the main Sunni Schools, they are considered as such because the students and the followers of those schools have been able to maintain and record down their Imams teaching and spread their ideas and teaching through the Islamic nations, some of the major Imams and scholars of the Islamic Shari'a and many of their teachings and ideas have been either lost or forgotten due to this fact of their students failure to spread their teachers ideas. See general El-ahdab and El-ahdab supra note 37 at 13.

¹⁹⁵ Trumbull, supra note 176, at 628.

¹⁹⁶ Civil Transaction Law Article 1.

¹⁹⁷ See supra 2.3 Historical Background on Arbitration in the UAE, page 14.

¹⁹⁸ This school founder is Malik ibn Anas Al-Asbahi Al-Hamyari (93-179 Hijri) from Madina (Which is equivalent to (711-795 AD)). See, BIN OMAR, supra note 180 at 99, see also SALEH, supra note 100 at 8. In addition to the primary sources and the secondary sources, Maliks Madheb is distinguished from the other schools by its use of one more significant source: the customs of Medina or the Ijma of the people of Medina (Madina was the city of the prophet and this is the reason why the customs and

Madhib of two of the major emirates in the UAE: Abu Dhabi (the capital) and Dubai (the financial capital of the Emirates).¹⁹⁹ The Hanbali Madhib is the prominent Madhib in Sharjah and Ras Al Khaimah,²⁰⁰ the two emirates that come after Abu Dhabi and Dubai in the importance. The rest of the emirates differ in their following of the Madhibs, and they tend to vary. Therefore, it may be assumed that those who wrote the Article quoted above chose the remaining two Madhibs (Shafei²⁰¹ and Hanifi²⁰²) based on their own personal preferences.

the Ijma of the people of Madina was used as a source in Maliks Madheb, however Malek did not view it as part of Ijma of the Muslim scholars. See BIN OMAR, supra note 180 at 102. See also SALEH, supra note 144 at 8). Additionally, Malek is considered a scholar who prefers *ra'y* or subjective opinion. BIN OMAR, supra note 180 at 103. See also SALEH, supra note 100 at 8. When it comes to arbitration, this *madheb* holds two views: to not promote arbitration, yet to allow it if it occurs; or to ban it. *Fiqh Encyclopedia*, infra note 202 at 236. However, the established view of this school is to allow arbitration. It also allows the appointment of one of the parties in a dispute as an arbitrator, and it considers the arbitrator's decision to be binding unless it contains flagrant injustice. If such injustice is shown to have occurred, then a judge could interfere. Finally, the effect of an arbitral award is limited to the parties of the agreement and does not affect a third party's rights. BIN OMAR, supra note 180 at 107. See also SALEH, supra note 100 at 8-9.

¹⁹⁹ BIN OMAR, supra note 180 at 104-105.

²⁰⁰ Id, at 116, which refers to Ahmad ibn Mohammad ibn Hanbil (164-241 Hijri) founded this school in Baghdad. 780-855 AD) See, BIN OMAR, supra note 180 at 113, see also SALEH, supra note 144 at 9. The school tends to focus mainly on the main sources of Shari'a law (Quran and Sunnah) See, BIN OMAR, supra note 149 at 118, see also SALEH, supra note 100 at 9. Thus, this Madhib can be said to follow the *Hadith* school rather than the *ra'y*. Hanbali jurists allow arbitration, see *Fiqh Encyclopedia*, infra note 202 at 236, and they consider an arbitrator's decision to be binding and to have the same strength as a decision made by a judge; therefore, the parties to the arbitration are considered to bound by the award see EL AHDAB & EL AHDAB supra note 37 at 15.

²⁰¹ Mohammad ibn Idris ibn Al-abaas ibn Shafi (150-200 Hijri) founded the Shafii Madheb or school. Al Shafi studied in Iraq, which was famous for being the school of *Ra'y* at the time he was there, as well as in Medina, which was considered the school of *Hadith*. See BIN OMAR, supra note 180 at 107. See also SALEH, supra note 100 at 8-9. This school has three camps regarding arbitration: to ban it, to permit it if no judge is present in the city to hear a case, and to allow it in cases involving monetary transactions (i.e., trade and commerce). The Shafii consensus permits arbitration. see *Fiqh Encyclopedia*, infra note 202 at 236. However, the school consider the arbitrator's role and status is to be inferior to that of a judge, because an arbitral appointment can be revoked or dismissed, whereas a judge cannot be dismissed. The school also agrees that the use of arbitration is required when judges are found to be corrupt. See EL AHDAB & EL AHDAB supra note 37 at 14

²⁰² The Hanafi school is named after its founder, Abu Hanifa Al Naman ibn Thabit (80-150 Hijri). Which is equivalent to (699-767 AD). See, SALEH, supra note 100 at 8 see also BIN OMAR, supra note 180 at 94. Founded in Iraq, the main feature of this school is its use of subjective opinion *Ra'y*, see SALEH, supra note 100 at 8, and *Qiyas*, see BIN OMAR, supra note 180 at 94-95. According to the teachings of this school, arbitration is legal and allowed, based on the fact the Quran and Sunnah, in addition to Ijma and *Qiyas*, confirm and authorize it. See EL AHDAB & EL AHDAB supra note 37 at 13. However, some Hanafi scholars dismiss the idea of arbitration, because they consider arbitrators in general to be unfit to decide and settle cases. Their dismissal comes despite this *madhab's* consensus to permit arbitration. see *Al-Mwsoe Al-Fiqhya* [The Fiqh Encyclopedia] Volume 10,236 (2012). [hereinafter *Fiqh Encyclopedia*]. See also EL AHDAB & EL AHDAB supra note 37 at 13-14. In addition, this school classifies arbitration as "[l]egally quite close to agencies and conciliation." See EL AHDAB & EL AHDAB supra note 37 at 14. Furthermore, the teachings of this school influenced the drafters of the

Around the work of the four Imams of the four schools grew the structure of the schools themselves, and as noted earlier, these four schools are considered to be supplementary sources of law in the UAE. They function to illuminate the actual meaning of legal rules, in case that the primary sources have left an issue unresolved.²⁰³ As such, these schools have influenced a substantial part of the Shari'a law currently practiced in most Muslim nations.²⁰⁴ Though other schools exist, these four are the most widespread, and they are the schools that are most relevant to the UAE.

Fully examining the Islamic Schools' views on arbitration is a subject for a different thesis; for the purposes of this paper, it may be concluded that the Four Schools mentioned here permit the use of arbitration, with some minor opposition from jurists in some of the *madhahib*, because they generally consider that Shari'a law tolerates it. Understanding the views of these schools, especially the Maliki, is important because they play a major role in Shari'a-based arbitration in the UAE, because the courts tend to rely on their teachings when deciding cases that relate to the Islamic Shari'a.²⁰⁵

3.3. Principles of Islamic Arbitration

Having established that arbitration has precedent and an established jurisprudence in the Islamic Shari'a, we may now further explore arbitration from the Islamic perspective. This is a wide subject that is narrowed in this paper to the consideration of family law arbitration and commercial arbitration only. The following three subsections illuminate certain aspects of arbitration in principle and in practice:

Majallat al-ahkam al-'Adliyyah, See general, *Majallat al-ahkam al-'Adliyyah* supra note 97, SALEH, supra note 100 at 8.

²⁰³ Al-Muhairi, supra note 24, at 223.

²⁰⁴ Trumbull, supra note 176, at 629.

²⁰⁵ Civil transaction law Article 1.

1. The first subsection discusses general principles of Islamic arbitration and compares them with modern standards and practice.
2. The second discusses family law arbitration from the perspective of the Islamic Shari'a and where it falls within the UAE's legislation.
3. The third discusses arbitration matters related to trade and commerce in the UAE.

3.3.1 General Principles of Islamic Arbitration²⁰⁶

According to Al Jhani, the principles of Islamic arbitration can be deduced from the definition of *arbitration*—"the appointment of an arbitrator by parties to settle a dispute." These principles are threefold: (1) the vocalization of parties' intent to arbitrate, in which there should be both an offer and an acceptance that constitute the arbitration agreement; (2) the identification of the disputing parties; and (3) the presence of an arbitrator. Al Jhani states that classical jurists referred only to the vocalization of parties' intent to arbitrate,²⁰⁷ suggesting that it is possible to establish an arbitration agreement orally.

The principles of Islamic arbitration derive from the sources of the Islamic Shari'a,²⁰⁸ which binds arbitration to those principles. However, this link does not mean that Islamic arbitration may not evolve and change. On the contrary, Shari'a law promotes and encourages such evolution, which can be attributed to the flexibility embedded in the Islamic Shari'a and *fiqh* that allows these laws to fulfill the ongoing

²⁰⁶ Paulsson proposes the idea that: "Some classical authors were hostile to arbitration because it could lead to decisions by persons not adequately versed in the Shari'a, or because it detracted from the rule of sovereigns; others accepted it only with respect to geographic zones where there were no judges." He continues to state that: "historical arbitration laws are hardly indicative of a unified Islamic view of arbitration because they tended to be predominantly anchored in one or another school of jurisprudence." Paulsson supra note 106 at 12.

²⁰⁷ Al Jhani supra note 96 at 129.

²⁰⁸ Which can be derived from either the primary sources or the secondary ones, see supra. 3.1.2 Sources of Islamic Shari'a

needs of people's daily lives and experiences.²⁰⁹ However, this flexibility is also limited in that it must not infringe on the purpose of the Islamic Shari'a and its main rules. Therefore, it cannot be argued that the Islamic Shari'a is inherently flexible, nor that one of its main principles or rules (such as the rules that govern the Muslims prayer), may be changed. Rather, Shari'a may be considered to be flexible with regard to certain customs and transactions. Shari'a may also be considered flexible in cases of transactions about which the Shari'a is silent; indeed, jurists have a right to invent and evolve laws related to such transactions. Sanhuri explained the flexibility of the Shari'a by saying that:

the Fiqh of this Shari'a is like a dress that the legislator (Allah) created to fits ones body, which was small at the time of the making of the dress, which He noticed and made room for the body to grow within the dress.²¹⁰

3.3.2 Family Law Arbitration

Family law arbitration has its basis in the Quran and takes its strength from this verse:

If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation, for Allah hath full knowledge and is acquainted with all things.²¹¹

This verse indicates that family arbitration is the Sharia's solution to family disputes, and the modern practice of legislators in Islamic states and the courts' endorsement of arbitration in family matters can be attributed to this verse.²¹² The verse adds to the significance and importance of this form of arbitration within the Islamic Shari'a, unlike other forms of arbitration family that derive authority from one

²⁰⁹See general, Bin Omar, supra note 180.

²¹⁰ id at 26.

²¹¹ Verse 35 of the Surah of the Women ABDULLA YUSUF ALI, THE MEANING OF THE HOLY QUR'AN, 44 (2010), See also El-ahdab and El-ahdab supra note 37 at 12.

²¹² Which shows the influence of the Shari'a on the UAE legislation since it was codified in the Personal Status Law, supra note 13, El-ahdab and Elahdab supra note 37 at 8-9. See also Al-jahni supra note 96 at 56-63.

of the primary sources of the Shari'a—the Quran, judges have limited authority over questions regarding family arbitration.²¹³

3.3.3 Arbitration Involving Trade and Commerce

Arbitration is commonly known as a tool for solving commercial disputes. The Shari'a is replete with examples on this topic, including a dispute between Omar bin Al Khtaab²¹⁴ and Abu bin Kaab over a farm, which Zaid bin Thabt arbitrated; and another between Omar Bin Al Khtaab and a man who sold him a horse, which Shraeyh arbitrated.²¹⁵ In both occasions, the decision of the arbitration was made according to the rules of the Shari'a and was considered enforceable and final with no room for appeal. These examples show the importance of arbitration as a tool for dispute resolution in Islamic Society, given the fact that the head of state at the time of Omar bin Al Khtaab, and prominent figures such as the Prophet's other companions, commonly sought arbitration to solve their disputes.²¹⁶

²¹³ Which shows that in addition to having a legal obligation, judges are bound to the Islamic Shari'a. The legislator emphasized this idea by codifying more than one principle of the Islamic Shari'a in more than one law. They are also bound by social and moral codes and norms. Which is exemplified by the nature of the UAE society, being a tribal society and an Islamic one, which in turn add pressure on the Judges to oblige with the rules of the Islamic Shari'a. Even if they come from different backgrounds and nationalities. Specifically, they are bound by: a) speaking and writing in Arabic, and b) they should be Muslim and have taken a course in the Islamic Fiqh in college. These two features characterize judges in the UAE, moreover, until recently, a law certificate awarded in the UAE would be given for a degree in "Shari'a and Law." see general Al Tamimi note 12. In addition, there is a Shari'a circuit in the federal courts and the local courts. This diversity in the backgrounds of the judges is one of the reasons that Article 1 of the civil transaction law; established a set of rules for the judges to follow. The Article was written in an attempt to solve the problem of judges' diversity and create a unified approach to solving legal problems. Furthermore, the judges in some Shari'a circuits are educated primarily in the Islamic Fiqh, and some are in loan from other Islamic states such as Saudi Arabia.
²¹⁴ Omar bin Al Khtaab was the Second Caliph of the Islamic Rashidun Caliphate and a companion of the Prophet. See general El-ahdab and El-ahdab supra note 37 at 7, in the footnote number 29 he explains the meaning of Rashidun: "The Rashidun Caliphs)"Rashid" meaning "wise") are those who immediately succeeded the Prophet."

²¹⁵ Shraeyh was a famous judge at the time. Fiqh Encyclopedia supra note 202 at 235-236.

²¹⁶ Another example is when Othman (the third Caliph) and Talha (one of the Prophets companion), asked Jobair (another companion of the prophet) to act as an arbitrator in a dispute between them. Moreover, neither Jobair nor Shrayeh were judges. Fiqh encyclopedia supra note 202 at 236.

In commercial arbitration from an Islamic perspective²¹⁷, the issue of most concern is *riba*, which is translated as interest and usury. This paper discusses *riba*, because some arbitral awards contain interest rates that are recognized and enforced. *Riba* affects the UAE constitution, and UAE courts have rendered a decision on this matter. Above all, *riba* is of great concern to the UAE where trade and commerce are concerned, because Islamic jurists consider usury/interest to fall under the doctrine of *riba*.²¹⁸

Arbitration is permitted and governed under the Islamic Shari'a. However, its roles is starting to diminish in the courts, because they are devising solutions that are contrary to Islamic Shari'a, rather than taking the time to look at a solution that may already exist within the Shari'a. This creates a problem, because the constitutions of most Islamic Nations include a provision that states that the Islamic Shari'a is a source of law; this is certainly true for the constitution of the UAE. The Shari'a rules and principles allow and encourage the evolution of arbitration; however, the courts are ignoring the use of such tools.²¹⁹ Therefore, the issue at hand relates to judges' practice and how it affects arbitration? Even though judges have the power to change and evolve arbitration, this power remains mostly untapped, meaning that most cases

²¹⁷ Al-manjid study on Islamic arbitration is worth mentioning in here, she gives an in depth analysis to how an Islamic arbitration system can function, she goes even further to propose the creation of an Islamic arbitration system, see Al-manjid supra note 96 at 160-190.

²¹⁸ See infra 3.4.3 Riba (usury), which discusses this issue in great detail. Furthermore, In the UAE, trade and commerce-related arbitration would not fall under the jurisdiction of the Shari'a circuit. It would fall under the commercial or civil circuit, in which, unlike the Shari'a circuit, judges are influenced by their background in Shari'a. The judges in the commercial circuit are specialists in commercial or civil law, and they make decisions based on their respective backgrounds and training. When faced with issues that concern Islamic Shari'a, they may not always come to the same conclusions as judges who specialize in Shari'a; this becomes evident when examining cases that address *riba*.

²¹⁹ El-ahdab and El-ahdab when explaining "the rules of arbitration and the evaluation of law" quoted Sanhury more than once in explaining how the Islamic rules on Shari'a evolved, they stated that:" Snhury adds that Islamic Law, however, did not remain rigid in its first stages. On the contrary, it had largely evolved and had enlarged that which had been reduced due to the needs for the stability of transaction" they continued to state that: "arbitration in Islam did not escape from this rule of the evolution of legal systems....", El-ahdab and Elahdab supra note 37 at 16.

concerning Islamic arbitration are limited to Family disputes, and even those are treated as conciliations or mediations.

3.4 Cases Related to Islamic Arbitration in the UAE

Substantive and procedural laws govern UAE courts, and they comply with the basic tenets of Shari'a law. This section analyzes decisions issued by a number of UAE courts, particularly with regard to how the courts apply Shari'a law. This section summarizes the facts of the cases and analyzes each decision. This analysis aims to illuminate the current practice of the court and evaluate whether it is in conformity with the legislation and how it affects arbitral practice in the UAE. In what follows, each case selected relates primarily to one of two different aspects of Shari'a law—family law and *riba*. The reason for choosing these two subjects relates to the contrast in how the court addresses each issue.

3.4.1 Cases Involving Family Law Disputes

Arbitration in UAE family law originates in the Shari'a and is governed by Shari'a law. The UAE codified the Shari'a in Federal Law no. 28 on Personal Status, issued on 19 November 2005.²²⁰ Examining cases of family law arbitration can therefore illuminate how UAE courts manage family law arbitration, which can in turn clarify the issue of arbitration in the UAE. Federal Law no. 28 requires the parties to mediate their dispute before submitting it to arbitration.²²¹ Most of the

²²⁰ The Personal Status law was issued on 19/11/2005 and was published in the office gazette in 30/11/2005, Federal Law no.28 on personal status. Hereinafter-personal status.

²²¹ Article 16 of the Personal Status, "1 - The lawsuit concerning personal status matters shall not be admitted before the court unless it has previously been submitted to the Family Orientation Committee. Are excepted from this provision, matters concerning wills, inheritance and like matters, summary and provisional lawsuits concerning alimony, fostering, guardianship as well as cases that cannot be settled by conciliation such as evidence of marriage or divorce. 2 - Where conciliation between the parties takes place before the Family Orientation Committee, it shall be recorded in a minutes signed by the parties and the competent member of the Committee. The minutes shall be sanctioned by the competent

disputes are divorce disputes²²² with two possible outcomes: divorce, or, if the arbitrator managed to reach a settlement upon which both parties could agree, the continuation of the marriage. However, arbitrators cannot award the parties additional damages and rights; they may only help guide the parties to one of these two primary outcomes. The importance of this form of arbitration comes from the arbitrators' right to award extra damages, to determine which party shall assume custody of any children, and to determine whether a dowry shall be paid or not.

The Shari'a requires parties involved in a dispute over a marriage to mediate before allowing them to arbitrate, given the social and monetary consequences that follow this form of arbitration and out of respect for an underlying intent to preserve the sanctity and stability of the family. Therefore, most arguments presented by appellants (those appealing an arbitral decision, such as in the case studies discussed below) revolve around complaints that the arbitrator failed to successfully reconcile the parties.

i. Appeal No. 372/25 to the Federal Supreme Court of the UAE²²³

This case raises certain questions: does the case at hand comply with Shari'a Law requirements for the appointment of arbitrators? Does this dispute constitute an arbitration proceeding?

The definitions of arbitration noted earlier in this chapter in the introduction to

judge , enforced as an executory deed and shall not be subject to any means of appeal except if it is in violation to the provisions of this Law .3 - The Minister of Justice , Islamic Affairs and Wakfs shall issue the implementing regulation organizing the work of the Family Orientation Committee."

²²² It should be noted that the divorce according to the Islamic Shari'a can fall under a number of forms and to give a couple of example to it they are either: 1- the divorce by the husbands sole power 2- Khal which is the consent of both parties 3- divorce by the adjudication 4- Automatic divorce according to the Shari'a. the third form is the one of concern, which contain in it the procedures of arbitration and the powers of the arbitrator. See general MAJID ABO-RKHAYH & ABDULLAH MOHAMMAD AL-JBORI, *Fiqh Al-Zwaj W Al-Tlaq* [The Fiqh of Marriage and Divorce] 115-199 (2006).

²²³ Federal Supreme Court of the UAE, Appeal no. 372/25, issued on the 12th of June 2004. This case would be available in full in the appendix.

the Shari'a²²⁴ are of interest here, given that the parties did not appoint the arbitrators *per se*. Instead, the court chose the arbitrator based on a delegation by one of the parties, which conflicts with what the Shari'a requires. Also, unlike other forms of arbitration of Family Law, divorce cases are exceptional, because the Shari'a requires that the arbitrators in divorce cases be related to the parties of the dispute. The court chose to uphold the first instance court's decision of the appointment of a non-relative as an arbitrator based on the request of the appellant, despite the fact that this does not follow the conditions set down by the Shari'a and also despite the appellant having argued this matter:

At the same time, the Supreme Court appealed to an exception of the rule requiring that arbitrators be relatives of a disputing party's family; namely, that in the event that no one from among the relatives of the parties can fulfill the role of an arbitrator, then the obligation to determine the arbitrator falls to the court.²²⁵ Moreover, once arbitrators have been appointed and have determined an award, according to the Maliki *madhab*, not only is that award considered to be binding and final, but the court is also obliged to confirm and enforce the award, even if it conflicts with the judge's *madhab*²²⁶ or one of the parties dispute the award.²²⁷

The court's reasoning follows the teaching of the Maliki madhab, and it cited certain Maliki Scholars to support its claim, including Mohammad Arfah al-Desoki', Abdul-Aziz al-Mubarak and Ali ibn Abdulslam al-Tsoli.²²⁸ These scholars argued that if there is no one competent and capable to serve as an arbitrator from the families of the disputing parties, the court shall appoint the arbitrators as it sees fit from outside

²²⁴ see general 2.6.2 The Shari'a view, page 28.

²²⁵ See, MOHAMMAD ARFAH al-DESOKI', HASHYAT' al-DESOKI AL'A al-SHARH al-KABIR [al-Desoki footnote on the Great Explanation] Volume II 346 (publisher Dar Ahya' al-Ktab al-Arabya') (1230 hijri, 1814 C.E.); see also ALI ibn ABDULSLAM al-TSOLI', al-BHJAH FE SHARH al-THFAH [The Bhjah the explanation of the Thfah] Volume I 489 (1st. ed. 1998); see also ABDUL-AZIZ al-MUBARAK, TBYEN al-MSALIK [The clarification of the Msalik] Volume III 112 (2d. ed. 1995). Those three prominent Maliki jurists were cited by the court in their decision.

²²⁶ *id*, For instance if an arbitrator issued an award according to Shafii thought, yet the judge adheres to Maliki madhib, the judge is obliged to enforce that judgment. See civil transaction law article 1.

²²⁷ Appeal no. 372/25.

²²⁸ See, al-DESOKI supra note 225 see also al-TSOLI', supra note 225; see al-MUBARAK, supra note 225. Those three prominent Maliki jurists were cited by the court in their decision., see also Appeal No. 372/25.

the relatives of the disputing parties, and further that the court is obliged to recognize and enforce the decision of the arbitrators. The court is essentially explaining Article 118 regarding personal status, which states:

judgment appointing two arbitrators from among their parents, if possible, after asking each of the spouses to nominate, in the next hearing at most, his arbitrator from among his parents, if possible, otherwise from those who have the experience and ability to reconcile.²²⁹

This Article shows the influence of the Maliki Madhab on the legislature and on personal status law, which was formalized by extracting and selecting solutions from all four schools of Islamic Fiqh thought. The influence of the Maliki Madhab is visible in this instance, given that the drafters of the personal status law chose the solution given by Maliki Jurists. This case demonstrates that the supreme court cited Maliki jurists in its decision to appoint an arbitrator from outside the families of the disputing parties. By doing so, the court also explained Article 118 regarding personal status. The explanation given by the court indicates the existence of an exception to the rule for appointing arbitrators, even though the Quran says that arbitrators need to be related to the disputing parties. The jurists argued for an exception to that rule in the event the relatives of the disputing parties are not competent to serve as arbitrators.

Therefore, with respect to the first question noted above, the requirements regarding the arbitrators were fulfilled according to the Maliki Madhab and the legislature. Regarding the second question, it can be inferred from the facts of the case that this is indeed an arbitration proceeding with roots in the Islamic Shari'a and related to a verse in the Quran.²³⁰ Moreover, the personal status involved in the case is codified the rules of the Islamic Shari'a.

²²⁹ Article 118/1 personal status.

²³⁰ See general; supra note 185 verse 35 of Surah of the Women.

This case also demonstrates how the UAE courts favor arbitration that is based on Shari'a, which is shown by the court's understanding an obligation to enforce the award, even if the judge interprets the facts of the case differently, or if the decision of the arbitrator conflicts with the judge's Madhab.²³¹

Moreover, once arbitrators have been appointed and have determined an award, according to the Maliki *madhab*, not only is that award considered to be binding and final, but the court is also obliged to confirm and enforce the award, even if it conflicts with the judge's *madhab* or one of the parties dispute the award.²³²

The courts rationalize the situation as such because arbitrators derive their power not only from statutory law, but also from the Shari'a-based arbitration agreement in general. This power is further emphasized by the personal status law that codified the agreement to arbitrate.²³³ By extension, arbitrators derive their power from the primary source of Shari'a—the Quran—which is itself a primary source of law in the UAE.²³⁴ The case also suggests that UAE courts do not view family law arbitration to be an exceptional means of resolving disputes, despite its exceptionality versus other forms of arbitration within Shari'a-based arbitration. Family law arbitration is viewed as a form of adhesive arbitration.

The case raises at least two issues: one regarding the appointment of arbitrators, and the other about the Shari'a's perspective on family law in the UAE. The case also

²³¹ The interpretation differ from one madhab to the other, and consequently the different interpretation would result in a differing in the opinion and the judgment, the Maliki Jurists have established a rule of enforcing the decision of the arbitrator even if it is in conflict to the judges Madhab, See, al-DESOKI supra note 225 see also al-TSOLI', supra note 225; see al-MUBARAK, supra note 225. See general El-ahdab and El-ahdab supra note 37 at 14, were they discuss the Maliki Madhab, Al-Manjid supra note 96 at 48-49.

²³² For instance if an arbitrator issued an award according to Shafii thought, yet the judge adheres to Maliki madhib, the judge is obliged to enforce that judgment. See appeal no. 372/25.

²³³ Articles 118-123 of the Personal Status Law.

²³⁴ See general UAE Constitution Article 7, and 2.2.1 The Legal System in the UAE page 11. See also Al-muhairi supra note 24 at 220.

refers to certain concepts of Shari'a law—namely, *ta'h*²³⁵, *khal'a*²³⁶, *mahr*²³⁷, and *thraar*²³⁸—which differ slightly in form, depending on the *madhab*.

Finally, family law arbitration receives favor in the courts and illuminates their mentality regarding Shari'a-based arbitration; namely, that it is susceptible to enforceability. As such, family law arbitration reveals a crack in the courts' general resistance to the use of arbitration that may be used to induce courts to reconsider their views on other kinds of arbitration.

ii. Appeal No. 149/24 to the Federal Supreme Court of the UAE²³⁹

This case raises the question of whether the husband's consent is required when arbitrators decide to divorce the parties according to the principle of *Kha'l*.²⁴⁰ It also raises questions of international private law and the law that governs disputes—should it be the law of the UAE or Egyptian law?

Since the disputing parties are foreigners that are starting proceedings within the UAE, and one of the parties has argued for the implementation of the Egyptian

²³⁵ This literally means obedience this term or concept in Shari'a would result in the continuing of the marriage and the dismissal of the request to divorce. See general, ABO-RKHAYH & AL-JBORI, supra note 222, at 105-108, which explains the rights of the husband.

²³⁶ Which is essentially a form of a mutual agreement between the two parties to terminate their marriage, Article 110 states that: "1- Divorce for consideration is a contract between the spouses whereby they agree to terminate the contract of marriage against consideration to be paid by the wife or by another person. 2- the amount to be paid as a consideration shall be governed by the same rules as dowry but it is not allowed to agree on forfeiture of the children's alimony or their fostering. 3- should the consideration to be paid in case of divorce by agreement be not validly determined, divorce shall occur and the husband shall be entitled to the dowry. 4- *Khul'* is rescission. 5- by exception to the provisions of clause 1 of this Article, where the husband is unduly obstinate in his rejection and it was feared not to observe God's will, the judge shall decide the "*Mukhala'a*" (divorce) against an adequate consideration."

²³⁷ Which translates to dowry, the husband in the marriage requires to pay a dowry to the wife this is either paid in full before hand or in a two installment first in the commencement of the marriage and later in the event of a divorce. See ABO-RKHAYH & AL-JBORI supra note 222 at 57.

²³⁸ ABO-RKHAYH & AL-JBORI supra note 222 at 176-181, the author states that the personal status law discusses this issue in articles 117 to 123.

²³⁹ Federal Supreme Court of the UAE, Appeal no. 149/24 issued on the 31st of May 2003.

²⁴⁰ *Kha'l* supra note 236.

law on the dispute,²⁴¹ the court responded to this by stating that Article 21 of the Civil Transaction law states that:

The rules of jurisdictions and all procedural matters shall be governed by the law of the State where the case is filed or where procedures take place.”²⁴² However, the Personal Status law has limited the power of this Article by stating the following:”
1 - The present Law shall apply to all facts occurring subsequent to the coming into force of its provisions. It shall retrospectively apply to divorce attestations and divorce lawsuits that have not received final settlement. 2 -The provisions of this Law shall apply on citizens of the United Arab Emirates State unless non-Muslims among them have special provisions applicable to their community or confession. They shall equally apply to non citizens unless one of them asks for the application of his law.²⁴³

Therefore, the facts of this case would have differed if the personal status law has been enacted at the time of the dispute. That is why the appellant argued based on the Civil Transaction Law, which states the process for the application of the law in general.²⁴⁴ The appellant argued that nothing should have prevented the application of Egyptian Law unless it contradicts with Article 27,²⁴⁵ and in this decision, Egyptian law was actually one resource on which the court based its decision, although in the end, it did not apply the provisions of the Egyptian law. The court responded that the procedural aspect of the case would fall under UAE law, and that the appellant’s argument had no merit.²⁴⁶

The Supreme Court dismissed these arguments, since the appeals court’s decision had been based on two grounds: (1) the arbitrators’ decision—which alone was enough to enforce the court’s decision—and (2) that the court is free to interpret the content of Egyptian law. Further, Article 21 of the Civil Transactions Code²⁴⁷ forces the court to abide by UAE laws, which do not require the involvement of the prosecution, the swearing in of the arbitrators, the mediation of the parties, or any requirement that

²⁴¹ The disputing parties in this case both hold an Egyptian nationality. Khal is governed in Egyptian law no. 1/2000, concerning Personal Status law, chapter three section one Articles 16-25; Article 20 addresses the issue of Khal.

²⁴² Civil Transaction law Article 21.

²⁴³ Personal Status law Article 1.

²⁴⁴ Civil Transactions Law Articles 10-28,

²⁴⁵ Civil Transactions Law Article 27

²⁴⁶ Civil Transactions Law Article 21.

²⁴⁷ Civil Transactions Law Article 21 states: “The rules of jurisdictions and all procedural matters shall be governed by the law of the State where the case is filed or where procedures take place.”

*Khal*²⁴⁸ decisions are not subject to appeal. Therefore, the court decided to dismiss the appeal.²⁴⁹

This emphasizes the role of Shari'a law at a time in which arbitration rules were not yet codified,²⁵⁰ and it shows how judges implemented an unwritten rule of law by essentially applying doctrinal writing and the teachings of Islamic Scholars and Madhabs.²⁵¹ All of this, then, helps to explain how a situation involving conflicting laws²⁵² was dealt with in the UAE and how the situation affected the use and enforcement of arbitration.

According to Malik's Madheb, the consent of the parties of the arbitration to the arbitrator's decision is not required, and the arbitrator's decision is enforceable even if the parties disagree with the outcome of the arbitration. Further, the judge is obliged to enforce an award even if he does not agree with the outcome.²⁵³

The Supreme Court dismissed these grounds, stating that according to the Maliki Madhab, the Court was obliged to stand behind and enforce the decisions of arbitrators and did not have the right to change or amend an arbitrator's decision, even if the court disagreed with the decision.²⁵⁴

UAE courts used this argument to respond to the claims of the appellant, thus establishing that the husband's consent is not required to enforce the arbitrator's decision. The court yet again cited Maliki Scholars such as al-DARDIRI,²⁵⁵ al-DESOKI', and al-TSOLI'²⁵⁶, which amplifies the importance of the Maliki Madhab in the court's jurisprudence, especially in this form of arbitration.

²⁴⁸ Kha'l supra note 236.

²⁴⁹ See appeal no. 149/24.

²⁵⁰ The Personal Status law was issued on 19/11/2005 and was published in the office gazette in 30/11/2005, Federal Law no.28 on personal status.

²⁵¹ Civil transaction law Article 1 set forth the process of finding a solution from the Islamic Shari'a and the hierarchy between the different Islamic Schools, which is further emphasized in the second Article of the personal status law.

²⁵² In this instance laws of different nations (Egypt and the UAE).

²⁵³ Supra note 190.

²⁵⁴ See AHMAD IBN MOHAMMAD al-DARDIRI, al-SHARH al-SAGEER ala AQRAB al-MSALIK ale MADHAB al-IMAM MALIK [The little explanation to the nearest route into Imam Malik Madhab] Volume II 514, see also al-DESOKI' supra note 225 at 346, also al-TSOLI' Supra note 225 at 491. See appeal no. 149/24.

²⁵⁵ al-DARDIRI supra note 254 at 514.

²⁵⁶ al-DESOKI' supra note 225 at 346, also al-TSOLI' Supra note 225 at 491.

This case encapsulates UAE court policy regarding Shari'a-based arbitration: to enforce awards by all possible means.²⁵⁷ Most importantly, in this case, the court outlined pro-arbitration reasoning that may be called upon to advance arbitration in other areas in the UAE, especially since UAE courts emphasize the procedural grounds of appeals.

However, despite the positive attitude toward arbitration shown by the court in the way that it enforced the arbitrators' decision, affirming and enforcing an arbitral award remains a lengthy process. This process may conflict with the basic principles of arbitration, as a court's pursuit of justice may ultimately lengthen the dispute process, such as in a case in which the courts become involved in a dispute that was already arbitrated and decided on by the arbitrators. Even a form of arbitration that is highly favored by the courts may be burdened by lengthy court proceedings that cost the disputing parties time and resources.

iii. Appeal No. 264/24 to the Federal Supreme Court of the UAE²⁵⁸

The issue raised in this case is whether an arbitration proceeding can be requested through an interlocutory request or must be requested through a separate claim that should follow the normal course of filing a dispute through the court. Also, did the court fail to uphold the Islamic Shari'a by divorcing the parties based on *thraar* ?

The arbitrators issued an award that granted the divorce based on *thraar*,²⁵⁹ which

²⁵⁷ Suggesting that UAE courts are not interested in the procedures by which arbitrators decide awards, or in any aspect of the arbitration other than the award itself—a stance shared by most modern practices of arbitration. Even though the appellant disputed some procedural issues that might have been cause to annul the decision, those issues proved to be of no concern in the court's view. In its view, the decision was based on the arbitral award, which alone was sufficient to oblige the court to defend the decision and enforce the award, as well as to dismiss any appeal seeking to amend or nullify that decision. The court's stance in this case may be attributed to the Maliki School that helped shape the court's jurisprudence and doctrine in this matter. The personal status law came into play only to affirm and codify the already existing court practice. The court recognized a moral obligation to enforce the award, which it expressed in its decision and in the way it decided to enforce the arbitral award; this obligation derives both from the rule of law and from religion. See general al-DESOKI' supra note 225 at 346, also al-TSOLI' Supra note 225 at 491. See general Al-Manjid supra note 96 at 58-59.

²⁵⁸ Federal Supreme Court of the UAE appeal no. 264/24 issued on 26th of June 2004

the first instance court decided to confirm and enforce by divorcing them²⁶⁰

In responding to the question raised by the appellant, the court relied again on the teachings of the Maliki Madhab and on the civil procedures law,²⁶¹ thus maintaining the separate identity of family law arbitration or, more precisely, Shari'a-based arbitration in the UAE. The appellant argued that the defendant lacked the right to request the court to divorce them in a case that the appellant initiated by requesting ta'h²⁶². The argument given by the appellant may be attributed to either his (or his counsel's) unfamiliarity with family disputes proceedings under the Islamic Shari'a, or it could have been a delay tactic used by the consul. Likely, it was ignorance and unfamiliarity on the part of both the appellant and his consul with Shari'a law in general, and not a delay tactic, the court responded by stating that:

the courts reserved the right to understand the facts of the case and to evaluate the evidence. Since Article 97 of the Civil Procedures Code²⁶³ allows both parties of a dispute to submit interlocutory requests, and since, according to the Maliki Madhab, a husband's desertion of his wife is not allowed under Shari'a law,²⁶⁴ the request for divorce had occurred. Furthermore, it argued that the arbitrator's decision was enforceable, even if the parties disagreed with the decision, as well as that the court was bound by the arbitrator's decision; hence, the appeal was dismissed.²⁶⁵

²⁵⁹ In here the court mentions the award as a report by the arbitrators although they look at it as a binding report, which is enforceable to them. Even in books that address the Islamic Shari'a they tend to distinguish between these concepts, e.g. Al-Jahni supra note 96 at 45.

²⁶⁰ Appeal no.264/23.

²⁶¹ Since the Personal status law did not enter into force, the court relied on what was available at that time.

²⁶² Ta'h supra note 235. Which was the case No.665/2002. See general, ABO-RKHAYH & AL-JBORI, supra note 222, at 105-108, which explains the rights of the husband.

²⁶³ Article 97 of the civil procedures Law states: "1 - The prosecutor and the prosecuted may submit any of the interlocutory requests which are relevant to the original request in a way that shall help the progression of justice if both shall be examined together. 2 - Such requests shall be submitted to the court through the usual procedures of the action's prosecution, or with a request presented verbally at the session, in the presence of the litigant party, and shall be recorded in its minutes."

²⁶⁴ For Imam Abi Dawud narrated in his Sunan the following Hadith: "Mu'awiyah asked: Messenger of Allah, what is the right of the wife of one of us over him? He replied: That you should give her food when you eat, clothe her when you clothe yourself, do not strike her on the face, do not revile her or separate yourself from her except in the house. Abu Dawud said: The meaning of "do not revile her" is, as you say: "May Allah revile you." IMAM ABU DAWUD SULYMAN as-SIJISTANI, SUNAN ABI DAWUD, Book 12 Hadith 97. <http://sunnah.com/abudawud/12> it was also narrated by Imam Ahmad Bin Hanbal, and cited by the court in this decision.

²⁶⁵ Appeal no. 264/24.

The Civil Procedures Law has many tools that allow the willing party the opportunity to appeal, and judges in both the Supreme court and the Cassation courts in the UAE are generally willing to accept cases that preserve their notion of justice, including the legitimate right of any party to seek a reexamination of a case, even though this particular case should have ended through arbitration and not been subject to appeal. Thus, even if the appellant was trying to use a delay tactic to stymie the arbitration, the court was willing to accept the appeal, because it fit the formal requirements set forth in the civil procedures law.²⁶⁶

Nevertheless, this decision also follows the general trend that the Federal Supreme Court of the UAE supports Shari'a-based arbitration. Here, its support can be inferred from its decision to enforce the arbitral award. Though the court has expressed its obligation to enforce arbitral awards, the finality of an award remains a general concern.²⁶⁷

Another concern relates to the court's wording when referring to an award. Here, for example, the court described the award as an expert report, despite its stating that the award was issued by an arbitrator and admitting its obligation to enforce the award according to the Maliki madhab. Though possibly of little concern—after all, UAE courts generally back this form of arbitration—this circumstance raises concerns for other forms of arbitration.

The court in this case dealt with an issue related to thraar, which was resolved by

²⁶⁶ Which is being addressed in book one title twelve of the Civil Procedures Law Articles 150-188. Which deals with the issue of challenges against judgments of the court, which is filled with recourse means that is highly favored by the court as they see it as a way of upholding justice.

²⁶⁷ Despite clear rulings in the first instance and appellate courts that awards are binding and final. In this case, for example, the appellate court's ruling failed to deter the appellant from appealing to the Supreme Court, which meant additional time and cost for the litigants. Thus, these procedures need to evolve in order to resolve such issues. See Khor Fakkan Federal Court of First Instance case no.3/2002, and Fujairah Federal Court of Appeals, appeal no. 14/2002 Shari'a Circuit issued on 19/6/2002. Furthermore, The facts of this case were mentioned in an earlier decision of this court dated 6/5/2004. Therefore most of the facts were not repeated in here and were referred back to that earlier decision. Moreover the parties got divorced twice before in 1986 and 1994.

the arbitrators and confirmed as justification for their ruling to divorce the parties. However, the court did not need to elaborate and to expand on this issue, since the court established that according to the Maliki madhab, it should enforce the arbitrator's award. The court has been seen to have difficulty giving up part of its power to arbitration, and in this case, it found a reason to intervene and answer a question that essentially constituted a review of the arbitrators' decision. The court ended up confirming that decision in the end; yet it should have adhered to the teaching of the Maliki madhab in ensuring that the award was not subject to appeal.²⁶⁸ Had the court done so, the appeal would not have reached the supreme court, nor should it have entered the halls of the first instance court.

iv. Appeal No. 307/26 to the Federal Supreme Court of the UAE²⁶⁹

The appellant raised the question of whether there is a Shari'a requirement of repetition of the claim in order to appoint arbitrators and initiate the arbitration proceeding. The other issue at stake in this case is whether the arbitrators are required under Shari'a Law to mediate and conciliate before rendering a decision on a case.

The appellant's second argument is based on the Quran, which is the main source of the Shari'a, and on the same verse of the Quran that gives arbitration a Shari'a connection and a foothold in Islamic jurisprudence.²⁷⁰ The question then becomes why the UAE court would ignore such an argument, even though as it has been established in previous cases that it favors and support the rules of the Islamic Shari'a.

²⁶⁸ Moreover, in this case the court also reaffirmed this concept by stating that the Arbitral award is enforceable between the parties of the dispute and the judge should uphold it and be bound by it. See general al-DESOKI' supra note 225 at 346, also al-TSOLI' supra note 225 at 491. See general Al-Manjid supra note 96 at 58-59

²⁶⁹ Federal Supreme Court of the UAE Judgment 307/26 issued on 2nd of May 2005.

²⁷⁰ Which is Mentioned in Surat AlNisa' verse 35, supra note 185.

The answer lies in the interpretation of the court and again comes back to the Maliki Madhab and its significant influence on the court.:

According to the Maliki *madhab*, the judge stated that he was bound by the arbitrator's decision and obliged to enforce the arbitral award.²⁷¹

Here, the court cited a number of Maliki Jurists, which is a common method used to interpret Quranic text. The court did not respond to the argument given by the appellant that there is a requirement under Shari'a law for arbitrators to try to mediate before rendering a decision. The court simply stated that according to the Islamic Shari'a, the decision of the arbitrators is final and binding. It seems from this dispute that the court assumed that the arbitrators tried to mediate. The significance of this appeal rests in the importance of this form of arbitration in Islamic Shari'a, and in the fact of the requirement that mediation and conciliation be a step that should be fulfilled either by the arbitrators or another party. This requirement is fulfilled in all cases that fall under the Personal Status law,²⁷² which requires that prior to submitting a dispute to the court, the parties to a dispute undergo a mandatory conciliation process within the court. Thus, the legislature has resolved this issue in the personal status law by making an attempt to reconcile a formal requirement.

Yet the issue remains of concern in the event of *ad hoc* arbitration. If the arbitrators do not fulfill the conciliation requirement and render an award, are the parties able to contest such an award? According to the Maliki Madhab, it seems that

²⁷¹ The court based their claim on a couple of Maliki Jurists opinion and cited them in their opinion. See, al-DESOKI' supra note 225 at 228, see al-TSOLI' supra note 225 at 491, see also appeal no. 397/26.

²⁷² Article 16/1 of the personal status law state: " The lawsuit concerning personal status matters shall not be admitted before the court unless it has previously been submitted to the Family Orientation Committee. Are excepted from this provision, matters concerning wills, inheritance and like matters, summary and provisional lawsuits concerning alimony, fostering, guardianship as well as cases that cannot be settled by conciliation such as evidence of marriage or divorce." This emphasizes the importance of the appellant's argument, which acknowledges that Shari'a aims to preserve the sanctity of the family and thus requires that reconciliation be attempted before a dispute is arbitrated with a binding and a final resolution.

such an argument would not have merit, since the Maliki support the award.

The appellant's first argument regarding the appointment of arbitrators held that a complaint must be repeated in front of the court before the other party can request that the court appoint an arbitrator, the Supreme Court responded by stating:

as the appellant had agreed to arbitrate in front of the court; moreover, the appellant and the defendant both named their arbitrators. The appellant's lawyer delegated to the court the selection of the arbitrators after the failure of the original arbitrators to fulfill their roles and duties. The court ultimately agreed to this request, which led to the appointment of arbitrators that decided to divorce the parties.²⁷³

The court's dismissal thus upheld the parties' freedom of contract—namely, the freedom to opt for arbitration—which suggests that once arbitration is agreed upon, both parties are bound by the arbitral award.²⁷⁴ If this reasoning may be generalized to other forms of arbitration in the UAE, this would—at least in theory—solve numerous problems faced by arbitration in the UAE. The Supreme Court also ruled that arbitrators were not obliged to mediate prior to issuing an arbitral award. For this, the court again cited the Maliki madhab, which binds the court to enforce the award.²⁷⁵

This decision again shows the courts' undeniable support for family arbitration and also demonstrates the influence of the Maliki Madhab on the courts' decisions.²⁷⁶ The Supreme Court's consistency regarding this form of arbitration is of great importance; if this idea were generalized to other forms of arbitration, it would improve arbitration's status in the UAE as a form of dispute resolution equal to litigation. Lastly, note once more that the court relied on doctrinal writing from Maliki scholars in writing its opinion in the case.

²⁷³ See appeal no. 307/26.

²⁷⁴ See Al-jahni supra note 96 at 44, in which the author confirms the freedom of contract concept in Islamic Arbitration

²⁷⁵ See general al-DESOKI' supra note 225 at 346, also al-TSOLI' Supra note 225 at 491. See general Al-Manjid supra note 96 at 58-59.

²⁷⁶ id. as well as article 1 of the civil transaction law.

v. Appeal No. 349/26 to the Federal Supreme Court of the UAE²⁷⁷

The first question raised by the appellant is whether a case must be submitted to the family orientation committee prior to the initiation of the proceeding. The second question is whether there is a requirement to repeat the claim in order to appoint an arbitrator?²⁷⁸

The appellant's first argument was that the dispute should have been mediated before being submitted to the court and ultimately to arbitration. This argument relates in part to the previous case,²⁷⁹ for in both instances, the issue goes back to the requirement of mediation before the dispute may go to arbitration. In response, the court stated that there is no requirement to submit the claim to the family orientation committee within the court to conciliate between the parties, and that such act is an administrative procedure:

The Supreme Court responded by dismissing the claim, since referring the dispute to mediation is an administrative procedure that the Court is not required to perform. Furthermore, the appellate court's decision only concerned divorce and did not refer to child support, which is related to the custody of children, who had not been brought to the court. Regarding the court's failure to submit the dispute to the prosecution office, it was decided that the prosecution was not obliged to interfere in divorce cases. As such, the argument was found to lack a legal basis.²⁸⁰

This issue was put to rest once the Personal Status law came into force, because this law made submitting the claim to the Family Orientation committee mandatory, particularly in article 117:²⁸¹

Each of the two spouses is entitled to ask for divorce due to prejudice that would make the continuity of the friendly companionship between them

²⁷⁷ Federal Supreme Court of the UAE appeal no.349/26 issued on 19th of September 2005.

²⁷⁸ Which has already been answered in the previous dispute, see appeal no. 307/26. Supra note 269.

²⁷⁹ *id.*

²⁸⁰ Which is governed under Book one, Title four of the civil procedures articles 60-69, appeal no. 394/26.

²⁸¹ Personal Status Law Article 117.

impossible. The right of each of the spouses thereto shall not be forfeited unless their reconciliation is established. 2. In accordance with Article 16 of this Law, the Family Orientation Committee shall endeavor [to achieve] the reconciliation of the two spouses and, in the case of failure, the judge shall propose reconciliation to the spouses. If this reconciliation is not possible and the prejudice is established, the judge shall order divorce.²⁸²

Article 16:

1 - The lawsuit concerning personal status matters shall not be admitted before the court unless it has previously been submitted to the Family Orientation Committee. Excepted from this provision are matters concerning wills, inheritance and like matters, summary and provisional lawsuits concerning alimony, fostering, guardianship as well as cases that cannot be settled by conciliation such as evidence of marriage or divorce.²⁸³

Here, Article 117 describes the process of mediation within the courts in front of the Family Orientation Committee. However, courts are not obligated to force parties to seek reconciliation through the Committee. The other solution provided by the law is the appointment of arbitrators to settle the case, and they would have the obligation to try to reconcile the parties before rendering a decision on the dispute.

The appellant's argument that arbitrators must try to reconcile the spouses before rendering a decision is supported by the Quran,²⁸⁴ yet despite this, the court supported and enforced the arbitral award in this case, which illustrates the court's undeniable support for this form of arbitration. Moreover, it shows that the court presumed that the arbitrators tried to reconcile between the parties, and that any claim against this assumption would not have merit.

The appellant's second argument was also mentioned in the previous case;²⁸⁵ namely, the requirement that the case must be repeated in order for an arbitrator to be appointed. In response, the court stated:

the disputing parties agreed in front of the court to arbitrate their dispute, and

²⁸² Personal Status Law Article 117-123 discusses this issue in length.

²⁸³ Personal Status Law Article 16.

²⁸⁴ Verse 35 Surat Ni'sa, supra note 185.

²⁸⁵ Appeal no. 307/26, supra note 269.

that they named their arbitrators. As such, it was determined that they were bound by the arbitrator's decision.²⁸⁶

This argument would probably continue to be an issue even after the enactment of the personal status law, given that Article 118 states the following:

In the case that prejudice is not established, that discordance continues between the spouses, and that both the Family Orientation Committee and the judge were unsuccessful in reconciling them, the judge shall issue a judgment appointing two arbitrators.²⁸⁷

Therefore, it seems that such an argument would continue even after the enactment of the personal status law due to the wording of Article 118/1, which supports this view. However, it seems that such a claim would have a minimal effect if the dispute were already submitted to arbitration, and the arbitrators had rendered an award, based on the jurisprudence of the court and the teachings of the Maliki Madhab that the court observes.²⁸⁸

In any case, the court dismissed the appellant's claim in this case, which did have the result of protecting and upholding the freedom of the contract principle.

vi. Appeal No. 248/24 to the Federal Supreme Court of the UAE²⁸⁹

The appellant questioned whether the arbitration agreement needed to be rendered in writing, and he also challenged the neutrality of the chosen arbitrator.

Regarding the arbitrator's neutrality, the facts of this case show that one party chose a relative (i.e., father) as an arbitrator. The other party seconded the nomination, which complicated the situation and raised the question of the arbitrator's neutrality, especially considering the relationship between the plaintiff and the arbitrator; typically, some balance is afforded by having two distinct arbitrators. Nevertheless,

²⁸⁶ appeal no. 349/26. Supra note 277

²⁸⁷ Personal status law article 118/1., supra note 229.

²⁸⁸ al-DESOKI' supra note 225 at 346, also al-TSOLI' Supra note 225 at 491. See general Al-Manjid supra note 96 at 58-59.

²⁸⁹ Federal Supreme Court of the UAE Appeal no. 248/24 issued on 5th of June 2004.

the Court upheld the parties' freedom to contract, and it also followed Shari'a law in accordance with the teaching of the Maliki Madhab. From the Court's reasoning:

that for the appealed decision to breach the law, the arbitrator must have exceeded the powers of the agreement or the scope of his or her power, which in this case had not occurred. Furthermore, the court claimed that, according to Maliki Madhab, the arbitrator's award must be enforced without any reservations, regardless of any bias on the arbitrator's part.²⁹⁰

It can be deduced that the parties' freedom to contract overrules even the arbitrator's neutrality, despite the unambiguous conflict of interest the occurred in this arbitration. By analogy, if this case had been litigated in court, such a clear conflict of interest in a judge would have been cause to request his recusal or dismissal.²⁹¹ However, arbitration is governed by a different set of rules than litigation and, it is generally viewed by the courts as "an exceptional means of resolving disputes."²⁹² That said, and even given that this case to Shari'a-based arbitration, which the courts view in an exceptional light as compared with other forms of arbitration, the court's protection of the arbitral process here is uncharacteristic. Allowing Shari'a-based arbitration to exist in a separate universe with its own set of governing rules suggests that there may be exceptions to exceptions; this may be attributed to the influence of the Maliki Madhab on the court, which cited many Maliki authors²⁹³ when writing its decision.

With regard to the appellant's argument that there was no arbitration agreement that established the arbitrator's authority, the court simply responded that the appellant agreed to arbitrate in front of the court. The agreement to arbitrate, even

²⁹⁰ See al-DESOKI', supra note 225 at 346, also al-Mubarak Supra note 225 at 112.

²⁹¹ Civil Procedures Law Article 114, this Article names the circumstances that under which the dismissal of the judge can be requested.

²⁹² This was discussed above when defining arbitration according to the view of the UAE courts, see supra 2.6.5 page 32.

²⁹³ Such as al-DESOKI' supra note 225 and al-Mubarak Supra note 225, al-TSOLI' Supra note 225.

though it was not in writing, is found in the Quran²⁹⁴.

Regarding the appellant's second argument, the Court explained that personal status matters in relation to public order and policy. This implies that the courts have the right to rule on certain matters without the parties' approval of the dispute. Here, all that binds the courts is the existence of a relationship between the decision being appealed and the issue at hand. In this case, legislation states that matters of personal status shall be considered to be public policy,²⁹⁵ despite the fact that public policy remains a controversial issue, because it adds to the courts' capacity to block arbitration. To date, in addressing issues related to Shari'a-based arbitration, the courts have responded in an uncharacteristic way; namely, they have supported arbitration and enforced arbitral awards, signifying that judges favor this form of arbitration.

The general terminology of the legislation that may be used to generalize all issues falling within public policy creates a different set of problems. Since the legislation considers all issues that are related to personal status to be part of public policy, the courts may legally interfere and rule on matters about which the plaintiffs did not request a ruling. Legislators may have made such issues matters of public policy upon which they may act without the parties' permission, because certain issues are highly valued by legislators, and the courts believe they must exert their utmost protection to preserve them.

This author suggests that some provisions should be rewritten to narrow their effect and preclude exceptions that can be used to hinder the arbitral process.

²⁹⁴ Also, it is similar to adhesive arbitration in this regard, by having the arbitration agreement set forth in the Quran. Surah of the women verse 35 supra note 185.

²⁹⁵ Civil transaction supra note 165, Article 3.

3.4.2 Conclusion

UAE courts greatly favor Shari'a-based arbitration in Family Law, as a solution for family disputes and urge litigants to arbitrate their issues. With few reservations, UAE courts stand by arbitral decisions and enforce arbitral awards, and the scholarship of the Maliki Madhab²⁹⁶ has been shown to greatly influence the court's decisions. This influence has helped to shape court doctrine, which has cloaked arbitration with a religious mantle and fully endorsed its use. This has given family law an almost parallel existence as its own system, not simply an exception to the courts' authority. Arbitration as practiced in matters of family law has been relatively free from the courts' scrutiny; few arbitral awards have been reversed or nullified. Yet, despite the courts' endorsement of this form of arbitration, it still encounters complications:

- i. The terminology used by the Supreme Court regarding this form of arbitration suggests that the courts view arbitral awards as expert reports written by arbitrators; however, UAE courts do generally view awards as binding and requiring enforcement. This again is in accordance with the guidance of the Maliki Madhab²⁹⁷. The reliance on the courts to enforce arbitral awards also means that arbitration remains partly dependent on the courts for a legal identity, which tends to reinforce the courts' view of arbitration as being an exception to litigation. The deference to the courts may also be attributed to the requirements set forth by the Shari'a; namely, that prior to arbitrators rendering a decision, they should try to mediate between the disputing parties. This mediation is often conducted as a matter of the Personal status law in light of the requirement that family disputes should be submitted to a family

²⁹⁶ al-DESOKI' supra note 225 and al-Mubarak Supra note 225, al-TSOLI' Supra note 225.

²⁹⁷ i.d.

conciliation committee prior to going to court²⁹⁸.

- ii. The previous point raises the question of how the requirement of conciliation in ad hoc arbitration may be fulfilled? Arbitration in the courts fulfills this requirement through a conciliation committee. However, in ad hoc arbitration, the fulfillment of such a requirement would fall to one of the relatives of the disputing parties, who may be chosen as arbitrators in the dispute. This requirement is not unique to Shari'a-based arbitration; on the contrary, some arbitration agreements require a similar requirement of mediation before arbitration proceedings may begin.²⁹⁹ In this case, the requirement is derived from the Shari'a and should be fulfilled.
- iii. The arbitration agreement was an issue in several of the previous cases, particularly when there was an attempt to identify the rights and obligations of the arbitrator. There was no written arbitration agreement in most of the cases discussed; most of the agreements to arbitrate were verbal; this is unique to Shari'a-based arbitration in family disputes. Thus, given this unique characteristic that accompanies this form of arbitration, the issue of identifying the obligations of the arbitrator arises. It must be determined whether the arbitrator breached the arbitration agreement or have exceeded his or her authority. Despite this positive aspect, the parties' failure to

²⁹⁸ Personal Status Law articles 16, 117, and 118/1.

²⁹⁹ An example of such a requirement is provided in the Yearbook for commercial arbitrations, which state: "On 27 April 2011, Global Gold and its subsidiaries concluded a Joint Venture Agreement (JVA) with Consolidated. The JVA superseded the Formation Agreement and stated, inter alia, that Consolidated had supplied a funding advance of US\$ 500,000 under the Formation Agreement and that it would supply a further US\$ 4.5 million working capital. The JVA further provided that the parties would form a joint venture company and would enter into a Shareholders Agreement to govern it. The JVA was governed by the substantive laws of the State of New York. It provided for the settlement of disputes arising out the JVA, or relating to any non-contractual obligations arising in connection with the JVA, by consultation, followed by mediation and, if mediation was unsuccessful, by arbitration in New York City under the Commercial Arbitration Rules of the American Arbitration Association (AAA)." UK No. 2017-1, Consolidated Resources Armenia B. Global Consolidated Resources Limited et al., Jersey Court of Appeal, 27 March 2015 In Albert van den Berg (ed), , Yearbook Commercial Arbitration, Volume 42, 1 (Kluwer Law International 2017) available at <http://retro.kluwerarbitration.com.ezaccess.libraries.psu.edu/CommonUI/document.aspx?id=kli-ka-icca-yb-xlii-211-n>.

record their agreement to arbitrate in writing can become a cause for the continuation of the dispute. This occurs in some cases due to the parties' unfamiliarity with the arbitration process in general, or it may be used by one party or the other as a delay tactic. However, this would not occur if the court and its current procedures did not allow such an appeal process. Currently, the door is open for anyone to appeal an arbitral award.

- iv. Arbitrator neutrality is another concern. The court's tendency to uphold the freedom of the parties to contract allows an arbitrator to be chosen from the parties' relatives, thus calling his or her neutrality into question.³⁰⁰ However, given the fact that an arbitrator is an expert in his or her field chosen for his or her expertise, an arbitrator in this form of arbitration would need to know the specific cause of the dispute between the parties. This would require prior knowledge about the parties' private lives, which—given the nature of the family in Islamic society—would not be accessible to the public. Thus, even when the neutrality of the arbitrator may be in question, it is necessary to choose an arbitrator in this manner. Moreover, the issue of neutrality may be countered by allowing both parties to choose an arbitrator from among their relatives. This is a unique attribute of arbitration in the UAE, and helps disputants resolve family disputes.
- v. The legislature's view of family law as part of public policy and order derives from the UAE's being an Arabic Islamic nation that emphasizes unified families and social status. However, generalizing public policy would invite a higher level of scrutiny and protection from the court, which in turn would emphasize the need to revise the legislation that allows for a number of methods of appeal. More importantly, it might push judges to revise and amend their positions about

³⁰⁰ which can be attributed to the teaching of the Maliki school that allows such, see appeal no. 372/25, supra note 223.

arbitration. While judges favor family law-related arbitration, they also support the idea of allowing the parties a second chance to look into the case in the form of an appeal. The appeals process in the eyes of judges and UAE public policy is a form of preserving justice by allowing the parties the opportunity to appeal.

Overall, the courts have shown uncharacteristic behavior in supporting arbitration in family law cases. This may be seen in their expression of the obligation to stand by arbitrators' decisions, as well as in their not attempting to assume jurisdiction over the arbitration process. This attitude may be attributed to the influence of the Maliki Madhab and the Islamic Shari'a, and it should be exploited to encourage the UAE courts to treat all arbitration not as an exception to the law, but rather as its equal.

3.4.3 Riba (usury)

The reason for discussing an issue concerning finance—namely, *riba*, or interest—in a section that deals with Shari'a arbitration stems from two cases: Appeal no. 831/25 and 67/26³⁰¹ to the Federal Supreme Court of the UAE and Appeal no. 146/2008³⁰² to the Dubai Court of Cassation. Given that Shari'a law governs all aspects of a Muslim's life,³⁰³ it is necessary to examine how the court addresses issues that conflict with the rules of Shari'a. The way the court addresses *riba* differs from how it addresses family law arbitration. In the latter case, the courts have seemed very willing to uphold the rules of the Islamic Shari'a. However, judges seem to have a different view when it comes to commercial transactions. The following cases demonstrate this, and they also highlight the role that judges play in the UAE and how their role affects the process of arbitration.

Before investigating cases in detail, this section introduces the Islamic notion of *riba* to clarify the arguments used by UAE courts, which are discussed in subsequent

³⁰¹ Federal Supreme Court of the UAE, appeal no. 831/25 and 67/26, issued on 23rd of May 2004.

³⁰² Dubai Court of Cassation, appeal no. 146/2008

³⁰³ See *supra*, 3.1.1 defining Shari'a page 49.

subsections. It also briefly explains Islamic jurisprudence and UAE courts' stance on the matter.

3.4.4. What Is *Riba*?

By understanding the concept of *riba*, one can understand the reasoning and views of UAE courts on the issue. Mahmoud A. El-Gamal defined *riba* as “trading two goods of the same kind in different quantities, where the increase is not a proper compensation,”³⁰⁴ which suggests that *riba* concerns the sale of goods and, more generally, of contracts. The rationale for prohibiting *riba* is that doing so would promote equity through equality.³⁰⁵

The Quran on multiple occasions mentions *riba* and the Shari'a's view of it. The first instance states:

“That which ye lay out for increase through the property of (other) people, will have no increase with Allah. But that which ye lay out for charity, seeking the countenance of Allah, (will increase): it is these who will get a recompense multiplied³⁰⁶

This line of reasoning characterizes pre-Islamic practices in Arabia, in which interest was charged on debts.³⁰⁷ Another, more succinct, verse from the Quran states

: “O ye who believe! Devour not usury, doubled and multiplied; but fear Allah. That ye may (really) prosper.”³⁰⁸

There are two forms of *riba*: *riba al-nasi'a* and *riba al-fadl*. While *riba al-nasi'a* covers all loans that accrue interest, *riba al-fadl* addresses the trading of goods of the

³⁰⁴ MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE LAW, ECONOMICS, AND PRACTICE 49, (1st ed. 2009).

³⁰⁵ MAHA-HANAAN BLALALA, ISLAMIC FINANCE AND LAW THEORY AND PRACTICE IN A GLOBALIZED WORLD 62, (2011).

³⁰⁶ Surah Al Rum (The Romans) verse 39, Ali supra note 210 at 240.

³⁰⁷ El-Gamal, supra note 304, at 50.

³⁰⁸ Id., at 50.

same kind in different quantities.³⁰⁹

How then, from this simple definition that makes no mention of interest, does interest relate to the doctrine of *riba*?

3.4.5. Does Interest Fall under the Doctrine of *Riba*?³¹⁰

The answer to this question may determine whether interest infringes upon or is consistent with public policy doctrine in the UAE. This subsection will investigate how the *riba* question has been answered in other jurisdictions with Shari'a-based legislation, as well as how Islamic Jurists deal with this issue. Comparing these cases should help illuminate the UAE's view on *riba*.

Contemporary Islamic jurists have debated this issue on a number of occasions. Al-Hussayen³¹¹ explained in his article how this issue came into existence in the Islamic legal system, noting that al-Sanhury³¹² had three theories that excepted interest/usury from the doctrine of *riba*. One is the Professor Maroof al-Dwaleibi theory, which was the subject of his paper at the 1951 Islamic law conference in Paris. This theory holds that *riba* is limited to consumption loans (i.e. personal loans) and does not apply to production loans (i.e. commercial and business loans).³¹³ A second is the theory of al-Sheikh Mohammad Rasheed Rida, which states that *riba* is limited

³⁰⁹ El-Gamal, supra note 304, at 50. See also Surah Al 'Imran (The Family of 'Imran) verse 130, Ali supra note 210 at 36.

³¹⁰ For a complete understanding on the Islamic Jurists discussion on interest or usury and whether it is *Haram* or not, see, general, SALEH AL-HUSSAYEN, [*Commentary on the difference between the Banks Interest Rate and Riba*], *Islamic Research Magazine*, Issue 31, 123 (1991), SALEH AL-HUSSAYEN, [*The response of Sheikh Saleh Al-Hussayen on Ibrahim Al-Nasser Article on the stand of the Islamic Shari'a in regard to the banking transactions*], *Islamic Research Magazine*, Issue 23, 121 (1988), SALEH AL-FOZAN, [*The Difference between selling and riba in the Islamic shari'a, on contrast to the customs of al-jahlyia Islamic Research Magazine*], Issue 10, 86 (1983), ABDUL AZIZ BIN BAZ, [*The response of Sheikh Abdul-Aziz bin Baz on Ibrahim Al-Nasser Article on the stand of the Islamic Shari'a in regard to the banking transactions*] *Islamic Research Magazine*, Issue 18, 121 (1986-87). In these Articles by prominent authorities in Islamic Shari'a, which is published from the Presidency of Islamic Researches and Ifta in Saudi Arabia, which the authors of these Articles are all members of the council of senior scholars in Saudi Arabia and highly respected authorities in Islamic Shari'a, they concluded that Interest falls under the doctrine of *Riba* and therefore it is *Haram*.

³¹¹ Id AL-HUSSAYEN at, 121 (1988.).

³¹² See general Bechor, supra note 17.

³¹³ AL-HUSSAYEN, supra note 310 at 123 (1991).

to one form; namely, the one mentioned in the , which is *riba al-Jhalh* (Ignorance).³¹⁴ The third is al-Sanhury's own theory, which holds that *riba* in all of its forms is considered *haram* or unlawful under the Shari'a. He further explains that compound interest falls under the doctrine of *riba*, and that simple interest, while unlawful under the Islamic Shari'a, is allowed because there is a need for it. This need is general and should be exemplified and only allowed in case of need. Further, the legislature should regulate simple interest to limit its power, and when the need for simple interest goes away, it should once again be deemed unlawful.³¹⁵ Al-Hussayen discusses all three theories, and explains that al-Sanhury concluded that *riba* in the first two theories is unlawful in the eyes of the Shari'a.³¹⁶ With regard to the third theory (Sanhury's own theory) al-Hussayen argues that this theory might have been plausible and have a merit in a time when there were two banking systems: the communist and the capitalist system. However, times have changed significantly since the Islamic banking system came into existence. Therefore, al-Sanhury's theory, which relies on the economic necessity for simple interest, no longer has merit.³¹⁷

Two examples of two Islamic jurisdictions and how they address this issue, would help in highlighting the different solutions that can be adopted to resolve this issue.

When faced with the possible unconstitutionality of Article 226 of the Civil Code³¹⁸ concerning interest, the Egyptian Supreme Constitutional Court stated that Article 2 of the Constitution afforded no retroactive power. Moreover, it stated that Article 226 of the Civil Code addressed interest as part of a specific field of private

³¹⁴ *id* at 124.

³¹⁵ *id* at 124-126.

³¹⁶ *Id* at 126.

³¹⁷ *id* at 127.

³¹⁸ This Article deals with simple interest in personal laws, Egyptian Law no. 131 for the year of 1948 in regards to civil law, Article 226. The Supreme Court of the UAE would adopt this same method of reasoning, as it shall be noted when analyzing the next case.

law.³¹⁹ In this stance, the Egyptian court followed the viewpoint of the creator of its civil law.

By contrast, the Pakistani Supreme Court ruled in December 1999 that interest as used in banking procedures infringes upon and is contrary to the Shari'a—a ruling that effectively nullified 22 interest-related provisions in Pakistani statutes.³²⁰

The contrast between these two decisions is significant, particularly from the perspective of practicality. On the one hand, although the Egyptian court preferred a practical solution to the problem—even if that solution proved to be unconstitutional—the Egyptian court's decision fell short of addressing the real issue: the unconstitutionality of Article 226. This demonstrates that the Egyptian courts are still influenced by the teachings of Prof. Sanhury, and that they do not note that his views on simple interest were bound to the circumstances of his time and are unlawful in the eyes of the Islamic Shari'a.³²¹

On the other hand, the Pakistani solution nullified provisions by deeming them unconstitutional to eliminate the problem at the root. Though the Pakistani Supreme Court's decision complied with the provisions of its Constitution, it conflicted with global standards and banking practices essential to modern commerce. This would affect arbitration, especially foreign arbitral awards seeking recognition in Pakistan, and more specifically, any awards that involve interest.³²²

The problem therefore becomes upholding constitutional/Islamic principles while not hindering international trade and commerce. This problem will be examined in detail after an analysis of case law in the UAE that touches on *riba*.

³¹⁹ Tetley, supra note 15 at 701.

³²⁰ Howard L. Stovall, *Doubts persist Arab Commercial Law into the Future*, in ARAB COMMERCIAL LAW: PRINCIPLES AND PERSPECTIVE 9 (William M. Ballamtyne & Howard L. Stovall ed., 2002).

³²¹ AL-HUSSAYEN supra note 260 at 127.

³²² Stovall supra note 320 at 9-10.

3.4.6. Disputes Relating to *Riba* (Usury/Interest)

i. Appeal No. 831/25 and 67/26³²³

This case underscores numerous issues concerning the practice of arbitration in the UAE. One primary issue concerns how the court answers questions about the Constitutional legality of interest or *riba*, which was implicitly answered by the Court during this case addressing the relationship between interest and arbitration in the UAE:

The Court's jurisprudence regarding interest is that interest, either compound or simple, is considered by Shari'a law to be *haram*. However, the Constitutional panel of the Supreme Court in its explanation for decision no. 14/19 allowed simple interest in banking transactions, although compound interest continued to be considered *haram*. The court also examined interest in arrears as a form of compensation for the delayed payment of debt and argued that interest as a form of compensation on delayed payment is compliant with the rules of the Shari'a. In order for the court to rule on interest, it must fulfill one more requirement related to the debt itself: the debt must be identified and should be due at the time of the claim, unlike compensation, which is subject to the court's estimation.³²⁴

This raises a question concerning the hierarchy of laws. In the previous section, we saw how the court stood by and enforced Shari'a rules, and this is the same court that refuted those rules that they had been upholding. What changed the court's attitude from complete support of the provisions of the Islamic Shari'a to ruling against it?

The decisions of the court in cases involving family arbitration were influenced by the Islamic Schools of thought, in particular the Maliki Madhab. This can be attributed to the fact that the cases discussed earlier were submitted to the Shari'a circuit³²⁵. The commercial case on the other hand would fall under the jurisdiction of the Civil or Commercial Circuit, given the nature of the dispute.³²⁶ Therefore,

³²³ Supra note 301.

³²⁴ Appeal no. 831/25 and 67/26.

³²⁵ 3.4.1 cases involving family law disputes at 59.

³²⁶ See general Turki supra note 11 at 389, where the author explains how the different circuits in the UAE courts function.

different influences were at play in the commercial case, which can be attributed to the backgrounds of the judges and their education in general.³²⁷ It also can be traced to Prof. al-Sanhury, the father of much of the Civil Law in the Arabian world. The court adopted the reasoning and rationale that was given by Prof. al-Sanhury.

In general, *riba* in the UAE conflicts with Shari'a law, which implies that interest in all forms is unconstitutional. The appellant sought to nullify the compensation awarded by the arbitrators by arguing that compensation containing *riba* is unlawful and should be dismissed. The Court's jurisprudence indicates that such an argument on its own would have been sufficient reason for the Court to justify nullifying the award, for the Court's policy regarding Shari'a-related issues is to uphold the Shari'a. As such, the natural course of events would have been the nullification of the award in order to fulfill Shari'a law. However, the Court dismissed this claim, despite admitting in clear language that interest, either compound or simple, is *haram* as per the Shari'a. The Court made this determination according to the constitutional panel's tolerance of simple interest in banking transactions and of the idea that interest in arrears is a form of compensation for the delayed payment of a debt:

in contrast to what the appellant argued in front of the first instance court (that the dispute does not relate to a banking transaction and thus there was no room for issuing interest), the case fell outside the scope of Article 216³²⁸, which is the Article that contains the conditions of annulment. Regarding the argument that the court's decision about the award constituted a breach of public policy, the court said this argument had no merit because the dispute fell under the provisions of the commercial law,³²⁹ and according to that law, creditors have the right to ask for interest and are not required to prove damages in order to ask for it.³³⁰ Thus, the arbitral award did not breach public policy by involving simple

³²⁷ Turki explains that the reason behind having specialized circuits within the court, is to accelerate the rate in which cases are decided within the court, by having jurists specialized in certain fields, which in turn would make them gain experience in certain disputes, and in theory enhance their ability to resolve these disputes. Turki Supra 11 at 388.

³²⁸ Civil Procedures Law Article 216.

³²⁹ This is identified in the Federal law no. 18 on Commercial Transaction issued on 7/9/1993, hereinafter commercial law, in Articles 4-10.

³³⁰ Id, Article 90 state that: "Interests on arrears for delay of payment of commercial debts are due upon maturity, unless otherwise provided in the law or in an agreement." Moreover, Article 88 of the same law states the following: "Unless otherwise agreed, where the commercial obligation is a sum of

interest.³³¹

Thus, these two forms of interest were deemed lawful and in accordance with Shari'a law, which thereafter allowed the awarding of interest for identified debts only.

Despite the Court's reasoning, the Shari'a views interest in all forms as unlawful,³³² a fact that has not changed, despite the Court's accommodation of interest in commercial practices and its redefinition of *interest* as a form of compensation. The Court's reasoning does not resolve the problem of interest, nor does its justification change the fact that interest conflicts with Shari'a law, which implies that the Court has defied a constitutional provision and that its justification is an attempt to justify their practice. The Court's justification mirrors the Egyptian Constitutional Court's opinion on interest, which the Federal Supreme Court of the UAE has adopted.

In essence, the Supreme Court has compromised a constitutional rule in order to facilitate and promote commerce, which prompts concerns regarding to what extent *riba* will be permitted across other kinds of cases. From another angle, one might ask whether compromising a constitutional principle is the only answer available. Though constitutional principles should be preserved and upheld by the court, if doing so requires that charging interest not be permitted, then the UAE courts and legislators may choose to amend the constitution or the court's practice regarding interest. In many ways, amending the constitution—thereby changing a principle essential to the

money, the amount of which was known when the obligation arose, and the debtor delays payment thereof, he shall be held liable to pay to the creditors, as compensation for the delay, the interest fixed in Articles (76) and (77).”

³³¹ The other ground of appeals does not relate to the issue at hand, they relate to the appointment of the arbitrator and the arbitrators fee, which would be discussed later on.

³³² The Islamic Jurists *Ijma* on this matter is that interest in all of its forms considered as *Haram*, see general, 3.1.2 sources of Shari'a at 50, see also AL-HUSSAYEN Supra note 310 at 123 (1991), See AL-HUSSAYEN Supra note 310 at 121 (1988), See AL-FOZAN, supra note 310 at 86, See BIN BAZ, supra note 310 at 121.

nation—is not as practical a solution as amending the court’s practice and the legislation that conflicts with constitutional principles³³³. Nevertheless, this latter solution would give rise to a new set of problems, starting with finding an alternative to interest when ruling on compensation and changing banking and other practices that award interest.

How can a solution be realized that does not hinder established commercial and civil practice in the UAE? Would such a solution not interfere with the international practices? Furthermore, how would the change affect certain arbitral awards that require enforcement in the UAE?

The bottom line is that the UAE’s provisions involving interest and the decisions of its Supreme Court contradict the UAE constitution. In addition, they breach the hierarchy of laws by dismissing the rule of Shari’a. This position can be traced to the Egyptian courts rulings on this matter³³⁴; Egyptian legislation and legal practices have been a form of foreign influence on the UAE courts for many years.³³⁵ The UAE constitution could be amended to accommodate commercial practices, though doing so would favor a commercial practice over a fundamental constitutional principle.³³⁶ Another solution would be to require commercial practices in the UAE to meet constitutional principles, which would also require the prohibition of all forms of interest in the UAE and the introduction of a substitute system of compensation and legislative remedies. However, altering such widely recognized practices may pose diverse problems, and it may fail to preserve the fundamental constitutional

³³³ Which is article 7 of the constitution, see general Al-muhairi supra note 24.

³³⁴ Tetley, supra note 15 at 701, also to Prof. al-sanhuri teachings, see AL-HUSSAYEN supra note 260 at 127.

³³⁵ Tamimi supra note 12 at 6.

³³⁶ Stovall added a quote by Professor William Ballantyne that explains this situation, which states: “The Problem is that the Arabs have, to greater or less degree, in wishing to adopt the existing international world of commerce, come face to face with the classic situation: an irresistible force against an irremovable object. As is not uncommon in these circumstances (not by any means only in the Arab world) the question has been begged on all sides. It will be, to say the least, interesting to see for how long and to what extent this apparent anomaly continue.” Stovall supra note 320 at 9.

principles. A line should thus be drawn when it comes to preserving Constitutional principles.³³⁷

ii. Appeal no. 146/2008³³⁸

The issue raised in this case is similar to one raised in the previous case: the First Instance court was the one that dismissed an award, while the appeal and the Federal Supreme court both upheld the award for the reasons that were discussed previously. In this case, the First Instance and the Appeal Court both dismissed the claim, while the Cassation Court decided to recognize and enforce the award. These cases share elements such as the conflict among of laws, insurance policies, and inheritance. By combining elements of civil and commercial transactions in addition to Shari'a law, the analysis in this section focuses on the Shari'a aspect of this appeal.

Though the decision to nullify the award was annulled by the Dubai Court of Cassation, which in part seems to support arbitration, the decision nevertheless contradicted a constitutional provision, which therefore raises issues of public policy. The courts view interest as unlawful and *haram*, since interest falls under the doctrine of *riba*. As part of public policy and order, the courts must address this issue when deciding whether to recognize an arbitral award that involves interest:

the rules regarding inheritance—according to both certain provisions in Shari'a law and UAE public policy constitute *riba* and are therefore *haram*, despite being part of public policy to which the court should adhere when deciding to recognize or nullify an award. Moreover, the appealed decision failed to uphold due process

³³⁷ Ballantyne gave an explanation of why the Egyptian courts allows interest, which illustrates the difficulty of answering this question, he states: Had the court agreed, it would have thrown all of the Egyptian banking and economic system into chaos. Faced with this agonizing decision, the court decided that the change was, as the court put it, not to have retroactive effect so as to affect existing laws, but that in the future, such laws should be adapted as far as possible to come into line with the Shari'a, and that future legislation must similarly conform. To ne, this reasoning is suspect; but there it is." Willam M. Ballamtyne, *The challenge of Islamic commercial Law in the Middle East*, in ARAB COMMERCIAL LAW: PRINCIPLES AND PERSPECTIVE 16 (Willam M. Ballamtyne & Howard L. Stovall ed., 2002).

³³⁸ Supra note 302.

and reasoning in nullifying the award and should itself have been annulled.³³⁹

Interest/usury is grounds for nullifying an award, and the court is obliged to uphold this principle and to rule on the matter, as demonstrated by the decision in this case.³⁴⁰ Nevertheless, the Court of Cassation decided to annul the decision to nullify the award, despite having stated that interest violates public policy.

Unlike the ruling of the Supreme Court, the Court of Cassation did not in its decision distinguish between compound interest and simple interest, or identify the nature of the transaction at hand, which the Supreme Court did do, and it also elaborated upon in detail on this decision.³⁴¹ These circumstances suggest that the outcome of the decision would have changed if the Supreme Court had held jurisdiction over this case, since the decision concerned a civil matter and thus did not fall under the commercial exceptions articulated by the Supreme Court³⁴². In this context, the Supreme Court would likely have upheld the appellate court's decision to nullify the award, or at the very least to partially nullify the clause in the award involving interest. By contrast, the Court of Cassation, while admitting that the interest in arrears would fall under the doctrine of *riba*, upheld the award and did not try to nullify the clause involving interest in arrears. By doing so, the Cassation Court went beyond the teaching of al-Sanhury, which requires that interest should be subject to strict rules and regulations in order to be applied.³⁴³

The Cassation Court's decision in this case is peculiar. On the one hand, the Court stated that interest violates public policy; on the other, it decided to annul the

³³⁹ Appeal no. 146/2008.

³⁴⁰ See appeal no. 831/25 supra note 301, where the court states clearly that this is considered *riba* and is thereby haram.

³⁴¹ Federal appeal no. 831/25 supra note 301.

³⁴² See Stovall supra note 320 at 10, where the author confirms that this is the practice in most Arab countries: "most Arab legal systems draw a distinction which permits interest charges in commercial (but not civil) transactions...."

³⁴³ AL-HUSSAYEN supra note 260 at 127. See general Ballantyne supra note 337 at 17, where the author confirms that "the majority of Islamic jurists are of the opinion that *riba* includes all interest on money."

Court of Cassation's decision to nullify the award, based on the reasoning discussed above. Here, the Cassation Court contradicts its own jurisprudence; according to the reasoning of the Court, it must be concluded that interest is forbidden in such transactions, and therefore the Court should have at least nullified the clause involving interest.

In sum, it seems that the Court of Cassation and the Supreme Court both agreed that interest is part of *riba*, yet they differ in their reasoning and predicted outcomes. The Supreme Court upheld an exception to the rule based on the explanation of its constitutional panel, while the Court of Cassation stated that interest is unlawful without addressing it. In one sense, both cases ultimately arrive at the same outcome. However, since the Court of Cassation's decision contradicts and violates the Constitution, the Court failed to uphold UAE public policy. As such, the question becomes whether solving the issue requires enacting new laws or falls into the hands of judges.

3.5 Conclusion

Shari'a-based arbitration in the UAE is a practice highly favored by the courts, which regard enforcing arbitral awards as a moral obligation in accordance with the provisions of Shari'a law. However, such practices and attitudes seem to change when it comes to applying Shari'a law to the issue of interest/usury. The courts admit that interest contradicts the provisions of Shari'a law, yet they allow interest to be charged in order to accommodate contemporary commercial practices. This approach can be traced back to the theory of Prof. al-Sanhury, who allowed the application of interest transactions in accordance with a strict set of rules.

Two points can be concluded from the courts' actions. First, the UAE's practice

of arbitration has been subject to foreign influence for many years, as demonstrated by the Supreme court's explanation of its ruling on a case involving interest. The ruling in question mirrors that of the Egyptian Constitutional Court. Second, the unconstitutionality of interest in the UAE requires a legislative remedy. Such a remedy will invariably require major reforms in multiple sectors in order to accommodate commercial necessities. The solution will also ultimately need to consider enforcing foreign awards in the UAE, since such awards likely will create an entirely different set of problems.

However, no legislative remedy will succeed without the backing of the judges, as civil law judges tend to make laws, they have an active role to play in interpreting laws, and it is they who implement the laws.

Despite concerns related to Shari'a arbitration, the courts' seemingly enthusiastic support of family arbitration may be the key to persuading them to embrace arbitration more generally and incorporate it within the UAE court system. Upon exploring these family arbitration cases, we find that the courts' support for this form greatly enhances its effectiveness, because the courts are not viewing arbitration as a competitor or an exception.

If the UAE's courts viewed all forms of arbitration the way they view family law-related arbitration, the productivity of arbitration in the UAE would be greatly enhanced.

Chapter Four

The Civil Circuit

4.1 Introduction

In its basic form, the study of law is no different than the study of any social science.³⁴⁴ It requires an examination of its practice and the effect this practice creates in order to establish the impact of the law on society. Arbitration is no exception to this idea. The previous chapter of this study established that the court views arbitration as an exception to the adjudication process in the UAE. However, there is an exception to *that* exception, which is Shari'a-based arbitration, although it is limited to family law arbitration. An examination of other forms of arbitration is required to better understand the impact of this idea³⁴⁵ on arbitration.

This chapter will focus on one of those other forms of arbitration—disputes that are of a civil nature brought in front of the civil circuit chamber of the UAE's high courts. These disputes can be divided into lease disputes and general civil disputes. Lease disputes have further complications and require examining them on their own. Therefore, this chapter will be limited to examining seventy general civil

³⁴⁴ See general, John E. Drotning & Bruce Fortado, *Arbitral Decisions; a Social Science Analog*, 1984 Mo. J. Disp. Resol. 77-86, in which they examine the similarity between arbitral decision making and social science research; also K.W. Wedderburn, *Law as a Social Science*, 9 J. Soc'y Pub. Tchrs. L. n.s. 335-342 1966, in which the author is trying to explain a new approach of teaching law that includes social science, also David Nelken *Can Law Learn From Social Science?* 35 Isr. L. Rev. 205-224 2001, the author is trying to brig the gap between law and social science.

³⁴⁵ Which is the courts attitude towards arbitration, Dr. Ibrahim Al-mulla examined the Jurisprudence of the Federal court in arbitration, he recommended that the hostile tendancies of the court should be limited, see Ibrahim Al-Mulla, *Qth'a al-Tahkeam fe ejtha'dat al-Mhkam'ah al-etihadyah al-aly'ah*[*The Jurisprudence of the Federal Supreme Court of the UAE*], 13-45, at 42 (2013), this article was published by the federal supreme court in a jorunal that examined the role of the Supreme court in developing the UAE courts.

decisions. A brief introduction to the provisions that address arbitration in the civil procedures law is required. The chapter is structured as follows:

- Introduction to the Civil Procedures law
- Forms of Arbitration examined by the Civil Circuit
 - Lease disputes
 - Civil disputes

4.2 Introduction to the UAE Civil Procedures Law³⁴⁶

For a civilized society to function, it requires laws that regulate the conduct and transactions of individuals. For individuals to protect these rights, they must have the opportunity to present their cases to a higher authority. This process of adjudicating requires procedures to guide individuals and shape the legal protections they seek.³⁴⁷

The drafters of the civil procedures law in the UAE devoted an entire chapter to regulating the process of arbitration in the UAE.³⁴⁸ Fifteen articles in this chapter regulate the entire process of arbitration, in addition to regulating the court's interpretation of arbitration agreements.³⁴⁹ Recognizing and enforcing arbitral awards

³⁴⁶ see the appendix for a detailed account of the civil procedures law provisions on arbitration, *infra* civil procedures law.

³⁴⁷ Turki, *supra* note 11 at 7, (1st ed. 2009).

³⁴⁸ Chapter three of book two addresses this issue in articles 203-218, see the appendix for a detailed account of those articles, including an analysis of these articles.

³⁴⁹ Which can be found in article 203, see the appendix.

is subject to the general provisions of enforcement³⁵⁰ that govern all forms of enforcement, including arbitration.³⁵¹

However, a strict application of these procedures may actually result in a loss of rights; for example, in the event that individuals fail to uphold the proper procedural requirements, making justice costly and slow.³⁵² However, legislation provides a solution to this problem in article 13³⁵³ of the law, which accepts the validity of a legal procedure if its goal has been met.³⁵⁴ A combination of several factors may cause a delay in justice: the limited number of judges, the large number of cases, the use of delay tactics employed by the disputing parties or their lawyers, and (in some cases) judges' lack of experience with the law.³⁵⁵

The provisions in article 13³⁵⁶ that may resolve conflicts between the law and the use of arbitration raises question of why they are not employed more often in cases involving arbitration. If the court interpreted arbitration agreements and awards according to the principles of article 13 (that an arbitration procedure should stand if it achieved the goals of the disputing parties), then no conflict would exist between the courts and the use of arbitration.

However, arbitration is currently treated as an inferior method of adjudication, as exemplified by the courts' practices and their definition of arbitration.³⁵⁷ This

³⁵⁰ The process of enforcement are regulated in 45 articles (articles 219-246 of the civil procedures law).

³⁵¹ The enforcement of foreign arbitral awards is addressed in book three, chapter four that regulates the enforcement of foreign judgments, bills and orders procedure, civil procedures law articles 235-238.

³⁵² See Turki, supra note 11 at 19.

³⁵³ Civil procedures law article 13 state; "The procedure shall be null if the law has stipulated expressly its nullity or if it has been impaired with a defect or an essential imperfection because of which the procedure purpose has not been fulfilled. In case the procedure purpose has been proved, the nullity shall not be decided in spite of the stipulation thereon."

³⁵⁴ See Turki, supra note 11 at 20.

³⁵⁵ Id at 20.

³⁵⁶ This solution is contained in article 13, supra note 353.

³⁵⁷ Which has already been examined in this study, supra 2.6.5 UAE Courts view of the Definition at 32.

suggests that the court considers arbitration to be merely an exercise in the rendering of expert opinion, and not as a separate and equal adjudicatory process.³⁵⁸

This means that the number of procedural disputes concerning arbitration that may arise, as well as the possibility of appeals, is infinite; the system that the legislature created seems to encourage appeals, and this amounts to holding arbitration to the same, or even higher standards, as those that the courts must meet³⁵⁹. The legislation as it stands supports the courts' views on arbitration, and this, along with the possibility for a proliferation of appeals, often extends the length of the dispute. If a party were informed about how the law works, he or she could easily extend the length of the dispute or disrupt the arbitral process. Or, the party may be dissuaded altogether from opting-out into arbitration³⁶⁰.

However, despite the flaws embedded in the civil procedures law regarding arbitration, its popularity as a dispute resolution method has not been affected. Therefore, there is an increasing need to improve legislation in order to better serve the individuals who choose to opt-out into arbitration³⁶¹. In particular, the appeals process in the civil procedures law must be revised. If left unchecked, the current situation will increase the load on the court, as an examination of the courts' current practices and decisions in arbitration cases, which is the subject of the next section, will exemplify.

³⁵⁸ see supra 2.7 Examples of the Courts View of Arbitration at 36.

³⁵⁹ When trying to find a balance between personal justice in the form of arbitration and the law, Paulsson explained what attract parties to arbitration by stating: "Parties are attracted to arbitration because it promises a resolution of their dispute." Paulsson supra note 106 at 17, at the end of the day this is what the parties entering opting-into arbitration are seeking.

³⁶⁰ Quoting Paulsson again he states: "Parties, like Janus, are two-faced. When arbitraiton favours them, they delight in their escape from judicial formalism and delays; but when they lose they speak ardently of judges as the last bastion of justice. The grouching of unsuccessful arbitrants is always suspect; they are not different than losers in any system of adjudication-no matter how accountable the judges, how elevated the ultimate appellate recourse.", Paulssoan supra note 106 at 17.

³⁶¹ "Arbitration that ignores law would be retrograde, based on the fiction of an agreement among perfect equals to entrust an arbitrator to find a unique solution to an isolated problem..." Paulsson supra note 106 at 17.

4.3 Forms of Arbitration examined by the Civil Circuit

The court classifies cases based on the nature of the dispute.³⁶² Based on this categorization, the case is then presented to the different circuits within the court.³⁶³ Specialized judges in their respective fields of law head each circuit. No circuit is fully dedicated to arbitration, which means that arbitration disputes are categorized based on the nature of the dispute that the court believes is most appropriate.³⁶⁴

Most judges that are presented with disputes related to arbitration, in any stage of the arbitration process except enforcement,³⁶⁵ examine the dispute and the claims of the litigants as a whole. They are not limited to the arbitral claims.³⁶⁶ To study the courts' views on arbitration, one must divide the forms of arbitration based on the way the court have categorized them.³⁶⁷ This will allow us to identify any distinguishing factors among the different forms of arbitration, and help to determine whether judges' nationality and background have any effect on their decisions. It also may help to discover whether appeals are a *de facto* part of the litigation of arbitration disputes. Finally, we should ask whether arbitration that is appropriated by a court

³⁶² Thus, in the case of arbitration this would usually fall to one of three circuits: civil, commercial or labor, article 19 of the civil procedures, see general Turki supra note 11 at 389-391.

³⁶³ Therefore, if a dispute rises in any stage of the arbitration and was submitted to the court, or if it was in regards to an arbitral award, the suit would first have to be categorized in order for it to be filed to the different circuits of the court, if a dispute was categorized as a civil dispute then it would be submitted to the civil circuit, see general Al-Tamimi supra note 12 at 10-17, Turki supra note 11 at 389-391.

³⁶⁴ For instance, a request to recognize an award might be submitted to a civil circuit and later on appealed to a commercial circuit, implying that there is a possibility that a judge, who specializes in civil law might be presented with a commercial arbitration dispute or an award. See general Turki supra note 11 at 388.

³⁶⁵ Which in most instances should be brought directly in front of an enforcement judge, unless one of the parties disputed the award by filing a suit in front of the court, see articles 219-224 of the civil procedures law, and a detailed account of this in the appendix. See general Turki supra note 11 at 393, and Tamimi supra note 12 at 97, where the author explains the execution procedures.

³⁶⁶ Which increases the chances of having this dispute appealed.

³⁶⁷ As was the case when the court addressed Shari'a based arbitration, where it was established in this study that the courts' view and attitude changed when faced with Shari'a arbitration, especially in family law disputes, see supra 2.6.2 Shari'a View and 3.4.1 cases involving family law disputes.

receive favorable treatment³⁶⁸. Such questions require an examination of the courts' decisions against the background of a complete understanding of civil arbitration.

4.3.1 Civil Arbitration

What is meant by civil arbitration? This study will be limited to the courts' classification of their cases, as found in their decisions and publications. Currently, courts tend to exclude other kinds of disputes from the jurisdiction of the civil circuit, such as commercial disputes, which fall under the commercial transaction law.³⁶⁹ However, earlier decisions have classified commercial and labor disputes under the civil circuit, since during the early days of the court system, there was no need for specialized circuits.³⁷⁰ However, as the court system grew and the number of cases grew with it, the need for more circuits also increased. Now, a dispute submitted to the civil circuit must be of a civil nature and fall under one of the provisions of the civil transaction law.³⁷¹ Thus, in the UAE, a civil arbitration would constitute an arbitration that deals with a dispute arising from a civil transaction according to the civil transaction law. Such a case would exclude any transaction of any other nature that would fall under another circuit, such as a commercial transaction.³⁷²

³⁶⁸ In other words, do the court favor court-annexed arbitration?

³⁶⁹ Article 1 of the commercial law states that: "The provisions of this Law shall apply to merchants, as well as to all acts of commerce carried out by any person even though he is not a trader" It went on to identify those acts in article 2 of the same law.

³⁷⁰ Dr. Turki explained this idea in detail and referred to the Federal law no. 3/1983 concerning the federal judicial authority, issued on 30/5/1983, stating that "the purpose behind this division is to increase the courts activity, in a way that they are able to hear a number of cases at the same time in the different circuits. See Turki, supra note 11 at 389-391.

³⁷¹ This is not to say that all the disputes that get the label civil are purely of a civil nature.

³⁷² Last thing to note about the courts view, is their view of the parties of the dispute, in particular they tend to view the individuals that fall under the civil law as weaker individuals and require the protections of the law, which influence their decision making process. Al-Bndari distinguished between traders or in other words people and entities that fall under the spectrum of the commercial law, and stated the importance of identifying each one by stating that: "the law gives them certain obligations and rights...." MOSTAFA AL-BANDARI, *MBAD'A QANON AL-MAMALAAT AL-TJARYAH L DWALT AL-EMARAT AL-ARABYAH -AL-MTHADAH*, (The principles of commercial transaction law in the United Arab Emirates), 198-199(1st ed. 2006).

This section examines two forms of disputes that fall under the jurisdiction of the civil circuit: civil disputes in general, and lease and land disputes. The latter category is subject to judicial committees that have jurisdiction over such disputes.

4.3.2 Lease and Land Disputes³⁷³

Lease and land disputes are related. Most of the disputes examined in this section fall under the jurisdiction of the lease committees, which have jurisdiction over disputes that arise from the leasing of non-transferable goods.³⁷⁴ Naturally, this would put disputes over lands and properties under the jurisdiction of lease committees, excluding the leases of transferable goods. This division affects arbitration.

The idea behind having lease committees³⁷⁵ is to relieve the pressure on the courts.³⁷⁶ They are meant to create a buffer that decreases the number of lease disputes that appear in front of the courts. The decisions of lease committees are final and binding and not subject to appeals.³⁷⁷

³⁷³ Due to the major economic boost that the UAE have experienced in recent years, and the increased number of foreigners that seek jobs in the UAE and foreign businesses that choose the UAE as a base of their operation, which resulted in an increase in the number of residence in the UAE and the flourishing of the real-estate market; what followed is an increase number of lease and land related disputes. See general al-tamimi supra note 12 at 25-26, where he discusses the rent disputes.

³⁷⁴ Dubai Court of Cassation appeal no.47/2007, issued on the 29th of April 2007, the court in this decision referred to the explanatory note in defining the disputes that fall under the jurisdiction of this committee “the explanatory note published by the office of the ruler, which defines the term “any dispute” to mean any dispute arising from renting the non-transferable goods only...” The Explanatory decree no. 1/1999 in regard to the jurisdiction of the rent committee, article 1.

³⁷⁵ Such is the case in Dubai, Sharjah, Abu Dhabi, and most emirates nowadays, which followed in their footsteps. See Al-tamimi supra note 12 at 25-26.

³⁷⁶ This committee usually located in the municipality or the land department of the Emirate and in some cases headed by a judge.

³⁷⁷ The court in more than one decision stated this fact, see Dubai Court of Cassation appeal no.47/2007, in which they stated “and that the ruling of this committee is final and binding and unappealable...” citing article 4 of the Emirate of Dubai Emir Decree no. 2/1993, in regard to forming a special tribunal to determine disputes between landlords and tenants. Moreover, there are two other laws regulating the relationship between landlords and tenants in Dubai, which are law no.26/2007, and law no.15/2009 concerning hearing rent disputes in the free zone.

This is in essence a hybrid system, modeled after institutional arbitration, and it has the attributes of court-annexed arbitration and adhesive arbitration.³⁷⁸ The lease committees have the support of the courts and the Emirates that created them.

However, not all lease disputes fall under the jurisdiction of these committees, which can be noted from the cases examined in this section. What, then, is the jurisdiction of these committees? Do their decisions constitute a form of court-annexed arbitration³⁷⁹? Are they a form of institutional arbitration or another form of arbitration altogether? Or do they represent a separate judicial authority that has the same legal powers as the court? Finally, what does the study of these committees add to the discussion of arbitration?

Sixteen cases are addressed in this section, from three high courts: the Dubai Cassation Court, the Abu Dhabi Cassation Court, and the Federal Supreme Court of the UAE.

4.3.3 Dubai Court of Cassation

The court of cassation in Dubai identified the jurisdiction of lease committees in three separate decisions,³⁸⁰ in which they came to the conclusion that:

Articles 1 and 4 of the decree³⁸¹ that established this committee gives it the power and the right to resolve leasing disputes and that their decisions are final and binding, moreover it is not subject to appeal. This fact is not affected by article

³⁷⁸ Since the parties are obliged to submit to this committee before seeking the court. See general, Levin supra note 141 at 538. Those committees are also similar to how Levin define court-annexed arbitration: “it is mandatory rather than voluntary; the arbitrators are typically assigned by a third party rather than chosen by the parties; and the award is not binding. Typically the procedure is imposed upon litigants by statute and by rule. Moreover, court-annexed arbitration is a method of dealing with civil litigants subsequent to the filing of the case while traditional arbitration occurs prior to the institution of the lawsuit.”

³⁷⁹ id.

³⁸⁰ Dubai Court of Cassation Appeal no.193/2002, issued on the 23rd of June 2002, Dubai Court of Cassation appeal no.47/2007, issued on the 29th of April 2007 and Dubai Court of cassation (civil circuit), appeal no. 133/2007, issued on the 23rd of September 2007.

³⁸¹ Decree no. 2/1993, supra note 377.

213³⁸², which established the jurisdiction of recognizing arbitral awards to the court; since the dispute between the parties concern a leasing agreement, which is regulated under the rules of the civil transaction law³⁸³ and the decree³⁸⁴, both of which gives the committee the jurisdiction to rule on all lease disputes, even those that concerning the recognition of arbitral awards, this fact is not overruled nor changed by the appeal court's decision, which establishes the jurisdiction to the court.³⁸⁵

The court in this decision established that the lease dispute committee has power equal to that of the court with regard to recognizing arbitral awards that arise from lease disputes. It also has the same supervisory powers that the court enjoys. The importance of these decisions is that the court gave up part of its supervisory power over arbitration to another entity. This outcome may be the result of the lease committee having been established by an Emir's decree that delegated all aspects of lease disputes to the committee. Thus, the lease committee is viewed not as a competitor to the court, but rather as an equal judicial authority that is an extension of the court's own jurisdiction. However, despite this structure, as created by the court, and (more importantly) legislative support for this structure, some arbitration cases still come through to the cassation court.³⁸⁶

This decision imply that parties in lease disputes are able to opt-out into arbitration outside the scope of the lease committee, only to have the committee act in the court's place to recognize and enforce the award. In another decision, which involved a question from one of the litigants about the option to submit to arbitration based on the existence of an arbitration clause in the contract, the court answered as follows:

³⁸² Civil Procedures law article 213 supra note 139.

³⁸³ civil transaction law articles 742-848, regulates this issue.

³⁸⁴ Supra note 380.

³⁸⁵ Appeal no. 193/2002, supra note 380. This decisions concerns an arbitral award, which was issued by an arbitrator appointed by the chamber of commerce and later on recognized by the lease committee.

³⁸⁶ It took thirteen months of litigation only to establish yet again that the committee has the authority to decide on all aspects that rises from a lease agreement, including recognizing an arbitral award.

The court responded to this by stating that article of the civil procedure law allows the emirate that have opted-out into establishing their local courts system the right to establish specialized legal committees³⁸⁷, and given the fact that the ruler of Dubai established in a decree³⁸⁸ a specialized legal committee, which states that the establishment of a specialized judicial committee that have jurisdiction over dispute raising between the tenants and their landlords whatever the nature of this dispute be³⁸⁹, and that the ruling of this committee is final and binding and un-appealable³⁹⁰. In addition, to the explanatory note published by the office of the ruler, which defines the term “any dispute” to mean any dispute rising from renting the non-transferable goods only³⁹¹. Thus, excluding it from the general principles of the court jurisdiction, emphasizing the fact that the court has no jurisdiction over lease disputes, and the parties has no right to opt-out by submitting their dispute to the court, or to agree to submit their dispute to arbitration. Furthermore, articles 742³⁹², 745³⁹³ and 770³⁹⁴ of the civil transaction law, implies that the dispute in this instance rises from a lease agreement, which gives the jurisdiction to settle this dispute to the rent committee, even if the parties of the contract agreed to submit their dispute to arbitration. Furthermore, article 85 of the civil procedures³⁹⁵ allow jurisdictional pleas to be heard at any stage in front of the court, in addition the court can decide on its own without a request of one of the parties, and since pleas on the existence of an arbitration clause fall under this category, and the appeal court dismissal of the appellant argument to dismiss the claim based on the existence of an arbitration clause is an indication that the court has the jurisdiction to hear the dispute. This decision is subject to appeal on its own before rendering the final decision in the dispute.³⁹⁶ Furthermore, based on the facts of this dispute, which have risen from a lease agreement between the parties and as such the jurisdiction to hear this dispute falls to the rent committee, and since the appeal court failed to uphold this fact.³⁹⁷

This decision differs from what was established by the same court in the previous decision. The court’s justification for this decision may be deduced from the above quote, which implies that it interpreted the legislature’s intent to give the committee

³⁸⁷ Article 1 of the civil procedures.

³⁸⁸ supra note 377.

³⁸⁹ Decree Article 1. Supra note 377.

³⁹⁰ Decree Article 4. Supra note 377.

³⁹¹ The Explanatory decree no. 1/1999 article 1 supra note 374.

³⁹² Civil transaction law article 742 of states: “A lease is granting ownership of the use of a specific thing to the lessee for a certain time in return for a fixed rent.”

³⁹³ id. article 745 states: “The object of the contract of lease is the enjoyment of the right to use the leased premises which takes effect by delivery thereof.”

³⁹⁴ Which explains the warranty over the leased property.

³⁹⁵ Civil procedures Article 85, states: “1- The plea against the court's jurisdiction for lack of its authority or because of the action's type, or its value may be exhibited in any of the action's circumstances, and the court shall automatically decide it. 2- If the court has judged its lack of jurisdiction it should give orders to forward the action, as is, to the authorized court, and the court's clerk office should notify the litigant parties with the decision.”

³⁹⁶ id article 151 state: “...deciding the lack of jurisdiction...” which gives the parties the right to appeal such decisions.

³⁹⁷ appeal no.47/2007, supra note 380.

general jurisdiction over all lease disputes. This implies that disputing parties may not submit to the court or to arbitration, and are obliged to submit a dispute that arises from a lease contract to the lease committee.³⁹⁸

What then is the nature of the lease committee and the status of arbitration in lease disputes according to the court in Dubai? It can be inferred from the previous discussion that two contrasting views exist within the same court.³⁹⁹ Those two interpretations given by the same court leave disputing parties at a crossroads, asking themselves which of these decisions and interpretations to follow.

Individuals are faced with two options in this situation: (1) both parties willingly uphold their contractual obligation to resort to arbitration, in which case they would claim their award through the lease committee⁴⁰⁰; (2) the parties resort to the lease dispute committee to settle their dispute, in the event that they do not willingly submit to arbitration. Having both options open at the same time is unproductive for individuals seeking to utilize arbitration. The court should adopt the first option of allowing arbitration in lease disputes to exist under the supervision of the lease committee.

The jurisdiction of the lease committee is challenged even further when the nature of the dispute comes into question; if the parties do not agree about the nature of the dispute or the nature of the contract that contains the arbitration

³⁹⁸ See general Al-tamimi supra note 12 at 25-26.

³⁹⁹ First off the court accepted the existence of arbitration in lease dispute outside the confines of the lease committee, the only condition that they gave is to shift the courts supervisory role to the committees, thus, the committee would be responsible of recognizing the award and ensuring that nothing affects the enforcement of such awards. However, the same court shifted and changed their own opinion on this matter, and interpreted the legislators intent to include all lease disputes under the scope of this committee, thereby the parties would be unable to opt-out into arbitration.

⁴⁰⁰ See appeal no. 193/2002, supra note 380.

clause, the case would fall to the court to determine what entity has jurisdiction over the dispute:

The appellant's claim that based on the documents presented in this case the relationship between the parties is in fact a lease agreement, since the appellants have lease land no.1013 from the defendant, as such it is in fact a lease agreement and not a company's contract, which falls under the jurisdiction of the lease committee and not the court. The court dismissed this argument, stating that lease committee⁴⁰¹ which regulates the leasing of un-transferable goods⁴⁰² is limited to the disputes that rise from the lease of those goods. Furthermore, the Court has the right to interpret the will of the parties and define the clauses of the contract, which the court has the right to deduce from the documents presented to it, as such the parties intent in this dispute were to have the appellants invest in the defendant property for ten years. Therefore, the dispute between the parties doesn't rise from a relationship between a tenant and a landlord, but a dispute rising from an investment contract, which makes the appeal court's decision to dismiss the appellant's plea that the court lacks jurisdiction justifiable.⁴⁰³

The court's power of interpretation over contracts is extensive and not limited to what the parties submit or to what has been written in the contract. The court is more than capable of, and willing to, interpret contracts and determine the competent authority that has jurisdiction over a dispute. In the event that it views the leasing contract as an investment contract, it would then fall outside the scope of the leasing committee and under the court's jurisdiction. However, in the previous decision, which involves a contract that could also be identified as an investment contract,⁴⁰⁴ the court decided to identify the dispute as arising from a lease contract and thereby confirmed that it should fall under the jurisdiction of the lease committee.

⁴⁰¹ decree no. 2/1993, supra note 377.

⁴⁰² explanatory decree no.1/1999, supra note 374.

⁴⁰³ Dubai Court of cassation (civil circuit), appeal no. 133/2007, issued on the 23rd of September 2007.

⁴⁰⁴ Appeal no.47/2007, supra note 380, which revolves around the leasing of a pavilion in a project called the global village for a certain period of time (usually no more than six months) the tenant would then be allowed to construct a pavilion over this land and lease the shops under the supervision of the global village.

This decision raises another question that concerns arbitration in general; namely, how does the court handle a case in which the parties question the legality of the contract. May the parties arbitrate their dispute if the legality of the contract is in question? In other words, does the court accept the separability doctrine?⁴⁰⁵

The appellants second ground of appeal argues that the appeal court by deciding that the first instance decision to appoint an arbitrator is not subject to appeal, have failed to apply the law, they argue that arbitration clause state that the arbitrator have the right to hear all dispute that arise from this contract, which implies that the arbitrator jurisdiction is limited to those disputes, and since the defendant claimed that the appellants have misguided and deceived the defendant, thereby removing this dispute from the arbitrators jurisdiction by falling outside the scope of the arbitration clause, moreover the defendant should have requested to nullify the contract instead of asking the court to appoint an arbitrator. The court agreed with the appellants argument, stating that according to articles 203⁴⁰⁶ and 204⁴⁰⁷ supports their claim, both articles implies that in order accept a request to appoint an arbitrator by the court, the parties are required to agree in writing to their intent to submit the dispute into arbitration, and if they identified the scope of the arbitration, then the arbitrators power is limited to what the parties have agreed upon in the contract without extending to other disputes, and according to the jurisprudence of this court, arbitration is an exceptional means of resolving dispute in which the individual waiver his right to submit his dispute to their natural judge, which requires the court to limit their interpretation of the arbitration clause to what has been explicitly agreed upon by the parties.⁴⁰⁸

The court's ability to interpret such cases is aided by the arguments and requests that the litigants submit to the court. The defendant asked the court to appoint an arbitrator, instead of asking the lease committee to do so; by this action, the defendant invited the court into the dispute. He argued that the appellants misguided him in the

⁴⁰⁵ See general, Carbonneau supra note 70 at 18. Were the author discusses the separability and kompetenz-kompetenz doctrine. See general Carbonneau supra note 74 at 30-31.

⁴⁰⁶ Civil procedures law article 203/2 state "The agreement shall not be recorded except in writing", see infra civil procedures law.

⁴⁰⁷ Civil Procedures law article 204 state: "1- If the litigation has occurred and the litigant parties haven't agreed on the arbitrators, or one or more arbitrators, who was agreed on, has abstained from the work, has retired there from, has been dismissed there from, or his refusal has been decided, or a hindrance has prevented his undertaking therein, and there were not an agreement between the litigant parties concerning that, the court which is principally authorized to examine that litigation shall appoint whoever shall be needed of the arbitrators, and that on the grounds of a request from one of the litigant parties, through the usual procedures of the action prosecution. The number of those appointed by the court should be equal to the number agreed on between the litigant parties or completing thereto. 2- It shall not be possible to appeal against the decision issued in that through any of the proceedings of appeal." See infra civil procedures law.

⁴⁰⁸ appeal no. 133/2007, supra note 403.

signing the contract, which may have compromised the legality of the contract. As the court is not generally eager to extend the powers of the arbitrators, the separability and *kompetenz-kompetenz* doctrines⁴⁰⁹ would have no application in this dispute—otherwise, the cassation court would have agreed with the defendant’s request to appoint an arbitrator. Instead, they stated that such arguments about the validity of the main contract do not entitle the court to appoint an arbitrator. This decision suggests that the court is required to first decide upon the validity of the main contract before appointing an arbitrator.

This entire dispute could have been avoided if the court applied two rules. First, the civil procedure rule that decisions about the appointment of the arbitrators is not subject to appeal.⁴¹⁰ Had this rule been applied, then the first instance decision to appoint an arbitrator in the dispute would have been final. The second rule relates to the separability and *kompetenz-kompetenz* doctrines. In applying these doctrines, the parties would agree to submit challenges to the arbitrators instead of to the court, which in turn would “reinforce the autonomy of the arbitral process.”⁴¹¹ Therefore, applying both of these rules would help to enforce the arbitrator’s autonomy and power over the arbitral process, which in turn would help to preserve the parties’ freedom of contract and the sanctity of the arbitral process.

The fourth decision that would be examined in here is one that involves a dispute over a land, in which the appellant tried to set-aside two arbitral awards, one of those argued that the arbitration agreement is null and subsequently the arbitral award is void, claiming that since the dispute was already being heard by the court the parties

⁴⁰⁹ See general, Carbonneau supra note 70 at 18, see Carbonneau supra note 74 at 30-31.

⁴¹⁰ Article 204 supra note 407, see also infra civil procedures law page.

⁴¹¹ Carbonneau supra note 70 at 18.

don't have the right to agree to arbitrate, the court response was based on article 210/1⁴¹² stating that:

article 210/1⁴¹³ of the civil procedures implies that even if a dispute was brought to the court this doesn't mean that the parties are unable to opt-out into arbitration, the only requirement is that the court hasn't decided the dispute. Therefore, opting-out into arbitration at the time of hearing the dispute in front of the court doesn't constitute a ground for setting-aside the award nor is it a parallel proceeding.⁴¹⁴

The appellant also argued that the arbitrator lacks the legal capacity to rule over the dispute, which was based on article 207/4⁴¹⁵ that addresses conditions for dismissing arbitrators. The court responded by stating:

the arbitrator capacity to rule is one of the grounds for setting aside the award under article 216⁴¹⁶. However, the grounds mentioned in this article have been explicitly identified, and in regards to article 207/4⁴¹⁷ which determines the conditions under which dismissing the arbitrator is possible, have set a time limit in which this request can be made to the court, the request should be made to the court within five days and this requirement applies to both ad-hoc and court-annexed arbitration. Therefore, in order for the award to be set-aside it needs to meet those requirements that have been explicitly stated in the law.⁴¹⁸

In essence, the appellant wanted to apply the same conditions for dismissing the arbitrators in court-annexed arbitration in this dispute in order to use it as a ground for setting-aside the arbitral award, the court interpreted the application of this article to be limited to court-annexed arbitration.

⁴¹² Civil procedures law article 210 state: "1 - If the litigant parties haven't set, as a condition in the agreement, a date for the arbitration the arbitrator should arbitrate within six month from the date of the session of the first arbitration, otherwise anyone who wanted of the litigant parties may prosecute the litigation to the court or may continue therein before the court if it was prosecuted before that." See *infra* civil procedures law.

⁴¹³ *id.*

⁴¹⁴ Dubai Court of Cassation appeal no. 10/1995, issued on the 8th of October 1995.

⁴¹⁵ *Supra* note 139, see appendix Civil procedures law.

⁴¹⁶ Civil procedures law article 216/1 subsection A states: "If it has been delivered without an arbitration report or delivered according to a void document or a document that has been extinguished by the failure to observe the date or if the arbitrator has gone beyond the document's limits." This is the translation provided by the ministry of justice, the document in here refers to the arbitration agreement. See *infra* the appendix civil procedures law.

⁴¹⁷ *Supra* note 139..

⁴¹⁸ Appeal no. 10/1995.

The appellant tried to contest the statement that was given under oath by contesting the procedure in which it was taken. In essence, the appellant was attempting to apply one of the conditions for setting aside the award according to article 216⁴¹⁹, which was dismissed by the court after examining and discussing this ground in detail.⁴²⁰

The last attempt by the appellant was to argue that the partially nullifying the award implies that the entire award is null since both parts of the award cannot be separated, the trial court reasoning for this partial nullification was that the arbitrator have exceeded the scope of the arbitration agreement in this point. The court finally accepted this attempt, by stating that:

if part of the award was nullified based on the arbitrator exceeding the scope of the arbitration agreement, which constitute nullifying the other half of the award that relates to the first part, which falls under the consideration of the trial court once they have based their decision on sound reasoning, and since the appealed decision responded to this argument by stating that the appellant has no right nor interest to appeal, which is a void decision since it failed to uphold due process.⁴²¹

However, do both parts of the award relate to each other? Why did the first instance decide to nullify the first half of the award? The first half of the award relates to registering a foreign property located outside the UAE, and the second to order him to pay compensation to the defendant.⁴²² The reason behind the first instance decision, can be explained by examining the UAE civil procedures law, which according to article 220/4 section C⁴²³, which requires the judge to refer the dispute that concerns properties to the judge or court that the property is located in, the theory behind this is

⁴¹⁹ Supra note 416.

⁴²⁰ See appeal no.10/1995.

⁴²¹ See Appeal no. 10/1995

⁴²² See Dubai Court of First instance, case no. 225/1993, issued on 27/4/1994.

⁴²³ Which addresses the jurisdiction of the execution judge on enforcing decisions over properties, civil procedures law article 220/4 section C, states: "If the execution included:.. C-Sequestered real estates located in another court's area or several courts' circuits.....By then , the authorized execution judge should forward the matter to an execution judge in any of the areas mentioned above in order to deliver such item or to sell such sequestered items."

since the properties are an unmovable objects and are most likely has special legislation that governs the transfer of property it is best suited to refer such disputes to the court that the property is located in their jurisdiction, since they are better suited to address the issues that relate to enforcing any order or award over that property. Furthermore, article 32⁴²⁴ of the civil procedures that addresses the jurisdiction of the court in property disputes confirms this principle, in addition to article 20⁴²⁵ that addresses the courts international jurisdiction and puts an exception over the courts jurisdiction when the dispute relates to a property that is located abroad. In essence, the civil procedures law compiles the court to refer disputes that concern properties to the court that the property is located in, the property in this dispute is located in Jordan, as such the court when deciding to recognize an award that concerns a property located outside the jurisdiction of the court would refer the dispute to that court. Thus, after understanding all of those regulations that govern disputes over property, it wouldn't come as a surprise that the court would decide to set-aside the first part of the award.

In conclusion, the court is trying to apply the same rules that govern litigation to arbitration, which results in conflict of principles and rules, on one hand they state that the arbitrator is not subject to the same standards that the judges are expected to meet, on the other they accept appeals even though the arbitration agreement clearly state that the arbitral award is not subject to appeal; those traits and contradictory

⁴²⁴ Civil procedures law article 32 state: "1- In the real estate actions and the possession actions, the jurisdiction should be given to the court in which circuit the real property, or one of its parts in case it exists in more than one court's circuit. 2- In the personal real estate actions the jurisdiction should be given to the courts in which circuit the real property or the residence of the prosecuted exists."

⁴²⁵ Civil procedures law article 20 state: "With the exception of the real actions related to a real estate abroad, the courts shall have the jurisdiction to examine the actions prosecuted against the citizen and the actions prosecuted against the foreigner who has residence or domicile in the state."

practice by the court is clearly noted from the early days of enacting the civil procedures law⁴²⁶.

4.3.4 Abu Dhabi Cassation Court

The five decisions examined in this section are more diverse in nature than those of the Dubai courts, and they do not explicitly discuss Abu Dhabi's lease committee. Instead, they provide more examples of how the court handles land disputes that involve arbitration.

The court in Abu Dhabi (AD) came to the same conclusion as that of the court in Dubai⁴²⁷ regarding the limited application of the separability and *kompetenz-kompetenz* doctrines, as exemplified by this statement:

The appellant argues that the appeal court by upholding the arbitral clause has misapplied the law according to article 203⁴²⁸, since the appellant upheld the argument that the clause is void since the main contract that contained the clause is void, subsequently the arbitrator has no jurisdiction over the dispute according to article 209/2⁴²⁹. Moreover, the appealed decision by stating that the arbitral clause still is valid even if the agreement in which it was contained were to be void and that the arbitrator is the one that has to determine the validity of the arbitral clause. However, the determination of whether or not the agreement is valid is a preliminary issue that falls outside the scope of the arbitrators power, since the nullification of the main contract would subsequently nullify the arbitral clause, as such the court should take back its jurisdiction. The cassation court accepted this argument, stating that the nullification of the main contract entails the nullification of the clause and the determination of the validity of the arbitral clause falls to the court according to article 209/2.⁴³⁰ In addition, the documents presented by the appellant shows that they have upheld this argument in front of the court and that the contract in question⁴³¹ is null and that the appealed decision did not answer this by deciding to refer the dispute to arbitration, which renders

⁴²⁶ Which in turn wont help arbitration to reach its goal of "alleviating court congestion" as Rayner puts it." In an effort to alleviate court congestion, several American jurisdictions attempted to channel small claim disputes into arbitration, either voluntary or compulsory." Rayner supra note 5 at 37.

⁴²⁷ See appeal no. 133/2007 supra note 403. See general Carbonneau supra note 74 at 30-31.

⁴²⁸ Civil procedures law article 203/3 states "The scope of the arbitration should be established in the arbitration agreement or during the examination of the suit, even if the arbitrators were authorized to reconcile, otherwise the arbitration shall be void."

⁴²⁹ Civil procedures law article 209/2 state: "2- If a priority matter which is not related to the arbitrator's authority, or an appeal against a paper falsification, or a criminal procedures have been taken in its falsification, or in another criminal incident has been exposed during the arbitration, the arbitrator shall stop his work until a final decision shall be issued therein, and the arbitrator shall also stop his work in order to refer to the authorized court's president to proceed..."

⁴³⁰ id.

⁴³¹ Which was concluded on the 17/1/1999 and contained the arbitration clause.

the decision unlawful for it gave the power to the arbitrators to determine their own jurisdiction.⁴³²

With this decision, the AD court mirrors the decision of the Dubai court and then goes further, shutting down any attempt by the lower court to introduce those principles. This is highlighted by the way in which the court sided with the appellant and disregarded the findings of the first instance court. The court's view can be explained by how the court defines arbitration and the way courts and jurists in the UAE explain and view arbitration.⁴³³ When interpreting contracts, the AD court refers back to the general principles of interpretation, which are codified in the civil transaction law.⁴³⁴ These principles provide insight into how the court functions, and most importantly how the courts apply rules to interpret contracts and clauses. In this instance, the court used came to the conclusion that the separability doctrine has no application.⁴³⁵

The above decision is also similar to how the Dubai court came to decide to exclude investment contracts from the jurisdiction of the lease committees.⁴³⁶

However, in another dispute, the court included disputes that arise from investment contracts under the jurisdiction of the lease committee:

The appellant argues in the first ground of appeal that the court has no jurisdiction over the dispute, which should fall under the jurisdiction of the lease committee

⁴³² Abu Dhabi Court of Cassation (civil circuit) appeal no. 58/2007, issued on the 30th of October 2007.

⁴³³ See supra 2.6.5 at 32, UAE Courts' View of the Definition.

⁴³⁴ Those principles determine the interpretation of contract are mentioned in articles 29-70 of the civil transaction law; such as the ones mentioned in articles 53-57, article 53 Accessory is appurtenant and may not be individualized independently. Article 54 where the principal is forfeited, the ancillary follows. Article 55 that is forfeited, alike the inexistent, shall not come back to existence. Article 56 voidance shall extend to the thing and its contents. Article 57 where the principal is void the substitute shall be sought.

⁴³⁵ Even though the Abu Dhabi court is considered to be in its early years and was established in this new era, it is still applying the same principles and have the same view as that of the other courts in the UAE. Therefore, the Abu Dhabi court by trying to establish its own jurisprudence on arbitration is in reality mirroring the jurisprudence of other courts in the UAE. Which, emphasize the importance of minimizing the courts power of interpretation when it comes to arbitration, in order to develop a functioning arbitration system.

⁴³⁶ See general Dubai Court of Cassation, appeal no.133/2007, which is due to the fact that the contract in question is an investment contract over a land, supra note 403.

according to law no.20/2006⁴³⁷. Moreover, this dispute doesn't fall under the provisions of the civil transaction law that addresses the lease contracts in general, rather it falls under the provisions of the lease law no.20/2006. The court agreed with this ground stating that article 2, 24 and 25 of that law no. 20/2006 in regard to regulating the lease transaction between the tenants and the landlords in the emirate of Abu Dhabi, delegates all lease disputes in Abu Dhabi to this committee, including interim measures, which falls under article 31 of that law, and since the request in this situation is an interim one, in the form of a request to vacate the property, which falls under the lease committee jurisdiction, this idea is further supported by article 25 of that law. A general arbitration clause doesn't deter the appellant from presenting his request to the lease committee and consequently doesn't deter the committee from hearing the case. Therefore, the jurisdiction in this dispute doesn't fall to the court nor to arbitration, rather to the lease committee based on article 25 of law no.20/2006.⁴³⁸

In this decision, the court appears uncertain as to how to determine the jurisdiction of the lease committee.⁴³⁹ In one instance, the court determined that investment contracts are excluded from the jurisdiction of the lease committee, and in another, it states that such contracts do fall under the jurisdiction of this committee. This uncertainty produces confusion and conflict within the court itself.

This dispute also demonstrates how the court addressed the matter of interim measures, which the court requires to be explicitly stated in the arbitral clause in order for the case to fall under the arbitrators' jurisdiction, even if the interim measure is raised by an issue that directly relates to the contract in question, such as the case in this dispute:

[t]he appellant argues in the second ground of the appeal that the court's decision to dismiss their request of referring the dispute to arbitration, was based on the fact that the clause is a general one and didn't specify interim measures to fall under the scope of the arbitration clause, as such interim measures would fall under the court jurisdiction. The appellant argues that this interpretation of the clause is flawed, for it is limiting the application of the arbitral clause, given that the parties have agreed to refer all disputes to arbitration, which include interim measures. The court dismissed this argument stating that interim measures need to be mentioned explicitly in the clause, in order for it fall under the arbitrators power, implying that such

⁴³⁷ Abu Dhabi law no.20/2006, in regard to regulating the lease transactions between the tenants and the landlords.

⁴³⁸ Abu Dhabi Court of Cassation, civil circuit appeal no.136/2009, issued 31/3/2009.

⁴³⁹ Which is similar to the situation in Dubai.

measures falls outside the scope of arbitral clause, and subsequently outside of the scope of the arbitrators power. Moreover, it doesn't prohibit the parties from referring such disputes to the court.⁴⁴⁰

The probability of having an arbitral award vacated may arise due to this decision, since the court is adding a further requirement to the arbitral clause, because the interim measures that arise from a lease agreement fall under the jurisdiction of the lease committee. In the event that an arbitral clause does not explicitly include such measures, the court would set aside the award, because, in its view, arbitrators lack the jurisdictional authority to rule on interim measures. Also, the court tends to favor supporting the lease committee, because it views it as an extension of the court's own authority.⁴⁴¹ Taking all of this into consideration, it is crucial that the arbitral clause explicitly states the existence of the interim measures.

The ability to invoke the arbitral clause in land/lease disputes would still be governed by the same rules that govern arbitration in the UAE, which was in fact the case when one disputing party tried to refer the dispute to arbitration in front of the court:

The appellant appealed this decision to the cassation court, arguing that the arbitration clause is void since the defendants failed to uphold this argument in the first hearing, which according to article 203/5⁴⁴² constitute a waiver of their right to uphold this clause. The cassation court agreed with this argument, stating that article 203 requires the party seeking to uphold the arbitration clause to take a positive action in the first hearing and that the failure to do so would result in a waiver of this clause, and based on the facts of the case the defendant request to

⁴⁴⁰ Appeal no.136/2009 supra note 438.

⁴⁴¹ Which can be attributed to the fact that they are established through an Emir decree, which makes them into a specialized judicial authority that is headed in some emirates by judges, as such they are viewed as a branch of the court, a specialized independent branch but a branch nonetheless. Thus, the court would not treat it as an exception to litigation rather it would be viewed as the main source of judicial relief when it comes to lease disputes. See general Law no. 20/2006 supra note 437, and law no 2/1993 and law no. 26/2007 and 15/2009 supra note 377.

⁴⁴² Civil procedures law article 203/5 state "If the litigant parties have agreed on the arbitration in some litigation, it shall not be possible to prosecute an action therewith before the judiciary, however, if one of the two litigant parties has resorted to prosecute the action without taking into consideration the arbitration condition and the other party hasn't objected at the first sessions, the action should be examined and the arbitration agreement shall be void."

refer the dispute into arbitration were done in the second hearing and not the first, implying that they have waived their right to arbitrate, subsequently nullifies this clause. Thus, the court decided to vacate the appeal decision and refer the dispute back to the court.⁴⁴³

This dispute is a prime example of the application of the court's own views on arbitration. In this instance, these views favor an interpretation of arbitration as an exception to the individual's right to seek their natural judge⁴⁴⁴, as well as an application of the rules of article 203/5. Also, upon attempting to take a pro-arbitration stand,⁴⁴⁵ the appeals court was shut down by the cassation court.

The point of conflict between the courts is the determination of what is meant by the first hearing. It can be inferred that the appeals court's definition of the first hearing differs slightly from the cassation court, and it expanded the meaning of the first hearing beyond what the cassation court was willing to accept. The appeals court is taking a pro-arbitration stance in expanding the meaning of the first hearing. In doing so, it is favoring a practical interpretation of this article, given the fact that in most cases, the first hearing usually is considered to have occurred when the parties appear in the court either on their own or through their legal representatives. In most instances, the participants in the first hearing would ask the court to postpone the hearing in order to prepare their answers and defense, which makes the second hearing the one in which the litigants present these answers and defenses. Thus, the appeals court is viewing the first hearing as the one in which the parties start

⁴⁴³ Abu Dhabi Court of Cassation civil circuit, appeal no. 72/2007, issued on the 11th of December 2007.

⁴⁴⁴ This term refer to the judge that has the original authority to settle the dispute. see general Turki supra note 11 at 404-411.

⁴⁴⁵ The appeal court reversed the decision of the first instance court, which in turn mirrored that of the cassation court.

presenting their arguments to the court; this interpretation takes a more practical interpretation of this article.⁴⁴⁶

The court also examined the ability of a minor to enter into an arbitration agreement either on his or her own or through a guardian or legal representative, which also applies to disputes that relate to the ownership of land, and to whether or not the transaction in question is a sales or an investment contract. In the case cited below, the argument presented by the defendant involved whether the court should dismiss the dispute based on the existence of an arbitration clause in the sales contract:

[t]he appellant argues that they have upheld their request to dismiss the dispute based on the existence of the arbitration clause. However, the court dismissed their request, basing their refusal on article 159 of the civil transactions law.⁴⁴⁷ Which, implies that the minor has the right to allow certain acts once he become of age, and the defendant after coming of age didn't agree to be bound by the arbitration clause. However, this article is limited to the acts in which the minor have entered on his own and not agreements that were concluded through his agent, in this case through his guardian. The court dismissed this argument stating that the appealed decision dismissed the claim to uphold the arbitration clause based upon the fact that dispute doesn't fall within the scope of the arbitration clause. Moreover, article 159/2⁴⁴⁸ of the civil transaction law state that the acts that fall between profitable or detrimental requires the consent of the minors guardian or the minors own consent after he become of age, this fact doesn't change whether he concluded the contract on his own or through his guardian, making the appellants argument in this regard void and without basis.⁴⁴⁹

Some rules that may be inferred from this discussion are requirements for parties that have entered into a contract with a minor or a guardian:

⁴⁴⁶ This approach by the appeal court exemplify the important role that the judges are able to play in promoting arbitration.

⁴⁴⁷ Civil transaction law article 159 which state: "1-Pecuniary dispositions of the discerning minor are valid, if totally beneficial to him, and void if entirely detrimental. 2 - All acts of disposition that may vary between being profitable or detrimental depend of the ratification of the tutor, within the limits he initially is allowed to dispose of, or of the minor after attaining legal age. 3 - The age of discernment is seven full Hegira years."

⁴⁴⁸ id.

⁴⁴⁹ Abu Dhabi court of cassation civil circuit, appeal no. 66 and 71/2007, issued on 15th January 2008

First, this rule require the parties to understand that arbitration agreements are considered to be acts that “vary between profitable or detrimental,”⁴⁵⁰ and furthermore they require the recognition of both the guardian and the minor after he or she reaches the legal age.

Second, this case shows that despite the fact that the guardian agreed to enter into this contract, the court still felt that such action requires the consent and ratification of a minor after he or she comes of age⁴⁵¹. This implies that arbitration falls outside the limits of the guardian’s capacity to enter into a contract, in addition to determining that this dispute falls outside the scope of the arbitration clause, which is sufficient to send the jurisdiction back to the court.

In essence, the court is insuring a minor’s right to review the arbitration agreement once he or she reaches the legal age⁴⁵². It also is granting the minor the legal right to withdraw from the agreement once he or she comes of age, which represents the court’s view of the dangers that are incurred by opting-out of the court’s jurisdiction, and by deciding to substitute the natural judge with an arbitrator.

This decision creates a dilemma for parties seeking to enter into an arbitration agreement, in the event that one of the parties is a minor. An arbitration agreement that involves a minor, or his/her guardian, as a party, has a higher chance of being appealed to the court and to subsequently be nullified by the court. This is a result of the court’s view of arbitration, combined with having a minor as a party to the arbitration agreement. Both factors are taken into consideration by the court when addressing pleas of this nature, the result of which would most likely favor the minor.

⁴⁵⁰ Civil Transaction law article 159/1 and 2, supra note 447. See general, MOUSA RAZEEQ, *AL-MADKIL ELA DRAST AL-QANOON*, (The Introduction to the Study of Law), 197 (2nd ed. 2006).

⁴⁵¹ Razeeq supra note 450 at 199-200.

⁴⁵² id at 199.

It would be discussed at length by the court, given that arbitration is an act that falls between “profitable and detrimental,⁴⁵³” and as such it is the court’s obligation to protect the minor’s rights by ensuring that entering into an arbitration agreement would be profitable and beneficial to the minor.

Because AD recently opted-out of the federal courts system, it is expected that some disputes would begin under the federal courts and end in the AD cassation court, and the following case, in which an arbitral award was contested and set aside serves as an illustration of this transition period:

The appellant appealed this decision to the Supreme Court of the UAE⁴⁵⁴, the court decided to dismiss the appeal⁴⁵⁵ This decision was appealed to the cassation court; the appellant argues that the court decided to nullify the award based on article 206/2⁴⁵⁶. However, the appointment of the arbitrators was done according to clause 22 of the contract, which was done according to the law since it allows the parties the freedom to opt-out into arbitration. Moreover, article 216⁴⁵⁷ states specific conditions for setting-aside arbitral awards, which don’t apply to this dispute. Furthermore, article 217⁴⁵⁸ states that the arbitral award is not subject to appeal. In addition, the defendant waived their right to appeal since they have agreed to arbitrate according to the arbitration agreement of 5/6/2006, which was drafted according to the requirements of article 203⁴⁵⁹ and 204.⁴⁶⁰ The cassation court dismissed this argument, stating that article 206/2⁴⁶¹ explicitly requires that the number of arbitrators should be an odd one, which is a rule that concerns public policy, as such the parties has no

⁴⁵³ id. at 197.

⁴⁵⁴ This was before the emirate of Abu Dhabi withdrew from the federal court system, and established their own Cassation Court.

⁴⁵⁵ Federal Supreme Court of the UAE, appeal no. 25/308, issued on 21/3/2005.

⁴⁵⁶ Civil Procedures Law article 206/2 states: “2- If there were many arbitrators their numbers, in all circumstances, should be odd.”

⁴⁵⁷ Supra note 416.

⁴⁵⁸ Civil Procedures Law article 217/1 states: “The arbitrators' decisions shall not accept the appeal therein through any of the appeal proceedings.” This is the ministry of justice translation, which essentially means that arbitral awards are not subject to appeal.

⁴⁵⁹ Article 203/2 supra note 406, article 203/3 supra note 428. Article 203/4 state “It shall not be possible to arbitrate in the matters in which the reconciliation is not possible, and it shall not be valid to agree on the arbitration unless by those who have the capacity of disposition in the litigated right.” Article 203/5 state “If the litigant parties have agreed on the arbitration in some litigation, it shall not be possible to prosecute an action therewith before the judiciary, however, if one of the two litigant parties has resorted to prosecute the action without taking into consideration the arbitration condition and the other party hasn't objected at the first sessions, the action should be examined and the arbitration agreement shall be void.”

⁴⁶⁰ Supra note 407.

⁴⁶¹ Supra note 456.

right to waiver this rule. Moreover, the waiver of this requirement in the contract doesn't entitle that the act itself is lawful in the eyes of the court. Thus, arguing in front of the court that the parties have agreed to waive their right to appeal or their right to contest the arbitration agreement, has no merit according to article 216⁴⁶². In addition, article 166⁴⁶³ state that if the appeal court vacated the first instance decision it is required to render a decision in the dispute, the appeal court failed to do so and as such the dispute is referred back to the appeal court to render a decision in the dispute.⁴⁶⁴

Are the parties allowed to appoint an even number of arbitrators? The court's answer to this is noted in this decision. However, the legislation is subject to a number of interpretations. If the courts were to interpret these articles in a way that favors arbitration, it would be saying that article 206 does not relate to public policy, and that the purpose of article 206 is to ensure that the parties do not deadlock. It would also essentially limit the application of this article to disputes that arise before the issuing of an arbitral award, since an arbitral award issued by an even number of arbitrators is issued in consensus, in which case there can be no deadlock that would justify nullifying the arbitration agreement.

This rule does not apply to family arbitration, which is governed by the rules of Shari'a, which allows the existence of an even number of arbitrators; indeed, it is the norm in family law cases to have an even number of arbitrators. Why, then, is an even number of arbitrators a factor that leads to awards being set aside in other forms of arbitration? The simple answer goes to the fact that the court's hands are tied when

⁴⁶² Supra note 416.

⁴⁶³ civil procedures law article 166 states: "If the court of first instance decided in the matter and the appellate court found that there has been a nullity in the decision or a nullity in the procedures affecting the decision, it shall decide its cancellation and judge in the action. But if the court of first instance has judged the lack of jurisdiction or the acceptance of a subsidiary plea that has had as a consequent the hindrance of the action progression, and the appellate court has decided the cancellation of the decision and the jurisdiction of the court or the rejection of the subsidiary plea and decided to examine the action, it should return the case to the court of first instance to decide in its matter."

⁴⁶⁴ Abu Dhabi Court of Cassation (civil circuit), appeal no.186/2008, issued on 8th of June 2008.

it comes to arbitration that is based on the rules of the Shari'a,⁴⁶⁵ and they have more room for maneuver and interpretation in other forms of arbitration.

4.3.5 Federal Supreme Court of The UAE

The seven decisions examined in this section shed light on the federal court's views on the subject of lease/land disputes and the lease committee. They also explore this court's attitudes toward lease disputes over transferable goods such as ships and airplanes.

The federal court supports of the lease committee is highlighted by the following decision:

the emir decree no.92/77⁴⁶⁶, which gave this tribunal the authority to settle lease disputes, which implies that the tribunal decisions are of a judicial nature, this fact doesn't change if the members of those tribunal are part of the judicial authority or not, moreover in order to enforce the award issued from this tribunal it doesn't require a judge to issue this award.⁴⁶⁷

Moreover, the court explained the nature of the committee in the emirate of Sharjah:

arbitration tribunal of the municipality of Sharjah, is an administrative tribunal, which can be emphasized from the way it was established and the nature of the members of the tribunal. However, the legislator in the Emirate of Sharjah added to this tribunal the responsibility to settle disputes between the tenants and the owners under the law no. 92/77 and its amendments 7/86, 4/88, furthermore article five of that law has stated on the conditions in which the tenants fail to fulfill his obligation, which is the base of the complain that the defendant stated in their plea in front of the tribunal. Moreover, based on article nine of that law the tribunal has the jurisdiction to settle the dispute between the parties, it also gives the party that want to object on the tribunals award the right to do so in front of the court, within fifteen days from them being notified by the issuing of the award, otherwise the decision would be binding and enforceable in front of the execution judge, furthermore, the only decisions that are enforceable in front of the execution judge are judicial decisions and as such the tribunal awards has judicial power equal to that of a courts decision. This fact isn't affected by the federal law no.6/78 in regard to establishing the federal courts, which didn't govern those tribunals for the

⁴⁶⁵ See supra chapter three of this study at 48-93.

⁴⁶⁶ Sharjah's Law no. 92/1977 and its amendments laws no.7/1986 and no.4/1988.

⁴⁶⁷ Federal Supreme Court of the UAE appeal no. 181/15, issued on the 19th of March 1995.

legislators intent in here is to leave the power of governing those tribunals to the local authorities.⁴⁶⁸

Which in the case of Sharjah, the debate is settled to the nature of this committee, based on this decision they are an administrative tribunal that have jurisdiction over lease disputes. Implying, that arbitration in Sharjah in regard to lease disputes would be examined by this committee, which raises concern when it comes to arbitration, since the decisions of the committee are subject to appeal to the court, thereby the litigants would have to go through three different forms of adjudication in order to resolve their disputes.

Another decision that highlights the examined the ability to appeal the decisions of the committee, is one that concerns the lease committee in Ajman:

even though article 16 of the decree⁴⁶⁹ state that the committees decisions are not subject to appeal, however, article 18/7 of the same decree allows the parties to set-aside the award on grounds that matches those of article 216⁴⁷⁰, and since the civil procedures law didn't state on a reason that relates to the subject matter of the dispute as a ground for setting-aside the award, as such the courts authority doesn't extend to examine those arguments that relates to the subject matter of the dispute, such as the ones presented by the appellant.⁴⁷¹

The hybrid nature of lease disputes should have helped in bolstering the status of this form of arbitration, in essence it should have meant that such awards would be enforceable, and the way to do that is by not subjugating them to appeals. However, the nature of the dispute had a minimal effect on the courts practice when it comes to appeals and accepting them. The court by allowing the appeals are simply flooding their own desks with never ending suits, in disputes that have already been settled by a final and binding decision. In essence, the court is upholding the individuals right to appeal over their right to arbitrate. Since both of those rights have been regulated

⁴⁶⁸ id.

⁴⁶⁹ Ajman Emir decree no. 6/2005 in regard to regulating lease transaction in Ajman.

⁴⁷⁰ Supra note 416.

⁴⁷¹ Federal Supreme Court of the UAE, appeal no. 5/2009, issued on the 17th of February 2010.

under the civil procedures law and the Emir decree, as such the court is able to justify which ever view or right they wish to support, and based on the courts practice and jurisprudence it is more likely that they would support the individual right to appeal, which is also supported by the courts view on arbitration and their view on the necessity of allowing appeals in order to preserve justice.

In another decision the court managed to limit the jurisdiction of the committee in Sharjah, by stating:

this committee's jurisdiction is limited to the disputes that rises from lease agreements between the landlord and the tenant in regard to the execution of that agreement only, and that the parties in this dispute don't fall under that category, since in this instance the dispute is between the owners in which case the court has the jurisdiction to hear the dispute.⁴⁷²

The benefits of extending the jurisdiction of those committee outweigh the ones gained from limiting their jurisdiction⁴⁷³, however, in order for those benefits to be gained the court would have to give up there practice of accepting all appeals, for even if the court were to stand by and uphold the jurisdiction of those committees, without deterring the parties from appeals, then there is no use from trying to extend the jurisdiction of those committees, for the purpose of having them and in extension any arbitration agreement of that sort would be defeated, since one of the purpose of establishing such committees is to ease the courts case load. Nevertheless, despite having all of the necessary tools available for the court to support this form of arbitration that already has the support of the legislator. However, the court is still

⁴⁷² Federal Supreme Court of the UAE, appeal no. 116/17, issued on the 31st of October 1995.

⁴⁷³ By extending their jurisdiction over all disputes that concerns lease agreements, these committees would be able to fulfill their goals of easing the caseload from the court, furthermore it would help to eradicate any confusion that the parties have in regard to were the parties should submit their disputes. See general Turki supra note 11 at 391, the author in here explains the reason behind establishing specialized courts, which also extends to the committees. See Also, ALI SHAHTAH AL-HADIDI, *AL-QD'IA W AL-TQADI*, (The judiciary and litigation with regard to the civil procedures law of the United Arab Emirates) 257-259 (Part one 2007). The author in here discuss these committees and discuss the ones in Dubai.

unwilling to forsake their jurisdiction. Implying, that once given the opportunity the court would always be more than willing to retake their jurisdiction.

The following case involves a lease dispute of a mixed nature, which revolved around the lease of a maritime vessel that combined both civil and commercial legal transactions.⁴⁷⁴ This act was excluded from the jurisdiction of the lease committee.⁴⁷⁵ It is thus crucial to understand how arbitration fits into such a case, and to determine whether the nature of the dispute affected the court's decision. The court's tone in this case changed and abandoned its practice of contesting the jurisdiction of arbitration, even when the appellant tried to dispose of the arbitral jurisdiction by invoking the provisions of *force majeure*⁴⁷⁶. Interim measures were examined as well:

The appellant first ground of appeal, argues that the decision failed to uphold the provisions of the law and more specifically the requirements of article 212/2⁴⁷⁷, which requires that the arbitrator to uphold the law when deciding on the dispute, which implies that the arbitrator is required to follow the requirements of article 245 of the commercial maritime law⁴⁷⁸, thus the arbitrator is forced to apply the rules of force majeure that exclude the

⁴⁷⁴ The general rules that govern lease disputes are mentioned in the civil transaction law; the lease of maritime vessels is regulated under the commercial maritime law, Federal Law no.26/1981, Concerning Commercial Maritime law, (hereinafter maritime law) articles 216-255 regulates the lease of maritime vessels.

⁴⁷⁵ Given the fact that these committees regulate lease transactions over non-transferable goods. See general Dubai decree no. 2/1993 supra note 377, Ajman decree no. 6/2005 supra note 469, Sharjah law no. 92/77 and 7/1986 and 4/1988 supra note 466, AD law no. 2006 supra note 437.

⁴⁷⁶ Civil Transaction article 273: "1- In bilateral contracts, if a force majeure arises that makes the performance of the obligation impossible, the corresponding obligation shall be extinguished and the contract ipso facto rescinded. 2 - If the impossibility is partial, the consideration for the impossible part shall be extinguished. This shall also apply on the provisional impossibility in continuous contracts. In both instances the creditor may rescind the contract provided the debtor has knowledge thereof."

⁴⁷⁷ Civil Procedures article 212/2 state: "The arbitrator's decision shall be according to the rules of the law unless if it were authorized with the reconciliation, then it shall not be obliged with such rules except with those related to the public order." See also ALI NAJDAH, AL-NTHRYAH AL-AMAH LL'LITZAM (AL-KTAB AL-AWAL MSADR AL-ALTZAM), (The general theory of obligation, book one the sources of obligation) 436-442 (1st ed. 1993). See general CAROLE MURRAY ET AL., SCHMITTHOFF EXPORT TRADE: THE LAW AND PRACTICE OF INTRATNIONAL TRADE 138 (11th ed. 2007). See general Ingeborg Schwenzer, *Force Majeure and Hardship in international sales contract*, 39 Victoria U. Wellington L. Rev. 709 (2008). See general Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 Inter. Rev. & Econ. 641 (2005). Both articles examine the affect of force majeure in international trade.

⁴⁷⁸ Commercial Maritime article 245 state: "The freighter must place the specified vessel, in seaworthy condition and properly equipped to carry out the operations specified in the charter party, at the disposal of the charterer at the agreed time and place. Furthermore he must keep the vessel in such condition throughout the period of the contract."

appellants from their obligation to pay the lease amount. The appellant continued their argument by stating that the appeal court at first agreed with this argument and referred the award back to the arbitrator to answer the appellants concerns in this regard. However, they retracted their decision after being informed that the arbitrator passed away, stating that they have the right to retract their decision since it is a matter relating to the law of evidence and according to article 5/1⁴⁷⁹, the court has the right to retract their decision. The appellant argues that interim measure doesn't fall under this article and the court issued the interim measure according to article 214 of the civil procedures⁴⁸⁰, which the court has no right to retract and the passing of the arbitrator doesn't affect this matter, the court should have appointed a new arbitrator or answered the dispute on their own. The appellant continued their argument stating that the interim measure renders the arbitral award null, in addition to the fact that the award has been issued in contrast to articles 245⁴⁸¹ and 249⁴⁸² of the maritime law, moreover the arbitrator have failed to taken into account the ships captains statement that confirms that the failure of the ships engines was due to force majeure.⁴⁸³

The court's response to the appellant's argument implies that the nature of the disputes affected their decision, even though the court defines arbitration as an exception that requires the strict supervision of the court in order to protect the parties' rights. This protection is limited when the parties' transaction is of a commercial nature,⁴⁸⁴ which implies that the parties are well-informed and

⁴⁷⁹ Federal Law no.10/1992 On Evidence In Civil and Commercial Transactions, article 5/1 state:" 1-The Court may, by virtue of a decision recorded in the minutes of the session, go back on what it has ordered to be taken as evidence procedures, provided it mentions in the minutes the reasons for changing its mind, unless such change was decided by the court without a request from the parties to the litigation."

⁴⁸⁰ Civil Procedures article 214 state: "The court may, during the examination of the authentication request of the arbitrators' decision, return it to them in order to examine what they have failed to arbitrate in the arbitration matters therein or to clarify the decision if it were not definite in a way that makes it impossible to execute, and the arbitrators should, in both cases, deliver their decision within three months from the date of their notification with the decision unless the law shall decide otherwise. It is not possible to appeal against its decision except with the final sentence delivered with the authentication of the sentence or its invalidation."

⁴⁸¹Supra note 477.

⁴⁸² Commercial Maritime article 249 states:" 1-The rent shall begin to run from the day on which the vessel is placed at the disposal of the charterer but nevertheless the rent is not due if the vessel is lost or if it is stopped by force majeure or act of the freighter. It is not allowed to agree that the same shall be paid under all circumstances. 2 - If news about the vessel cease and it is then established that it is lost, the rent shall be payable in full up to the date of the last news about the vessel."

⁴⁸³ Federal Supreme Court of the UAE appeal no.32/23, issued on the 6th of August 2003.

⁴⁸⁴ The reason why the parties are considered to fall under the provisions of the commercial law related to the article 1 of the commercial transaction law, which identifies the jurisdiction of the commercial law over merchants and all commercial acts. supra note 329. To better understand the UAE stand on lease of maritime vessels, see General FAYEZ NAEM RDWAN, *QANON AL-BAHI FE DWALT AL-EMARAT AL-ARABYAH AL-MTHADH*, (Maritime Law in the United Arab Emirates) 236-242 (3rd ed. 2008).

consequently do not require the court's protection, as noted in their response to this argument:

The court dismissed this claim stating that article 214⁴⁸⁵, implies that the court has the right to clarify some of the provisions within the award that the arbitrator failed to explain in the award, this clarification is considered to be an interim measure that doesn't bind the court when deciding the subject of the dispute, unless the clarification by the arbitrator have managed to decide or change part of the award, only then would the court be bound. Moreover, according to the jurisprudence of this court the appellant need to specify the grounds of appeal, for example if the appeal was based on the fact that the arbitrator have failed to rule on one of the subjects of the dispute that the parties have agreed to include in the arbitration agreement, then the appellant need to identify those issues in his appeal. Furthermore, according to the jurisprudence of this court article 212 sections 1 and 2 of the civil procedures⁴⁸⁶ shows the requirements needed in an arbitral award, and that the award is not required to meet the same requirements of a court's decision. Therefore, the court when deciding whether to recognize an award or not they are not required to examine the subject of the dispute only to ensure that public policy hasn't been breached. However, the court is required to examine the procedures within the arbitration process, to ensure that the arbitrators have met the requirements of articles 212⁴⁸⁷ and 216⁴⁸⁸. The courts supervision over the arbitral award is limited and the purpose of having such a supervision is to ensure that the award is enforceable within the UAE, the courts supervision should not extend to revising the subject of the award, for an award that have met the procedural requirements is considered to be a binding and enforceable award that receives res judicata status. Consequently, the appeal court decided to implement article 214⁴⁸⁹, which grants the court the right to seek explanation from the arbitrator and since the arbitrator have passed away the court is unable to get such clarification from the arbitrator. Therefore, the request to set-aside the award by the appellant should be limited to the award as being a legal act and should be on the procedural aspects of the award according to article 216⁴⁹⁰ and not on what the arbitrator decided to grant in the award. Since the appealed decision came to the conclusion that the arbitrator upheld due process and rendered an award within the scope of the arbitration agreement and issued an enforceable award, in addition the appellant didn't identify the aspects that the arbitrator have failed to rule upon in the arbitration, which renders their plea ungrounded.⁴⁹¹

⁴⁸⁵ Supra note 479.

⁴⁸⁶ Civil Procedures article 212/1 state: "The arbitrator shall deliver his decision without being bound to the civil procedures except to what has been mentioned in this chapter and the procedures concerning the litigant parties' action and hearing their defense's aspects, and enabling them to submit their documents, however, the parties may agree on certain procedures according to which the arbitrator should proceed." See article 212/2 supra note 476.

⁴⁸⁷ Id.

⁴⁸⁸ Supra note 416.

⁴⁸⁹ Supra note 480.

⁴⁹⁰ Supra note 416.

⁴⁹¹ Appeal no.32/23, supra note 483.

The court's dismissal of the appellant's argument is of great significance, since it highlights the change in the court's views. Namely, the court in this dispute did not employ its power to set aside the arbitral award, which it could have done for a number of reasons. First, the court could have used the passing of the arbitrator as an excuse to amend or set-aside the award. Second, it could have accepted the appellant's argument to exempt liability based on *force majeure*⁴⁹². However, the court uncharacteristically stated, "The court's supervision over the arbitral award is limited and the purpose of having such a supervision is to ensure that the award is enforceable within the UAE, the courts supervision should not extend to revising the subject of the award."⁴⁹³ The only distinctive feature in this dispute that may explain the court's leniency is the nature of the parties and the dispute; the commercial element in the dispute works in favor of arbitration in this instance.

Leasing disputes are not limited to properties and maritime vessels. Another form of lease dispute, which is similar to leasing a maritime vessel (since both kinds of transportation fulfill the same purpose of transferring goods between ports), is leasing airplanes]. This emphasizes the importance of distinguishing between the different types of lease contracts and identifying their nature. As is the case in leasing a maritime vessel, this dispute would not fall under the jurisdiction of the rent committee; the commercial nature of the dispute is the common feature, and it affected how the dispute was handled. In this dispute, the defendant initiated the proceedings and later amended his request to refer the dispute to arbitration. Normally, this would constitute a waiver of the right to arbitrate according to the

⁴⁹² Najidah supra note 477 at 436-442, Kessedjian supra note 477 at 138, Murray supra note 477, Schwenzer Supra note 477

⁴⁹³ Appeal no.32/23 supra note 483.

court's jurisprudence and article 203⁴⁹⁴, which is exemplified by how the court responded to the appellant's argument in this regard:

The appellant argues in the first part of the first ground and on the second ground that the appealed decision failed to apply the law; for the appeal court upheld the first instance decision to refer the dispute into arbitration, which is an amendment of the original request to order the payment of the amount of the claim. Thus, the court should not accept this request and given the fact that the parties have agreed before the start of the dispute to arbitrate, as such the defendant doesn't have the right to request the court to refer the dispute into arbitration and appoint arbitrators. Moreover, the court should have accepted the appellant request to dismiss the dispute due to the existence of an arbitration clause.

The cassation court dismissed this plea, stating that according to article 98 of the civil procedure⁴⁹⁵, which addresses the counter claims and request and the amendment of the original claim, which allows for such action to be made in front of the first instance court. Therefore, the defendant has the right to amend their original request any time before the closing argument.⁴⁹⁶

Instead of having the court contest the jurisdiction of the arbitration and use the provisions of article 203 as a basis to claim jurisdiction over the dispute,⁴⁹⁷ the court used the same civil procedure law to counter the argument presented by the defendant. This in turn exemplifies the important role that the nature of the dispute plays in influencing the court's position. The shift in the court's interpretation of the law can only be explained by the commercial nature of the dispute.

Furthermore, this decision highlights the court's practice when it comes to disputes regarding the appointment of arbitrators:

⁴⁹⁴ Supra notes 406, 428, 442 and 459.

⁴⁹⁵ Civil procedures article 98 state: "The claimant may submit any of the interlocutory requests: 1- Which include the amendment of the original request or the amendment of its facts in order to cope with the circumstances which have emerged or have been observed after the claim has been submitted. 2- Which are complementary to the original request, consequent, or indivisibly connected thereto. 3- Which includes addition or change to the reason of the action provided that the request's facts shall remain as they are. 4- Requesting an order with a precautionary procedure .5 - Which the court shall allow to be submitted and connected to the original request."

⁴⁹⁶ Federal Supreme Court of the UAE civil circuit, appeal no. 732/24, issued on 26th of February 2005.

⁴⁹⁷ Which was the case in the AD courts decision see supra AD court decision appeal no.72/2007 supra note 443.

The appellant argues in the second, third and fourth part of the second ground of the appeal that the appointment of the arbitrators occurred contrary to the requirement of the arbitration clause.

The court dismissed this argument stating that article 204 of the civil procedures⁴⁹⁸, allows the court to appointment the arbitrators based on a request by the parties in the event of a dispute on the appointment or in the event that the arbitration clause didn't state a process of an appointment or if one of the parties refused to appointment an arbitrator. Thus, the court intervention in the appointment of the arbitrator is regulated by the conditions stated in this article, in addition to having the jurisdiction to hear the subject matter of the dispute. Since the contract shows that the parties have chosen arbitration as a method of resolving their dispute and by failing to appoint an arbitrator at the start of the proceeding, which implies that the appellant waived his right to appoint an arbitrator and consequently cannot dispute the court's decision to appoint an arbitrator in their place.⁴⁹⁹

This is a straightforward answer by the court, and resolves any issues related to the appointment of the arbitrators. By establishing that when the parties waive their right to appoint an arbitrator, which occurs if the parties fail to agree on the arbitrator, then it is the court's duty to step in to resolve this issue. Thus, it is crucial to have the arbitration clause resolve such issues relating to the appointment of arbitrators, in order to minimize the court's intervention in arbitral disputes.

After examining all of these disputes, and the court's responses to them, especially those that relate to lease contracts, it seems that most lease disputes may be subject to arbitration. Is this true? The dispute examined next contradicts this statement, and shows that if the court sees fit, it may intervene and extend jurisdiction over the dispute:

The appellant appealed this decision on three grounds; the first ground argues that the appellant have pleaded in front of the first instance court that the court lacks the proper jurisdiction, since the dispute falls under the jurisdiction of the Municipality of Sharjah committee of arbitration and settlement⁵⁰⁰. However, the court stated that this dispute doesn't fall under the jurisdiction of that committee since the dispute doesn't rise from the lease agreement between the parties, since the dispute is in regard to

⁴⁹⁸ Supra note 407.

⁴⁹⁹ Appeal no. 732/24 supra note 496.

⁵⁰⁰ According to article 1 of law no.4/1988 in regards to regulating the relationship between the tenants and the landlords in the emirate of Sharjah, Emirate of Sharjah Law no. 92/1977 and its amendments laws no.7/1986 and no.4/1988, see supra note 466.

identifying the damages that occurred due to the appellant negligence. The appellant argues that on the contrary it is a result of the appellant's obligation to safeguard the leased property, subsequently it makes this dispute rise from the lease contract and as such falls under the jurisdiction of that committee. The court dismissed this argument, stating that based on the jurisprudence of this court the Municipality of Sharjah's Arbitration committee jurisdiction⁵⁰¹ is limited to disputes that rises from the lease agreement and in regard to the application of this agreement. The defendant in this dispute rented the warehouse to the appellant to use it as a car repair shop, and based his claim on the fact that the appellant was found guilty of negligence in another claim⁵⁰² that led to this warehouse destruction. Therefore, this dispute is governed by the general rule that every act that results in damages needs to be compensated⁵⁰³, even though that this act occurred as a result of leasing the property between the litigants, however the dispute is not in regards to the application of the contract, it is a dispute regarding the appellants unlawful act, which falls outside the scope of the committee.⁵⁰⁴

This is a prime example that even when the court acknowledges the jurisdiction of the committee, and is willing to defend and support the committee, there remain certain disputes that the court will not relinquish from its jurisdiction.⁵⁰⁵ In essence, the court excludes the determination of the amount of the damages from the committee's jurisdiction and from arbitration, since the court believes both of those bodies lack the legal capability to hear disputes that involve the damages themselves.⁵⁰⁶ Even if the fire (the subject of the case cited above) was directly related to the application of the lease contract, it can be argued that the appellant's responsibility to safeguard the warehouse was also a direct result of this contract. As such, it should fall to the committee to determine the amount of damages. It is

⁵⁰¹ id.

⁵⁰² Sharjah Federal court of first instance (criminal circuit) case no. 3301/1998.

⁵⁰³ Civil transaction law article 282 states: "The author of any tort, even if not discerning, shall be bound to repair the prejudice." This is the translation of the ministry of justice, which roughly translates to any action resulting in damages (tort), the one responsible of that action would be bound to fix or compensate.

⁵⁰⁴ Federal Supreme Court of the UAE, civil circuit appeal no. 546/24, issued on the 3rd of July 2005.

⁵⁰⁵ See general al-hadidi supra note 473 at 257-258. Al-hadidi advocate that these committees should be composed from one or more judges, and that the decisions of these committees should be subject to appeal in front of the appeal court, he argues that "the way these committees are being administered either in Dubai or other emirates by having members that are hold no law degrees affect the quality of justice and due process...., moreover the finality of awards issued by these committees also affects due process."

⁵⁰⁶ Again this can be explained by the quote stated above by al-hadidi, id., which gives insight into the courts view on this subject.

peculiar that the court would deny the jurisdiction of the committee—given that the committee is a branch of the court’s own jurisdiction and is specialized in lease disputes—only to refer the dispute back to an expert to calculate the amount of the damages⁵⁰⁷. In this case, the court simply went back to its practice of reasserting its jurisdiction, only to appoint an expert to calculate the amount of the damages, which could have been done by the committee.

The benefits of upholding the jurisdiction of the arbitration committee would have been to shorten the length of the proceedings, which in turn would have saved the litigants time and expenses, assuming that the award issued by the committee would not be appealed (which is a questionable assumption, given the court’s support of appeals.)

This decision illustrates that even a dispute which has been codified by the legislature and delegated to a specialized committee is not safe from the court’s intervention.

Another decision that revolves around the relationship between the courts and the committee occurred in the emirate of Sharjah, which has a committee similar to those in Dubai⁵⁰⁸ and Abu Dhabi⁵⁰⁹ that is governed by its own legislation.⁵¹⁰ However, unlike the laws of Dubai and AD, Sharjah’s law allows parties the ability to appeal to the court an award issued by the committee. By doing this, the legislature in Sharjah

⁵⁰⁷ *id.* at 258, al-hadidi argues that the awards issued by these committees are equal to the decisions issued by the court.

⁵⁰⁸ Which is regulated under a new law, which is the Emirate of Dubai Decree no. 26/2013, in regard to establishing the lease dispute settlement committee of the emirate of Dubai.

⁵⁰⁹ Abu Dhabi law no.20/2006 supra note 437, see also Abu Dhabi law no. 11/79 and the decree no. 33/1996.

⁵¹⁰ Sharjah law no. 92/1977, which is amended at the time of the dispute by two laws no.7/ 1986 and law no. 4/1988, supra note 466. This law saw a number of amendments in recent years; the recent edition was law no.2/2007. However, the process of appealing the committees award is still will and alive, it is being governed in this law in articles 23-30, the contrast between those laws is that instead of appealing the award to the court the law established an appeal tribunal within the committee, this tribunal is constructed from three judges. Furthermore not all awards by the committee are subject to appeal.

is undermining the power of these awards⁵¹¹, rendering them essentially no different from an expert's opinion or report⁵¹². In such a situation, the role of the committee becomes an advisory role rather than a body empowered to render a binding decision to the parties:

The appellant appealed this decision to the Supreme Court in this appeal on one ground⁵¹³, the appellant argues that the appealed decision ordered the appellant to vacate the property despite the fact that the arbitration committee ordered the increase of the rent from five thousand to ten thousand, which was recognized in front of the municipality of Sharjah's. The appellant managed to pay to the defendant and in doing so he managed to fulfill his obligation according to article 5 of law no. 92/1977 amended by laws no.7/1986 and 4/1988 for the emirate of Sharjah, which identify the conditions in which the owner of the property could request the tent to vacate, in this case it would have been the failure to pay the rent. However, the appellant managed to pay the rent in here and as such this article doesn't apply. The court dismissed this argument, stating that article 5⁵¹⁴, implies that the legislator in here added a new requirement to those mentioned in the civil transaction law regarding the lease agreement⁵¹⁵, which state that the lease agreement ends by the end of the term of the lease, the Sharjah's law state that the owner of the property has no right to request to vacate the property unless three years have passed from the start of the lease or if one of the condition mentioned in the law can be applies⁵¹⁶. Thus, it limits the request to vacate the property to the passing of three years or if one of the conditions in the law has been met. Moreover, based on the arbitral award in case no. 676/1998 dated 31/1/2000 the defendant became the owner of the property on the 23/1/1995 and the lease have continued for more than three years. Thus, the defendant request to vacate the property on the 21/6/1998 is lawful.⁵¹⁷

The legislature in Sharjah, by codifying the process of appeals made to the court, is answering the court's concerns when it comes to arbitration and ADR⁵¹⁸, which relates to the ability to review the award. It can be inferred that in the Sharjah court's

⁵¹¹ Sharjah law no. 2/2007 articles 23-30.

⁵¹² Given that the court is not bound to accept the expert report, which is similar to how the court is treating the awards issued by these committees once they are appealed, or having an appeal system put in place, for in this instance the court would start reviewing these awards and in turn have supervisory role over such committees, see al-hadidi supra note 473 at 219-220, Turki supra note 11 at 317-321.

⁵¹³ The defendant argued that the appeal should be dismissed based on the fact that the appeal was signed by the appellant representative that doesn't relate to the appellant. The court dismissed this argument stating that the law allows for the appeal request to be submitted by any individual in place of the appellant, and the only requirement is having the appeal signed by the appellant or his representative. Federal Supreme Court of the UAE civil circuit, appeal no. 851/25 issued on the 30th of May 2004.

⁵¹⁴ Sharjah law no. 92/77 and 7/1986 and 4/1988 article 5 supra note 466.

⁵¹⁵ Which is regulated in the civil transaction law articles 742-848.

⁵¹⁶ Sharjah's law no.2/2007 supra note 510, confirms those same requirements in article 13.

⁵¹⁷ Appeal no. 851/25 supra note 513.

⁵¹⁸ Alternative dispute resolution.

view, one of the requirements of upholding justice is giving individuals the right to contest any decision for a second time⁵¹⁹. In the adjudicatory process, this would include the ability to appeal these decisions or awards. However, this does not change the fact that in this decision, the court treated the award issued by the committee as an expert opinion or report, rather than as an award issued by an equal authority.⁵²⁰

4.4 Conclusion

The sixteen cases examined in this chapter express a sample of arbitration as used in lease/land disputes; they range in nature from disputes over leasing apartments, to planes and maritime vessels, to distinguishing between lease agreements and investment contracts. In general, lease disputes are subject to arbitration; moreover, each emirate has its own way of regulating lease disputes that arise from lease contracts when the subject of the lease is a non-movable object, such an apartment. In those cases, the legislature has delegated the responsibility of settling the dispute to specialized committees, which combine the attributes of a court and a dispute settlement institution. In most cases, the committee is headed by a judge assigned by the court, and is was established through the decree of an Emir. The similarity between those committees and arbitral institutions is that they employ experts, and that in some instances their decisions are not subject to appeal.

This brings us back to the question that was mentioned at the beginning of this section: what is the nature of these committees? Are they court-appropriated arbitration or institutional arbitration? Or are they a specialized judicial authority that has the same legal powers as the court?

⁵¹⁹ see general al-hadidi supra note 473 at 219-220, Turki supra note 11 at 317-321.

⁵²⁰ id.

Examining the above decisions, we may conclude that these committees are closer to being a specialized judicial authority, which implies that they are a branch of the courts⁵²¹. This statement is supported by the fact that these committees were established by the decree of an Emir and include as members one or more judges assigned to them by the court. Furthermore, the legislature in Sharjah has taken a further step to solidify this idea by creating an appeals process within those committees.⁵²² This appeals process implies that the committee's decisions may be appealed to the court.⁵²³

Even though the cases that were examined here comprise a relatively small number, they still give an indication of the average time for a dispute of this nature to be settled by the court--three years.⁵²⁴ While three years may be acceptable for a dispute to be settled by litigation, if a dispute were to be viewed as falling under the jurisdiction of arbitration, this could add three more years to the process, which would be onerous for the parties and the court.

Delays may be attributed to a number of factors, including the number of procedures governing lease disputes within the UAE. These procedures are one of the main causes of delays, and are also the main factor behind the court's ability to freely interpret lease contracts and arbitral clauses, which ultimately leads to more appeals.

The complexity involved in lease/land disputes in the UAE relates to a number of issues; some are specific to a case, while others are general concerns, such as the number of legislations that govern lease disputes and the way in which the court interprets the law. The jurisdiction of the lease committees is another source of

⁵²¹ see general al-hadidi supra note 473 at 257-258.

⁵²² See SHJ law no. 2/2007 supra note 510.

⁵²³ Which is conformity to what al-hadid was advocating, see al-hadidi supra note 473 at 258.

⁵²⁴ The average time of the Dubai courts were five years; the AD court three years; and the Federal Supreme court are seven years.

concern. It can be inferred that such committees have sole jurisdiction in resolving lease disputes that rise from lease contracts. Based on this interpretation, the parties would not be able to opt-out into arbitration. If a committee is seen to have the jurisdiction to recognize and enforce arbitral awards, as well as to resolve lease disputes, individuals would be able to opt-out into arbitration, and the court would have to accept the arbitration agreements. Both interpretations can be deduced from the legislation, and the court has in fact used both interpretations.

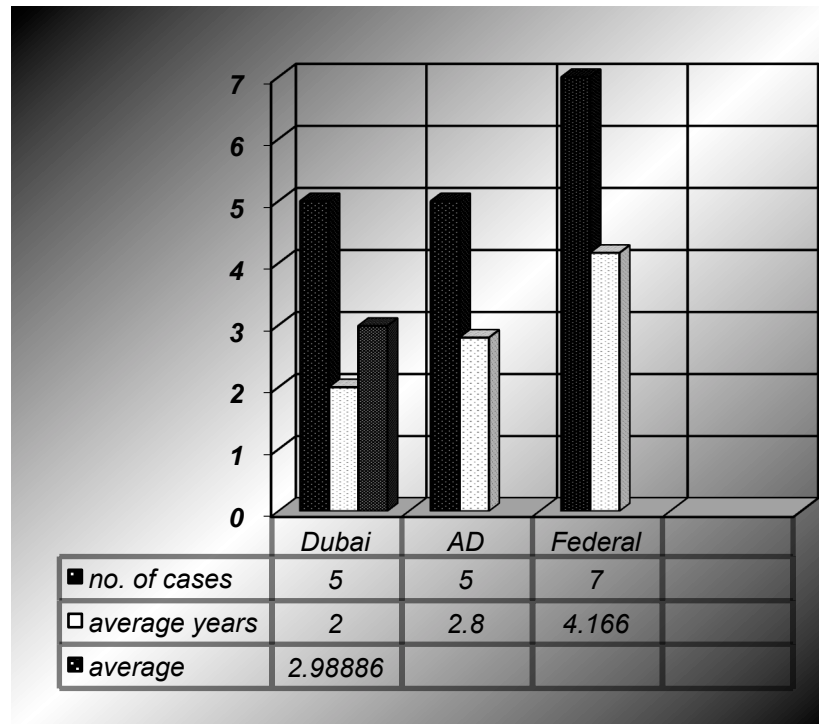
The ease with which the court accepts an appeal implies that the courts either do not trust the decision of the lease committees or the arbitrators, which relates to the court's general view of arbitration as an exception to litigation. Or, it may relate to the fact that the court is trying to preserve the individual's right to appeal. It can be concluded from the twelve cases examined in this chapter that the court's willingness to hear appeals is a combination of both factors.

The examination of lease disputes gives an indication of how a system of arbitration that falls under the direct supervision of the court would function. In essence, these committees were created to serve as a buffer for the courts that would ease the court's caseload; the emirates that chose this system did so with this clear goal in mind. However, despite clear legislative intent, such a system will not function properly without clear and complete cooperation from the court. While the courts seem to perceive arbitration in general as an exception to their authority, when it comes to lease committees, they seem to view them as an extension of the court's authority. This attitude can be seen from the way the courts allow appeals to go through. If courts had faith in the committees and in their ability to serve and preserve the individual's needs and rights, then the court likely would limit the appeals allowed of judgments handed down by the committees.

The situation created by having an arbitral clause in an investment contract that relates to a land transaction is another source of concern. The courts seem unable to agree on a correct answer to this situation, which adds to the complexity facing the parties and the process of arbitration in general. The confusion created by this situation discourages parties from opting-out into arbitration and in promotes the courts as the sole avenue of justice.

In conclusion, it seems that even a dispute resolution module that is backed by the state is incapable of escaping the courts' appeals mechanism, and by extension increases the courts' jurisdiction over disputes. It highlights the idea that in order for any system of dispute resolution to function, especially when it comes to arbitration, cooperation must exist between the legislative and judicial branches. Most importantly, the courts must work with these branches and not compete with them.

Court Name	Case No.	Date of the first instance decision	Date of the end of the litigation	Number of years		
Dubai	10/1995	27/4/1994	8/10/1995	1		
Dubai	193/2002	26/5/2001	23/1/2002	1		
Dubai	47/2002	18/10/2006	29/4/2007	1	Average length	2.98
Dubai	133/2007	28/1/2003	23/9/2007	4	Average Dubai	2
AD	58/2007	29/5/2005	30/10/2007	2	Average AD	2.8
AD	72/2007	29/11/2005	11/12/2007.	2	Average Federal	4.1
AD	66&71/2007	2005	15/1/2008	3		6
AD	186/2008	2002	8/6/2008.	6		
AD	136/2009	21/12/2008	31/3/2009	1		
Federal	32/23	28/3/2000	6/8/2003.	3		
Federal	732/24	2001	26/2/2005.	4		
Federal	546/24	1999	3/7/2005.	6		
Federal	181/15	-	19/3/1995	-		
Federal	5/2009	2007	17/2/2010	3		
Federal	116/17	1990	31/10/1995	5		
Federal	851/25	31/1/2000	30/5/2004	4		



4.5 Civil Transaction Disputes

This section examines arbitration disputes that fall under the spectrum of the civil transactions law. It addresses disputes submitted to the civil circuit court—specifically, to the Dubai cassation court and the Federal Supreme Court—excluding those that relate to lease/land and Shari’a, which are examined in a different chapter of this study. These disputes stem from contracts of a civil nature, although not all are of a purely civil nature.⁵²⁵

4.5.1 Dubai Court of Cassation

⁵²⁵ Which can be attributed to the fact that at the early stages of the life of the high courts in the UAE, the classification of the disputes would fall under one of two categories in most instances, either criminal or civil, later on more circuits were added, as the court continued to grow. See general Turki supra note 11 at 524, where the author starts discussing what is meant by civil and commercial suits in accord to the civil procedures law, see general Turki supra note 11 at 462, where the author starts discussing the jurisdiction rules and the classification of the circuits and courts in the UAE. See general Al-hadidi supra note 473 at 310.

The thirty-one disputes examined in this section represent a continuation of the discussion⁵²⁶ begun earlier and provide an understanding of the Dubai court's philosophy on arbitration. Most deal with appeals that relate to the recognition of arbitral awards, or contest the appointment of arbitrators. These cases address nineteen years of decisions made by the Dubai court. I categorize these disputes based on the nature of the contract that contained the arbitration clause or the agreement, and I also arrange them by date, in order to note any change in the court's philosophy on arbitration.

The cases are arranged as follows:

- **Disputes before the enactment of the civil procedures**
- **Checks**
- **Construction Disputes**
- **Insurance**
- **Companies**
- **Agent's Authority**

We begin with the era before the enactment of the civil procedures law.

4.5.1.1 Disputes before the enactment of the civil procedures law

This dispute involves a liquidation request and a court-annexed arbitration,⁵²⁷ and it shows that the court was free to invent its own rules on arbitration without being bound by any procedural law:

The appellant argues that the award should be dismissed based on the fact that it was issued after the agreed upon time. The appellant claims that the court decided to recognize the award by stating that the parties agreed to extend the arbitration time. However, the appellant claims that he did not agree to the extension, and that, in addition, any extension of the arbitration period requires

⁵²⁶ They continue the discussion started earlier in the previous chapters.

⁵²⁷ The defendant in this dispute started the proceedings in order to ask the court to appoint an accounting expert to examine the records between the parties, in order to liquidate the company, see Dubai Court of First Instance case no. 1172/1990.

the court's recognition. Neither the parties nor the arbitrators has the right to grant this extension on their own, which is only reserved to the court since it has the authority to supervise the arbitration procedure. The fact that the arbitrators have requested the amendment from the court is not sufficient unless the court renders a decision in this request, and that for these reasons the award should be set-aside.

The court dismissed this argument, stating that one of the attributes of arbitration is the fact that it is a voluntary process, implying that the parties have the right to agree in the arbitration clause to a certain time for the arbitral award to be issued or to extend it, either by providing a process for extension in the arbitration clause or delegating that authority to the arbitrators. This delegation of authority can either be explicit by being stated in the arbitration agreement, or implicit by the parties' appearing in the arbitration hearing after the extension and presenting their argument. Furthermore, the appeals court established that the appellant representative agreed in the arbitral hearing dated 4/6/1991 to authorize the arbitrators to extend the arbitration time, which the arbitrators used to extend the arbitration from 15/6/1991 to 4/8/1991. This procedure is not affected by the arbitrators informing the first instance court of the extension, since as proven from the facts of this dispute, the arbitrators have the authority to extend the arbitration on their own.

The second ground of the appeal argues that the appellant upheld the argument that the award is void, claiming that the arbitrators did not uphold due process by dismissing his request to refer the dispute back to the court to examine the evidence. The appeals court answered this request by stating that the arbitral tribunal had given him the opportunity to present his defense and that the purpose of his request was to extend the period of the dispute.

The court dismissed this argument, confirming that the arbitrators upheld due process in this dispute.⁵²⁸

Here, the court upheld the parties' freedom of contract and their contractual obligations⁵²⁹ without a procedural law to dictate their practice. Instead, they relied on the parties' agreement and allowed the parties the freedom to dictate their own actions as they saw fit, dismissing any argument that contradicted their agreement. This approach by the court relates directly to the absence of a legal code at the time of the dispute.⁵³⁰ At this stage, the code did not define the arbitration agreement⁵³¹, which

⁵²⁸ Dubai Court of Cassation, appeal no. 346/1991, issued on the 23rd of May 1992.

⁵²⁹ See general Najidah supra note 477 at 20-23, Bechor supra note 17 at 147-149, Hindi supra note 103 at 2-3 these authors examine this concept from the point view of an Arabian scholar, see Carbonneau supra note 73 at 24-25, for a western interpretation of freedom of contract. It can be noted that both the west and Arabian scholars tend to agree on what is meant to be "freedom of contract".

⁵³⁰ Which is the absence of Federal Law no.11 of 1992, see supra note 8.

may relate in part to the fact that the case was a court-annexed arbitration⁵³².

Nevertheless, this shows how the court used to reason and view arbitration, as an independent system and not as an exception to litigation. This decision also emphasizes the important role that the court could play in promoting the arbitral process in the UAE.

Another decision by the court that highlights this period relates to a construction dispute:

The appeal was based on three grounds. The first and second argue that the decision was appealed upon a decision to dismiss the dispute based on the existence of an arbitration clause. However, this dispute does not fall under the scope of the arbitration clause, since it relates to a debt claim that is not based on the contract in which the arbitration clause was stated. Furthermore, the arbitration clause is invalid and void since it lacks sufficient information to make it a valid clause, such as the determination of the number of arbitrators or the method of choosing them, as well as the place of the arbitration, the law that governs the arbitration process and the contract, and the time of the arbitration.

The court dismissed this argument, stating that article 17 of the contract between the parties stated that: “the disputes shall be settled through arbitration,” and since the dispute in this litigation involves the remainder of the payment of the construction contract. This payment arises from the construction contract that contains the arbitration clause, which renders this argument void. Furthermore, according to the jurisprudence of the court, all that is required for the validity of the arbitration clause is the parties’ agreement. Therefore, no agreement on the details of the dispute is required at the time of the drafting of the clause.

The third ground of the appeal argues that the appealed decision failed to uphold due process, since the appealed decision did not answer the appellant’s defense.

The court dismissed this ground, stating that the appeal court based its decision on sound grounds; moreover, the court has no obligation to answer all the litigants’ claims.⁵³³

This case is another example of the court’s attitude toward arbitration before the introduction of the civil procedures law.⁵³⁴ The similarity between these two cases

⁵³¹ Nor did the laws of that time try to define arbitration, neither the court views arbitration as an exception. See general supra 2.6.4 UAE legislators’ view and 2.6.5 UAE courts view of the Definition.

⁵³² See general, Levin supra note 141 at 538.

⁵³³ Dubai Court of Cassation appeal no.91/1992, issued 21st of November 1992

is the absence of a civil procedures law. Thus, the court relies on the parties' agreement and the general principles of contract. The parties' freedom to contract⁵³⁵ is held as most important, and the court in this case binds the parties to what they have agreed upon. The lack of a civil procedures law at the time of this case benefitted the use and acceptance of arbitration. The court was free to shape its own doctrine regarding an arbitral case, without being bound by any external factor. Therefore, it set a simple test that looked at the arbitration clause only to determine the parties' obligations in the dispute. This led the court to dismiss the appellants' argument that the "arbitration clause lacked sufficient information." Such an argument might have been accepted under the civil procedural law, since the court would interpret the arbitration clause as infringing on the litigant's right to due process, especially given the loose terminology of the arbitration clause, which leaves room for interpretation by the court⁵³⁶. However, in this decision, the court determined that the parties did not need to agree on all aspects of the arbitration at the moment the contract was drafted in order for the contract to be binding.

Another decision that highlights the court's position on arbitration in this period relates to appointment of the arbitrators and a request to arbitrate under the supervision of the court:

The appellant argues in the first ground that the court's decision that the parties are not willing to submit their dispute to arbitration is flawed, basing their decision on their representative counter-claim to deny the defendant's claim after amending their request to the court. However, this counter-claim did not touch upon the subject matter of the dispute in order for the court to consider it as a waiver of the parties' right to arbitrate.

⁵³⁴ Even though the parties entered into a lengthy litigation before the start of the arbitration, which is an issue that transcends arbitration and a general attribute of the courts in the UAE to encourage appeals, nevertheless the court in its early years kept on upholding the arbitration clause.

⁵³⁵ See general Najidah supra note 477 at 20-23, Bechor supra note 17 at 147-149, Hindi supra note 103 at 2-3 these authors examine this concept from the point view of an Arabian scholar, see Carbonneau supra note 73 at 24-25, for a western interpretation of freedom of contract. It can be noted that both the west and Arabian scholars tend to agree on what is meant to be "freedom of contract".

⁵³⁶ Which can be inferred from article 203/3 of the civil procedures, supra note 428, since the legislator requires in that article that the scope of arbitration should be defined in the arbitration clause.

The court dismissed this argument, stating that the arbitration is an agreement to grant the arbitrator the right to settle the dispute in place of the court and the natural judge. The nature of this agreement does not relate to public policy and thus the parties can waive this agreement and their right to arbitrate either explicitly or implicitly. Therefore, when the defendant amended the request, the appellant counterclaimed by denying the defendant's claim, which constitutes an implicit waiver of the right to arbitrate.⁵³⁷

Here the court develops an idea of arbitration, which can be noted from the court's definition of arbitration and subsequent explanation as to why it denied the request to arbitrate. The court explained that the arbitration clause can be waived either explicitly or implicitly—which essentially infringes the parties' right to freedom of contract and right to arbitrate—by claiming that the arbitration agreement does not relate to public policy⁵³⁸. The court stated that any party trying to uphold arbitration agreements needs to explicitly identify his position⁵³⁹; this gives the defendant the right to amend a request stemming from the appointment of an arbitrator and to ask the court to settle the dispute directly. If the appellant wanted to uphold the arbitration agreement, he should have taken a positive action.

Even though the court did not base its decision on the civil procedures law, it came to a conclusion that is opposite what was determined in the previous case study⁵⁴⁰, even though neither party denied the existence of the arbitration agreement, nor did the court dispute the fact that the dispute fell under the scope of the arbitration agreement. Despite all of these circumstances, the court interpreted this action as a waiver of the parties' right to arbitrate, which highlights the power of the court's interpretation. This case and the one presented just before it also show that even

⁵³⁷ Dubai Court of Cassation appeal no.337/1991, issued on the 7th of March 1992.

⁵³⁸ This view mirror that of the courts after the enactment of the civil procedures law, see general supra 2.6.4 UAE legislators' view and 2.6.5 UAE courts view of the Definition.

⁵³⁹ Which in turn mirrors the requirement of article 203/3 supra note 428, and article 204 supra note 407.

⁵⁴⁰ See appeal no. 91/1992, supra note 533.

before the enactment of the civil procedures law, the court sometimes ruled in a way that upheld the arbitral process, and sometimes did not.

The next several cases shed the light on the transition period between non-codified arbitration rules and those that were codified under the civil procedures law; the codification was a process that began before the enactment of the civil procedures law:

The appellant argues that the court recognized the arbitral award, which was issued based on an agreement that was nullified by the parties, and that the arbitrators had added interests and claimed compensation without any basis. Therefore, the appealed decision contradicted the first instance decision by allowing the first instance decision to be appealed, by stating that the arbitrators had the right to add interests to the amount of the claim, and by not answering the appellants plea in regard to the delay penalties [which were in the amount of two million Australian pounds], which should be limited to the amount that the parties agreed to. Lastly, the appealed decision failed to uphold the parties' freedom of contract when the arbitrators decided to compensate based on a percentage of the agreed amount.

The court dismissed this argument, stating that once the parties have agreed in the arbitration clause that the arbitral award is final, then they should not argue on the subject matter of the dispute in front of the cassation court, even if the dispute occurred before the enactment of the civil procedures law; furthermore there is no contradiction between the first instance and the appeals court decision.⁵⁴¹

In the previous cases, the court's interpretation and decision were guided by the parties' agreement and the general rules of contract⁵⁴². The codifying of the arbitration rules in the civil procedures law changed the court's perspective on arbitration. True, the court's decision in this instance upheld the arbitral award. Nevertheless, its response to the defendant's plea to dismiss the appeal is important. It shows the change that occurred after the enactment of the law. The defendant argued

⁵⁴¹ Dubai Court of Cassation, appeal no. 171/1992, issued on the 22nd of November 1992.

⁵⁴² In general the court confirms the parties right to arbitrate, not based on a provision in the law but on the parties right to freedom of contract. See appeal no. 346/1991 supra note 528 and appeal no. 91/1992 supra note 533. See general Najidah supra note 477 at 20-23, Bechor supra note 17 at 147-149, Hindi supra note 103 at 2-3 these authors examine this concept from the point view of an Arabian scholar, see Carboneau supra note 73 at 24-25, for a western interpretation of freedom of contract. It can be noted that both the west and Arabian scholars tend to agree on what is meant to be "freedom of contract".

in front of the court that the decision should not be appealable, since the parties agreed to authorize the arbitrators to mediate, which is not subject to appeal under the civil procedures law. Thus, the defendant argued that the court should therefore dismiss the appeal:

[T]he defendant's representative pleaded to the court to dismiss the appeal, since the appeal did not contain the defendant's address, furthermore this decision is not subject to appeal according to article 217⁵⁴³, which does not allow appeals of arbitral awards in the event that the arbitrators were authorized to mediate the dispute or if the parties have given up their right to appeal, which is the case in this dispute since the parties have agreed to waive their right to appeal.

The court also dismissed the defendant's plea that was based on article 217,⁵⁴⁴ explaining that this article states that the arbitral award was not subject to appeal if the parties agreed to authorize the arbitrators to mediate, or if they explicitly waived their right to appeal in the agreement, which is an exception to the general principle of adjudication mentioned in article 158,⁵⁴⁵ which allows the individuals to appeal the decision of the trial court to the appeals court. However, this does not apply to appeals to the cassation court that fall under article 173,⁵⁴⁶ which states that once a decision has been issued by the appeals court and has met the requirements of this article, the parties would be able to appeal it to the court of cassation. Also, since the appeal decision in question was issued on 21/6/1992, which occurred after the civil procedures law came into power on 9/6/1992, the appeal is granted even if it was in regard to recognizing an arbitral award, or it has been agreed to authorize the arbitrators to mediate, or if the parties agreed in the arbitration agreement that the award is final and not subject to appeal, which is limited to appeals from the first instance court to the appeal court. Therefore, the court allows the appeal to the cassation court.⁵⁴⁷

The court's response to the defendant's plea is peculiar; on the one hand, it admits that article 217⁵⁴⁸ applies to this situation. However, at the same time, it

⁵⁴³ Civil Procedures Law article 217 states: "1-The arbitrators' decisions shall not accept the appeal therein through any of the appeal proceedings. 2-As for the decision delivered for the authentication of the arbitrators' decision or by its nullity, it shall be possible to appeal against it by the appropriate appeal proceeding. 3- With the exception of the preceding clause terms, the decision shall not be subject to the appeal if the arbitrators were authorized for reconciliation or the litigant parties have expressly relinquished the right to appeal, or the litigation value were not exceeding ten thousand Dirham."

⁵⁴⁴ id.

⁵⁴⁵ Civil Procedures Law Article 158 states: "The litigant parties, in other than the circumstances excepted by the law stipulation, may appeal the decisions of the courts of first instances before the authorized court of appeal....", this article was amended by the federal law no. 30 on the 30/11/2005.

⁵⁴⁶ Civil Procedures Law Article 173 states: "The opposing parties may appeal with a cassation in the decisions issued from the appellate courts if the action value was more than two hundred thousand Dirham or was not valuated and that in the following circumstances....", this article was also amended by the federal law no. 30.

⁵⁴⁷ Appeal no. 171/1992 supra note 541.

⁵⁴⁸ Supra note 543.

decides to limit the application of this article to the decisions of the first instance court. This eliminates the application of article 217⁵⁴⁹, given that there is no mechanism to stop the parties from appealing the decisions of the court, as exemplified by this decision itself and the court's response that undermine article 217⁵⁵⁰.

The cases and decisions examined in this section, especially those that were issued before the enactment of the civil procedures law, suggests that the absence of regulation does not necessarily endanger the use of arbitration. Despite the pro-arbitration outcome of two⁵⁵¹ of the three decisions that occurred before the enactment of the law, the third case⁵⁵² shows that not all disputes that occurred before the enactment of the law favored arbitration. These cases highlight the court's theories and views on arbitration, and how these views evolved through the years. The fourth case exemplifies the differences between the periods and how the civil procedures law began to bind the court's powers⁵⁵³. It seems that the freedom that the court held before the enactment of the civil procedures law worked in favor of arbitration.

4.5.1.2 Checks

The following case examines whether the use of a check as payment has any effect on arbitration; this case involves the criminal element of having issued a check without sufficient funds to cover it⁵⁵⁴. In addition, this dispute shows the court's

⁵⁴⁹ id.

⁵⁵⁰ id

⁵⁵¹ Which are appeal no. 346/1991 supra note 528, and appeal no. 91/1992 supra note 533.

⁵⁵² Appeal no. 337/1991 supra note 537.

⁵⁵³ Appeal no. 171/1992 supra note 541.

⁵⁵⁴ Which is considered a criminal offense under the Federal Law no. 3/1987, issued on 8/12/1987, article 401, which state: "Shall be sentenced to detention or to a fine, whoever draws in bad faith a cheque without sufficient funds or who, after giving the cheque withdraws all or part of the funds, so that the remaining balance is insufficient to cover the amount of the cheque, or gives order to the drawee to stop payment, or if he deliberately writes or signs the cheque in such a manner as to make it non payable. Shall be sentenced to the same penalty whoever endorses to another or delivers to him a bearer draft knowing that it has no available sufficient funds in consideration thereof or that it is not drawable. The penal action shall be precluded in case of payment or its withdrawal subsequent to the

change in behavior toward arbitration after the introduction of the civil procedures law:

[T]he appellant argues that the appealed decision failed to uphold the law, claiming that the appealed decision recognized an award, which decided that the check was issued as an insurance to fulfill the obligation of the company towards the appellant. However, this decision was based on speculation and even the arbitrator admitted that he was not sure in regard to this issue. Furthermore, the arbitrator exceeded the scope of the arbitration by investigating the purpose of the check and adding the amount of 200000 dhs. from the appellant's account in the company. Secondly, he ordered the defendant to pay the amount of 100000 dhs., which the appealed decision did not recognize.

The court dismissed this argument, stating that arbitration is an exception to the individual's right to seek their natural judge, thus it is limited to what the parties have agreed to submit to the arbitration tribunal. As such, it is not sufficient to say that the arbitrator has jurisdiction over the dispute since it's an exception and the arbitrators do not have the right to decide over disputes that relate to the main issue that the parties agreed to arbitrate. As such, arguing that the issues raised after the submitting of the main dispute should be submitted to the court and not the arbitrator has no basis. Moreover, the court upon recognizing an arbitral award does not look at the subject of the award. The appellant started the dispute against the defendant to request the payment of 30000 dhs., for which the defendant submitted a check without sufficient funds, and the defendant claimed the check was submitted to the appellant as insurance to fulfilling their obligation. Then the parties agreed to submit the dispute to arbitration, and the arbitrator issued an award that the check in question was in fact issued as a guarantee and had no affect and was void. The arbitrator ordered the payment of the amount of 125000 dhs. and the amount of 7500000 dhs. to the appellant from the accounts of the company, and that the defendant should pay the amount of 100000 dhs. to the appellant. Thus, the appealed decision has a legal basis, and as such the court decided to dismiss the appeal.⁵⁵⁵

It is interesting to find the court stand by the arbitrator's conclusion in regard to the purpose of the check. The court in this case did not try to contest the arbitrator's

perpetration of the crime but prior to the settlement of the case by a decisive judgment otherwise stay of execution shall be ordered. In case the court orders the withdrawal of the checkbook from the condemned person and the prohibition to give him new checkbooks, according to the provisions of Article 643 of the Commercial Transactions Law, the public prosecution shall notify this order to the Central Bank in order to generalize it on all banks. Should any bank violate this order, it shall be liable to pay a fine amounting to one hundred thousand Dirhams. Shall be liable to the same penalty whoever endorses to another or deliver a bearer draft knowing that against the deed there are no available sufficient funds to pay its amount or that it is not drawable." As amended by federal law no. 34/2005. This is the exact translation of the ministry of justice of this article; see GANAM MOHAMMAD GANAM & FATIHA MOHAMMAD QWARIRI, *SHARH QANON AL-OQOBAT AL-ITHADIL DWALT AL-EMARAT AL-ARABYAH AL-MTHADAH*, (The Explanation of the Federal Penal Code of the United Arab Emirates) 2`4-249 (2006). The authors in here examine and explain this criminal offence under the rules of the federal penal code.

⁵⁵⁵ Dubai Court of Cassation, appeal no. 165/1992, issued on the 28th of November 1992.

right to determine such a thing, especially when issuing a check without sufficient funds to cover it would usually constitute a criminal offense⁵⁵⁶. This implies that the court in its early days was more liberal and understanding of arbitration and did not seem threatened by this newcomer in the ranks of dispute resolution methods.

4.5.1.3 Construction Disputes⁵⁵⁷

This section examines the decisions of the court that relate to arbitration in construction contracts and is arranged by the date the decisions were issued.

The first decision relates to how the court interprets the arbitration clause:

[T]he first ground argues that the appealed decision dismissed the request to submit the dispute into arbitration. The court's reasoning was that there is no dispute between the parties in regard to the execution of the construction contract, which makes this dispute fall outside the scope of the arbitration clause. Since the construction was already completed, the court based the argument on the meeting dated 2/5/1991 between the parties and concluded that the construction was completed between the parties. The appellant argued that this dispute falls under the scope of the arbitration clause, since the parties agreed in the clause to refer all disputes that arise from the execution of this contract into arbitration, which includes disputes that occur during the construction period and before the ending of the contract or after the fulfillment of the contract. As such, the defendant claimed that the payments arising from the contract fall under the scope of the arbitration clause. Furthermore, the appellants' claim that they agreed on the date of 7/3/1991 to complete the payments, which is before the defendant's delivery of the property to the appellants that should have occurred on 7/4/1991.

The court dismissed this argument, stating that the trial court has the authority to interpret the agreement and the will of the parties without the supervision of the cassation court, once they based their interpretation on sound legal basis. The trial court's reasoning was that: "... the tenth clause of the construction contract dated 21/12/1989, states that any dispute that arises between the parties in connection to this agreement, regarding the contract or its execution, should be referred to an engineering expert in order to settle the dispute..." and this dispute relates to the final payments and the final finishing's of the construction, making this dispute fall outside the scope of the arbitration clause, which is supported by the litigants' meeting on 2/5/1991 that confirmed the fulfillment of the construction contract.⁵⁵⁸

⁵⁵⁶ See Ganam & Qwariri supra note 554 at 250-254, and article 401 of the penal code supra note 554.

⁵⁵⁷ This section should have examined seventeen decisions of the cassation court. However, three of those decisions have already been examined in the previous section, which are appeals nos. 337/1991 supra note 537, 91/1992 supra note 533, and 171/1992 supra note 541.

⁵⁵⁸ Dubai Court of Cassation appeal no. 295/1993, issued on the 30th of January 1994.

Here, the court limits the scope of articles 203/5⁵⁵⁹, which state that if the parties agreed to submit their dispute to arbitration, they have waived their right to litigate the dispute in front the court. The only exception to this would be if the parties waived the right to arbitrate in front of the court once the dispute arose. However, this decision adds a new test for drafting arbitration clauses or agreements; parties are required by the court to draft a specific and detailed arbitration clause, since drafting a general clause such as the one in this dispute risks limiting the scope of the arbitral clause, which could eventually lead to the dismissal of the arbitral clause.

Another dispute that highlights the court's power to interpret contracts and clauses involves a dispute with similar circumstances to the first construction case described.⁵⁶⁰ However, the court in this dispute decided to uphold the interpretation of the first instance court and extend the scope of the arbitration clause, which emphasizes that the court's interpretation is relative and does not follow certain set of rules:

The second and third part of the first ground of appeal argues that the appellant continued to uphold the argument that the arbitrator exceeded the scope of the arbitration agreement, claiming that the clause was general and did not define the scope of the arbitration. There were two construction contracts between the parties, and the arbitrator decided to include both contracts under his jurisdiction. Moreover, the arbitration clause did not stipulate whether the dispute falls under the scope of the arbitration, implying that the arbitrator exceeded the scope of the arbitration, which is ground for setting-aside the award.

The court dismissed this argument, stating that the trial court has the right to interpret and explain the contract. The only requirement is that the interpretation is done according to the law. Since the appealed decision came to the conclusion that the

⁵⁵⁹ Civil procedures law article 203/5 supra note 442.

⁵⁶⁰ This dispute relates to a construction contract dated 10/4/1988 the appellant asked the defendant company to decorate their villa in exchange for 6500000 dhs. the appellant also requested on the 12/9/1989 to decorate his Majlis in the same villa in exchange for 550000 dhs. a dispute rose between the parties and on the 11/5/1991 they agreed to refer the dispute to a sole arbitrator and that his decision is final and binding and is not subject to appeal, the arbitrator issued an award on the 3/7/1993 and delivered a copy of the award to both parties. The court decided to recognize the award. See Dubai court of First Instance Case no. 158/1993, issued on 11/1/1994 and Dubai Court of Appeals, appeal no. 133/1994, issued on 15/5/1994.

scope of the arbitration agreement contained both contracts, it is implied that the arbitrator did not exceed the scope of the arbitration agreement.⁵⁶¹

The court's aversion to arbitration is highlighted in this case by the fact that the court states that the trial court has the right to interpret. Nevertheless, their decision was subject to appeal. One must then ask why the trial court's decisions are subject to appeal if it has the right to interpret contracts and agreements? The only rational answer is that the court is trying to uphold the individual's right to appeal, which the court views as an essential right that cannot be waived.⁵⁶²

Another dispute concerns the appointment of the arbitrator and the procedure that the parties should follow. It also establishes a rule with regard to the defendant's plea to dismiss the appeal based on article 204/2,⁵⁶³ which states that decisions about appointing an arbitrator are unappealable:

[T]he appellant argues that there is no dispute between them in regards to submitting the dispute into arbitration, and that the appellant tried to initiate the arbitration proceedings but the defendant and the arbitrator ignored the appellant's notice. The court dismissed this claim, stating that there is no evidence supporting this claim since there is no record that shows that the defendant or the arbitrator received the notice, and that the recorded message that the appellant presented is not sufficient to be considered a notification.⁵⁶⁴

The court dismissed this argument; stating that in the event that the parties agreed to appointing an arbitrator and to arbitrate their dispute, then the arbitration clause has been invoked, and the parties are bound to submit their dispute to the arbitrator they have chosen.

In this instance, the parties have waived their right to submit their dispute to the court to appoint a new arbitrator, except if the arbitrator refused to do his job, is dismissed by the parties, or the court decided to dismiss him. It seems there is no agreement between the parties that regulates this process. In this instance, they have the right to ask the court to appoint an arbitrator according to article 204,⁵⁶⁵ and the obligation to prove that one of those conditions has been fulfilled falls to the party requesting the

⁵⁶¹ Dubai Court of cassation appeal no.260 and 261/1994, issued on the 16th of October 1994.

⁵⁶² The rest of the grounds of appeals are available in the appendix.

⁵⁶³ Supra note 407.

⁵⁶⁴ Id. In essence, the court's decision to refuse the appointment implies that the court has waived the appellant's right to request an appointment from the court according to article 204.

⁵⁶⁵ Id.

court to appoint the arbitrator. Furthermore, according to the jurisprudence of this court, the examination of the evidence falls to the determination of the trial court, without supervision from the cassation court, if the claim has been properly submitted and if the trial court based its decision on sound legal reasoning. As such, the appealed decision was found to be based on both sound evidence and legal reasoning.⁵⁶⁶

The court's response to this plea was that it is an exception to the general principle that arbitral decisions are appealable. This limits appeals to the requirements stated in article 204/1⁵⁶⁷. Here, the court limits the application of paragraph 2 of article 204⁵⁶⁸, which addresses the procedure of appointing an arbitrator, by stating that the court's decision to refuse an appointment does not fall under the exception of this law. This in turn creates a never-ending cycle of appeals for the litigants.

This never ending-cycle of appeals remains, even for traditional, formulated contracts, which in the case of construction contracts would be the FIDIC contract⁵⁶⁹:

The appellant argues that the appealed decision failed to uphold what the parties agreed upon in the contract, since articles 5-8 of the construction contract state that the rules of the FIDIC are a reference for any disputes that occur during the time of construction and maintenance. The court came to the conclusion that this dispute is outside the scope of the arbitration clause, which is in contrast to clause 67/3 of the FIDIC⁵⁷⁰, which states that any dispute between the parties shall be resolved through the rule of the international chamber of commerce arbitration⁵⁷¹. This implies that the rule of arbitration apply to any dispute that arises between the parties and is not limited to disputes that concern the construction and maintenance of the property.

The court dismissed this argument, stating that the court has the authority to understand and interpret the contract as they see fit, and that this interpretation does not fall under the supervision of the cassation court. Furthermore, the jurisprudence of this court establishes that arbitration is an exception to the individual's right to seek his natural judge. Thus, every interpretation should be limited to what the parties have

⁵⁶⁶ Dubai Court of Cassation, appeal no. 167/1994, issued on the 13th of November 1994.

⁵⁶⁷ Supra note 407.

⁵⁶⁸ id.

⁵⁶⁹ Which is the contract issued by the International Federation of Consulting Engineers are the "authors the works of civil engineering construction (often known as the Red Book)...", see Gillard & Savage supra note 65 at 17-18, were the authors introduce the rules of FIDIC.

⁵⁷⁰ Gillard & Savage describe this article as: "Article 67 of the FIDIC conditions provides for a fairly complex two-tier procedures for settling disputes arising between the owner and the contractor." id at 18.

⁵⁷¹ id at 17, the authors state that: "by informing the engineer and the owner of its decision to resort to ICC arbitration."

intended. The appealed decision stated that the scope of the arbitration clause does not cover this dispute, based on an examination of the construction contract dated 15/2/1999 that shows in article 5/8 that the parties agreed to submit disputes relating to construction and maintenance into arbitration. This shows that the parties agreed to limit the scope of the arbitration to those disputes, and that moreover the defendant submitted evidence of the completion of the construction of the villa by submitting the certificate of completion issued from the municipality of Dubai on the 14/5/2001. The appellant did not dispute this, and thus his argument regarding the application of the arbitration clause had no basis. Therefore, the court decided not to implement the arbitration clause in this dispute. Also, the rules of the FDIC contract did not relate to public policy, which implies that the parties have the right to amend the rules of a contract in regard to submitting all disputes into arbitration. Since the parties in this dispute agreed to limit the scope of the arbitration to issues raised in the construction period, the arbitration clause does not apply to this dispute.⁵⁷²

This dispute exemplifies the mixed nature of construction contracts in the UAE. The litigants submitted their dispute to the commercial circuit in the first instance court, even though the dispute was governed by the civil transaction law⁵⁷³. This circuit decided to uphold the arbitration clause, as they viewed payments as an extension of the contract, which placed it (the contract) under the scope of the arbitration clause. The first instance interpretation takes into account both the arbitration clause in the contract and the FDIC contract. In doing so, it interpreted the parties' will in this contract as incorporating all disputes arising from this contract, including payments. This extends the scope of the arbitration clause.⁵⁷⁴ Naturally, this decision was subject to appeal and another review in order to determine the scope of the arbitration clause.

⁵⁷² Dubai Court of Cassation appeal no. 261/2002 issued on the 2nd of November 2002.

⁵⁷³ Turki supra note 11 at 551-553, the author in here explains what is meant by article 36 of the civil procedures law, which state: "The jurisdiction in the litigations related to supplies and contracting works and the lease of houses and wages of workmen and artisans and waged workers should be given to the court of the residence of the prosecuted or to the court in which circuit the agreement has been concluded or executed", it can be deduced from this article and from the discussion that Turki provided that the jurisdiction to here such dispute should have been brought in front of the civil circuit, since in this instance this is considered to be a civil, which can be deduced from Turki's explanation and from article 31/3 of the civil procedures, which state: "The jurisdiction should be in the commercial matters of the court in which circuit the prosecuted residence exists or be given to the court in which circuit the agreement has been concluded, totally or partially executed or to the court in which circuit the agreement should be executed." See Turki supra note 11 at 548-551. From both of these articles it can be deduced that Construction disputes, even though it might have a commercial element are considered to be a civil suit based on article 36 of the civil procedures law.

⁵⁷⁴ Dubai Court of first instance (commercial circuit) case no. 881/2001, dated 16/1/2002.

The appeals court came to a different conclusion and excluded the dispute from the arbitration clause.⁵⁷⁵ The cassation court confirmed the action of the appeal by explaining that the rules of the FDIC do not relate to public policy, and thus the court limited the scope of the arbitration clause.

The following case illustrates the court's double standard regarding the trial court's right to interpret contracts. The court in this case ruled that the appeal/first instance court's interpretation power is limited when it comes to upholding arbitral awards or arbitration agreements, and it also limited the arbitrators' authority, which ultimately affected the recognition of the arbitral award:

[T]he appellant argues that the appealed decision failed to uphold the law by deciding to recognize the arbitral award, arguing that the court recognized the award even though the arbitrator decided to award the defendant more than what he asked for in regard to the interest, which is against articles 173/1⁵⁷⁶ and 216/1⁵⁷⁷; the arbitrator awarded the defendant more than he requested and awarded the interest from 8/9/1995 and not from the start of the arbitration proceedings on 8/9/1999, as per the defendant's request. The appellant claims that they upheld this argument; however, the court decided that the arbitrator has the authority to order the interest rate from that date, justifying the decision on the fact that this request can be interpreted in this way. However, the arbitrator does not have the right to order that amount. The appellant requested that this decision be referred back to the arbitrator according to article 214⁵⁷⁸ in order to and amend the decision in regard to this point.

The court accepted this argument, stating that article 216/1⁵⁷⁹ allows the parties to request the arbitral award to be set-aside on this ground. Moreover, the court has the authority to supervise the arbitral award to ensure that the arbitrator issued the award within the scope of the parties' agreement and within the scope of what the parties

⁵⁷⁵ Dubai Court of appeals, appeal no. 151/2002, dated 27/4/2002.

⁵⁷⁶ Civil Procedures Law article 173/1 states: "1 - The opposing parties may appeal with a cassation in the decisions issued from the appellate courts if the action value was more than two hundred thousand Dirham or was not valuated and that in the following circumstances: a. If the appealed decision was based on breaching the law or a mistake in its application or its interpretation. b. If a nullity in the decision or in the procedures affecting the decision has occurred. c. If the appealed decision was issued contrary to the rules of the jurisdiction. d. If the litigation was sentenced with contradiction to another, which was issued in the same matter among the same opposing parties and acquired the power of the order decided thereto. e. The decision's lack of reasons, inadequacy or its ambiguity. f. If the decision has been issued with what the opposing parties haven't requested or with more than what they have requested."

⁵⁷⁷ Supra note 416.

⁵⁷⁸ id.

⁵⁷⁹ id.

requested and to ensure that the arbitrator did not decide more than what the parties requested.⁵⁸⁰

This decision shows that the court/s acceptance of the arbitrator's authority over the dispute does not necessarily means that it would also allow the arbitrator the authority to interpret the award or the clause, even if such might seem the most practical outcome in this situation. However, this situation could have been avoided if the court had implemented the provisions of the law that states that the award is subject neither to review nor appeal. Also, article 215 gives the courts a guideline when deciding to recognize arbitral awards, which revolves around ensuring that nothing will stop the enforcement of the award.⁵⁸¹ Therefore, if the court were not sure about a provision in the award, it should refer such provision to the arbitrator for clarification.⁵⁸² However, the court contradicts all of these provisions, as well as the rule that the trial court has the authority to interpret the facts of the dispute and the contracts submitted to it without the supervision of the cassation court. Had the court applied this rule, it would have upheld the first instance decision to recognize the arbitral award. However, since the law codifies the procedure for appealing the court's decision to recognize arbitral awards,⁵⁸³ such decision and re-examination of the award would continue.

The next case illustrates how the court plays an active role in promoting the arbitration process. In this dispute, the court reaffirms its definition of the arbitration agreement according to article 203⁵⁸⁴ and the court's authority to interpret contracts.

The court also establishes what is required from the parties to argue about the

⁵⁸⁰ Dubai Court of Cassation appeal no. 307/2002, issued on the 30th of November 2002.

⁵⁸¹ Civil Procedures Law article 215 state: "1- The arbitrators' decision shall not be executed except if the court in which clerk's office the decision was deposited, has authenticated it, and that after looking into the decision and the arbitration document and verifying that there is no prohibition to execute it, and such court shall be authorized to amend the material errors in the arbitrators' decision according to the request of the concerned persons through the proceedings set for amending the arbitrations. 2- The execution judge shall be authorized with all that concerns the execution of the arbitrators' decision."

⁵⁸² civil procedures law article 214 supra note 480.

⁵⁸³ Id.

⁵⁸⁴ supra notes 406, 428, 459.

existence of the arbitration clause; as such, this decision is an example of the court upholding the arbitration clause:

[The] appeal [had] two grounds, claiming that the dispute should be dismissed based on the existence of an arbitration clause in the contract between the parties, which states: “the agreement to arbitrate in this contract refers to a dispute about the construction contract, and the documents referred to in index two of this agreement, [state that] the contract includes all aspects of payment and conclusion of the contract and submits it to the owner, and the second index includes the description of the advisors ...” This implies that the arbitration clause interpretation includes all the disputes arising from the construction agreement from the start and until the fulfillment of the contract. The appellant argues that the appealed decision did not agree with this interpretation of the clause, which resulted in dismissal of the clause by claiming that article no. 18/1 of the agreement, which contains the clause, limits the scope of the arbitration between the owner and the contractor in regard to the fulfillment of the specification of index two of the contract and does not include the sub-construction contract.

The court agreed with this argument, stating that according to article 203⁵⁸⁵ and the jurisprudence of this court, which defines arbitration as an exceptional method of dispute resolution that constitutes excluding individuals from their right to seek their natural judge and the guarantees that are included from submitting the dispute to them, the court should limit the scope of the arbitration to what the parties agree upon in the arbitration agreement. Even if the trial court has the right to interpret and explain the parties’ contracts and clauses, this interpretation is governed by the parties’ intent, and the court is required to base that interpretation on sound reasoning and that does not exceed the parties agreement. It is also required to look at the entire contract and the nature of the agreement, not to mention the customs that govern the transaction. In essence, the construction contract between the parties defined the terms of the contract in clause 1 of the contract, and the dispute settlement method in clause 18 of the contract. By examining both of them, it becomes clear that the sub-construction contract falls under the arbitration clause. Furthermore, since the appellant failed to appear in front of the first instance court, the first hearing in which he may argue about the existence of the arbitration clause is considered to be the one in front of the appeals court, according to article 203⁵⁸⁶.

The court establishing that the first hearing is not necessarily limited to the first instance court, but that it is fundamental to the survivability of the arbitral process, would seem to allow the parties to dismiss the litigation at any time. However, this is not an expression of the requirements of article 203; rather, the court is clarifying that the first hearing would apply in a situation in which the parties were unable to attend

⁵⁸⁵ id.

⁵⁸⁶ id. Dubai Court of Cassation, appeal no.429/2002, issued on the23rd of February 2003.

the first hearing⁵⁸⁷. In this situation, the first hearing would extend to the hearing in which they did appear, even if it were the first hearing in front of the appeals court. This decision is also significant in that it opines on the necessity of drafting a clear arbitration clause that explains in detail the parties' requirements and the dispute scope of the arbitration; this detail must be in place in order for the court's interpretative power to be bound by the will of the parties.

Another dispute that illustrates the hurdles facing the recognition of arbitral awards; this dispute went through multiple rounds of litigation and arbitration before being settled, only to be set-aside by the court. It was set aside because the arbitrator failed to uphold due process when he failed to notify the parties of the start of the arbitration procedure. The appellant tried to argue that the award was not a new award, but rather was an extension of a previous award issued in 1997 and that the award in question was an explanatory award⁵⁸⁸. Therefore, the arbitrator was not required to notify the parties nor were they required to be present in the hearing:

[T]he appellant argues in the first ground and the last part of the second ground on the following: the decision of the court in case no. 83/98, which decided that this is a new award (issued on 24-9-1998) and not an explanatory award for the previous arbitration between the parties (which was issued on the 15-6-1997), basing their decision to set-aside the award on the assumption that the arbitrator failed to uphold due process, since the arbitrator failed to notify the parties of the start of the proceedings and the submission of their documents. However, the arbitral award that was issued on the 24-9-1998, which is the one the appellant requested to be recognized, is not a new award but rather an explanatory award of the award issued on 15-6-1997, which can be noted from the similar outcome of both awards. Since this second award is only an explanatory award, the arbitrator is not obliged to uphold the same procedures, such as notifying the parties of the hearing dates. The court dismissed this argument, stating that the court's jurisprudence, in addition to article 212,⁵⁸⁹ imply that if the parties did not agree on a certain procedure to be followed in the arbitration, then the arbitrator is bound by the procedures mentioned in the civil procedures law, such as

⁵⁸⁷ Civil procedures law article 203/5 supra note 442.

⁵⁸⁸ Or rather a correction or an interpretation of their award, see general Redfern & Hunter supra note 62 at 590-591, see also civil procedures law article 214/1 supra note 480.

⁵⁸⁹ Civil procedures law article 212 supra note 486 and 477.

the notification of the parties and hearing their defense⁵⁹⁰, this obligation is required from an arbitrator that is authorized to mediate or not, and notifying the parties of the hearing does not mean that they need to be present in order to uphold due process. In essence, the failure to uphold due process is one of the grounds for setting-aside the arbitral award according to article 216,⁵⁹¹ which implies that the party whose right to due process was infringed has the right to request the setting-aside of the award. Moreover, according to article 49 of the evidence law,⁵⁹² this decision is considered a final judgment that received *res judicata*⁵⁹³. As such, the parties do not have to raise the same arguments that were brought in front of the court and were answered by a final decision. Also, the determination of whether the two awards relate to the same dispute would fall to the trial court, and that court's decision is not subject to being vacated if they base their decision on sound reasoning. As such, the trial court's interpretation that this is a new award is a sound interpretation, since it does not relate to the previous award.⁵⁹⁴

The challenges facing arbitral awards demonstrated by this case may be attributed to the court's tolerance for and encouragement of appeals, as well as to the legislation that allows such appeals.⁵⁹⁵ This dispute documents an arbitral award issued in 1998 lingering in the court system from 13-11-2000 when the first instance court decided to recognize it, until 13-04-2003 when the cassation court finally set it aside. It reached the cassation court twice in appeals no. 387/2001 and 414/2001 and finally in this appeal, 21/2003. It would have been more practical for the parties to litigate their dispute in front of the court from the start. Then, the court's decision would have received *res judicata*, and the parties would have received a final and binding decision, ending the dispute between them. This situation likely would not have

⁵⁹⁰ Which are mentioned in article 212.

⁵⁹¹ Civil procedure law article 216 supra note 416.

⁵⁹² Evidence law article 49 states: "Res Judicata judgments are absolute proof as to the matters finally decided of the litigation, and no proof is admitted against the legal presumption resulting therefrom, provided that such judgments refer to rights between the parties themselves acting in the same capacities and having the same object and the same cause. The court, by its own initiative, shall decide the incontestable character of this proof."

⁵⁹³ See general El-ahdab & El-ahdab supra note 37 at 47-48. See Redfern & Hunter supra note 62 at 561-565. Redfern & Hunter defines this principle as: "The basic principle of *res judicata* provides that a right or fact specifically put in issue and determined by a court or tribunal of competent jurisdiction cannot later be put back into question as between the same parties." They continue to distinguish between the application of this principle in common and civil law jurisdictions: "In common law jurisdictions, the estoppel of *res judicata* broadly falls into two categories: cause of action estoppel....and issue estoppel..... Many civil law jurisdictions only apply *res judicata* as a cause of action estoppel...." id at 561.

⁵⁹⁴ Dubai Court of Cassation, appeal no. 21/2003, issued on the 13th of August 2003

⁵⁹⁵ Civil procedures law article 217/2 supra note 543.

occurred if the court's interpretative power were limited, since the probability of setting-aside the award often increases when the case was revisited more than once.

The affect of due process on the recognition of an arbitral award is the subject of the next dispute, and the affect that binding the arbitrator to article 212⁵⁹⁶ has on setting-aside awards.

The appellant argues that the arbitrator is not bound by the same procedures that bind the court, except to the procedures mentioned in article 212,⁵⁹⁷ which regulates the procedures that govern the hearing, the notification of the parties of the hearing dates, and the upholding of due process. The appellant claims that the arbitrator upheld those requirements, in addition to upholding due process. The defendant claims that the arbitrator failed to uphold due process by not giving him the opportunity to respond to the appellant. However, the defendant had prior knowledge of the appellant's request, which can be deduced from his deposition in front of the arbitration, in which he acknowledged these facts. Moreover, that request that was made in front of the arbitrator, and the court should have investigated whether or not the defendant was aware of the request, rather than dismissing it based on comparing it with the expert's report. Lastly, the award shows that the defendant was aware of the appellant's request and confirmed this request. However, the court agreed with the defendant's claim without receiving proper proof from the defendant. The court dismissed this claim, citing article 212,⁵⁹⁸ even though it states that the arbitrator is not bound by the same procedures of the court. However, the arbitrator is bound by the general principles of adjudication and due process, which include giving the parties the opportunity to examine the documents presented in the arbitration. The failure to uphold these principles would constitute a ground for setting-aside the award. Furthermore, it is not sufficient to uphold these principles to claim that the arbitrator noted in the award that the documents were presented to the defendant. This cannot be amended later on by referring to submitting the award back to the arbitrator or for the court to investigate it by asking the arbitrator or the litigants or any of the witnesses that were present in the arbitral hearing. Moreover, according to the appealed decision and the arbitral award, the arbitrator noted the submission of the document in question on 18-10-2001. However, that document was not presented to the defendant until 10-1-2002, which is after the issuing of the arbitral award. Thus, the arbitrator failed to uphold due process in this instance, and the award shall be set-aside in this instance. The appealed decision stated that the documents presented do not show that the appellant was present on 18-10-2001, and that the arbitrator's note of the submission of this document is not sufficient on its own to prove that it was submitted on that date. Therefore, the court came to the right conclusion by deciding to set-aside the award, based on the jurisprudence of this court that the deposition was yet to be determined beyond doubt. If any doubts were presented, then the deposition would be dismissed. Lastly, the appellant's argument that the defendant's deposition constitutes

⁵⁹⁶ Civil procedures law article 212 supra notes 486,477.

⁵⁹⁷ id.

⁵⁹⁸ Id.

an acknowledgement of this fact has no legal basis; as such the entire appeal has no legal basis. Therefore, the court decided to dismiss the appeal.⁵⁹⁹

This is another illustration of the court holding arbitration to the same standards and principles that the court is required to uphold. The nature of these principles is general⁶⁰⁰, which gives the court the ability to maneuver and interpret them in a way that supports their views on arbitration. Arbitration is an informal procedure, but here we see an award was vacated due to failure to uphold due process and the principles of adjudication; in this case, the arbitrator did not record the minutes of the hearing properly or up to the court's standards, despite recording the document submission date on the face of the document and signing it⁶⁰¹. The vacating of the award on these grounds can only be justified if viewing arbitration as an exception to the court's jurisdiction that lacks the proper tools to uphold the parties' rights, so the court stepped in to protect and uphold these rights.

The acceptance of the parties' freedom of contract⁶⁰², and the upholding of the parties' contractual obligation, are fundamental elements in developing the arbitral process, as exemplified by the next decision:

The appellant argued that the court dismissed his request to appoint an arbitrator on the ground that the appellant did not follow the appointment procedures to which the parties has agreed in the contract. These procedures include mediating the dispute before initiating an arbitration procedure. However, the appellant claims

⁵⁹⁹ Dubai Court of Cassation, appeal no. 161/2003, issued on the 14th June 2003.

⁶⁰⁰ See Turki supra note 11 at 22-23, the author names the general principles required from the court to uphold.

⁶⁰¹ id at 22, since in the courts view these principles relate to the public policy and therefore the court is obliged to uphold them when it comes to litigation. However, not all of these principles are required to be present in arbitration, in fact one of the reasons parties choose to arbitrate is to escape from the procedures that govern litigation in front of the court, as Redfern & Hunter puts it: "an arbitration can be tailored to meet the specific requirement of the dispute, rather than having to be conducted in accordance with fixed rules of civil procedure." Redfern & Hunter supra note 62 at 33.

⁶⁰² The parties right to freedom of contract can be inferred in appeal no. 346/1991 supra note 528 and appeal no. 91/1992 supra note 533. See general Najidah supra note 477 at 20-23, Bechor supra note 17 at 147-149, Hindi supra note 103 at 2-3 these authors examine this concept from the point view of an Arabian scholar, see Carbonneau supra note 73 at 24-25, for a western interpretation of freedom of contract. It can be noted that both the west and Arabian scholars tend to agree on what is meant to be "freedom of contract".

that he submitted a letter from an engineering expert (the mediator) in which he asked him to settle the dispute, despite the fact that the obligation of proving the facts falls to the defendant. Furthermore, this expert should not be appointed as an arbitrator in the dispute between the parties, since he cannot act as an arbitrator and be an adversary at the same time, which makes this clause void since it infringes public policy rules.

The court dismissed this argument, stating that based on the general principles of contracting, arbitration is considered a contract or an agreement between the parties. As such, the parties have the right to agree on any condition or procedure that does not contradict the rules of public policy.⁶⁰³ Thus, agreeing on certain conditions or procedures prior to submitting the dispute to arbitration in the arbitration agreement implies that the parties are obliged to fulfill those conditions before referring the dispute into arbitration, since they are bound by contract to this condition. Furthermore, the obligation to prove that these conditions have been met falls to the party that is requesting the submission of the dispute into arbitration. Arguing that the clause is void based on the fact that the expert is both an adversary and an arbitrator has no grounds, since the parties have agreed by their own free will to submit the dispute to the mediator (the engineering expert) before submitting it into arbitration, and the expert is not considered as an arbitrator in this instance...⁶⁰⁴

The principle established in this decision was not invented by the court nor is it unique to arbitration. The court is simply applying contractual principles to arbitration. In this case, the court recognized the parties' freedom of contract in arbitration, which led to upholding the arbitration agreement. This suggests that the court is applying a double standard or at least limiting those principles. This double standard is illustrated when one of the parties seeks to resort to the court despite having an arbitration clause or agreement, which would be considered waiving the right to arbitrate if the other party did not uphold the arbitration clause in the first hearing.⁶⁰⁵ This is a clear limitation of the parties' right to freedom of contract. The affect of these principles in practice are important if not crucial to the promotion of arbitration, for the court based its decision to refuse the appointment request on these principles. Therefore, the test or the question that the court should answer is whether

⁶⁰³ The court is confirming the parties' freedom of contract in this decision.

⁶⁰⁴ Dubai Court of Cassation appeal no.140/2007, issued on the 7th of October 2007.

⁶⁰⁵ Civil Procedures article 203/5 supra note 442.

its decisions would settle the dispute or drop it into a circle of adjudication. A test such as this could check the court's interpretative authority and lead to promoting arbitration as an alternative method of dispute resolution that is functional and equal to the court in authority.

The importance of customs in interpreting the arbitral clause, in addition to the affect on arbitration of the nature of the transaction, are at issue in this next dispute, which the court used to dismiss the appellant's ground for appeal:

The court decided to dismiss this ground, stating that article 204⁶⁰⁶ implies that if the arbitration clause or agreement did not contain a method of appointing an arbitrator or the number of arbitrators, the court shall appoint arbitrators upon the request of one of the parties. Furthermore, clause 67 of the contract implies that the parties agreed before submitting their dispute to arbitration to mediate the dispute⁶⁰⁷. If the mediator failed, then they shall submit their dispute to the arbitration tribunal, and if the parties failed to appoint the arbitrators within 15 days, then the parties could request the court to appoint arbitrators. The court interpreted the sole arbitrator requirement to be a mediator, basing this interpretation on the fact that the clause states that "the arbitrator shall mediate the dispute between the parties" and on article 265/2⁶⁰⁸ and 258⁶⁰⁹ of the civil transactions. This implies that the purpose of the contract should be deduced from what has been drafted and the intent of the parties. Therefore, the court should search for the parties' intent by interpreting the contract text and be guided in their interpretation by the nature of that transaction and its customs.⁶¹⁰

This decision is a further indication of the enormous power the court holds over arbitration, in addition to showing how the proper use of this power can assist arbitration. On the other hand, this decision also shows the court ignoring the

⁶⁰⁶ Civil Procedures article 204 supra note 407.

⁶⁰⁷ Gillard & Savage describe this article as: "Article 67 of the FIDIC conditions provides for a fairly complex two-tier procedures for settling disputes arising between the owner and the contractor." Gillard & Savage supra note 65 at 18.

⁶⁰⁸ Civil transaction law article 265 states: "1- When the wording of a contract is clear, it cannot be deviated from in order to ascertain by means of interpretation the intention of the contracting parties. 2 - Where the contract has to be construed, it is necessary to ascertain the common intention of the contracting parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that loyalty and confidence which should exist between the parties in accordance with commercial usage."

⁶⁰⁹ Civil Transaction law article 258 states: "1-In contracts, purposes and meanings are decisive, not the wording or construction forms. 2-True meaning is the basis of words. A word shall not bear a metaphor unless it is impossible to construe them according to their true meaning."

⁶¹⁰ Dubai Court of cassation, appeal no. 294/2008, issued on the 1st of March 2009

provisions of article 204/2⁶¹¹, an article that limits appeals, which defeats the purpose of opting-out into arbitration in the first place.

The requirements of article 203⁶¹² are of concern yet again in this next decision in which the court establishes that it is essential for the party trying to uphold the arbitration agreement to present his request to the court in the first hearing. Otherwise, it would be considered a waiver of their right to arbitrate. This adds an additional requirement to the party trying to uphold the contractual obligation. This decision also exemplifies the importance of having a functioning arbitration system. In this instance, the parallel litigations and appeals that resulted in a lengthy litigation process could have been avoided if the court had upheld the arbitration clause, as illustrated by the court's response to the appellant's argument:

[T]he appellant argues in the first ground that the appeals court decided to dismiss the request to dismiss the dispute based on the existence of an arbitration clause, claiming that his attorney was present in the first hearing⁶¹³ and requested an extension to present his power of attorney. The appellant argues that the first hearing is the one in which he was present or whomever he chose to represent him was present. Since the attorney presented the agreement on 2/6/2008 and upheld this clause, then that should be considered as the first hearing. The court dismissed this argument, stating that articles 50⁶¹⁴ and 55⁶¹⁵ of the civil procedures law imply that the first hearing is the one in which the attorney or the defendant is present, and this fact does not change because an extension was requested to present the agreement. Furthermore, article 203⁶¹⁶ of the civil procedures law requires that the party trying to uphold the arbitration clause or agreement take a positive action in the first hearing. Doing otherwise would be considered a waiver of the right to uphold the arbitration, since it is viewed as a waiver of the arbitration clause.⁶¹⁷

⁶¹¹ Civil Procedures article 204/2 supra note 497.

⁶¹² Civil Procedures article 203, supra notes 406, 428 and 459.

⁶¹³ Which was conducted on 5/5/2008.

⁶¹⁴ Civil Procedures article 50 states: "On the day fixed for examining the action, the opposing parties shall appear (attend) by themselves or whoever they brief (authorize - appoint - delegate)."

⁶¹⁵ Civil Procedures article 55 states: "1 - The court shall accept from the parties whoever they shall appoint as proxy according to the law. 2 - The proxy must establish his appointment as proxy for his client by an official document. 3 - The proxy may be done through a declaration recorded in the session's minutes."

⁶¹⁶ Civil Procedures article 203, supra notes 406, 428 and 459.

⁶¹⁷ Dubai Court of Cassation, appeals no.142/2009 and 146/2009, issued on the 13th of September 2009.

Yet again the first hearing comes into play, and this requirement comes into a collision course with arbitration and undermines the arbitral process.

The next case is another decision that examines the first hearing requirement and its affect on setting aside arbitral awards, in addition to the affect that determining the exact date has on the dispute when an appellant tries to uphold the arbitral award.

The court dismissed this argument, stating that articles 208⁶¹⁸ and 212⁶¹⁹ of the civil procedures law implies that the arbitration hearing and process start by the appearance of the parties in front of the tribunal or by notifying them. Moreover, these articles require the arbitrators to notify the parties within 30 days of their appointment of the date of the first hearing. It is not required for the parties to be present in the arbitration hearing; the only requirement is that the arbitrators give the parties the opportunity to present their defense. The court states that since confidentiality is the nature of the arbitration hearing and the norm when it comes to arbitration, unless the parties agree to the contrary, all that is required from the arbitrators is to uphold due process and the parties' right of defense. Therefore, arbitration does not fall under the civil procedures law when it comes to notifying the parties or requiring their presence in the arbitration hearing. However, the arbitrators are bound by the rules stated in the arbitration chapter. As such and according to the jurisprudence of this court, deficiencies in the award cannot be amended by asking the arbitrators to explain or complete any shortcoming in the award, such as asking the arbitrators to prove the first hearing. Therefore, once the arbitrators have agreed and notified the parties of the first hearing date, they are unable to change that date, in order for the time period to be properly calculated. Determining the first hearing falls to the discretion and interpretation of the trial court, according to articles 210⁶²⁰ and 216⁶²¹ and the court's jurisprudence. This implies that the one of the grounds for setting-aside the award is

⁶¹⁸ Civil procedures article 208 state:" 1 - The arbitrator shall, within thirty days at most from the acceptance of the arbitration, notify the litigant parties with the date of the first session fixed to examine the litigation and with its meeting place and that without obligation to the rules settled in that law for the notification and he shall fix for them a date to submit their documents, briefs and defense aspects .2 - It shall be possible to arbitrate according to what one side shall submit if the other party failed to do on the appointed date. 3- If the arbitrators were many they should undertake, together, the investigation procedures and each of them should sign on the reports."

⁶¹⁹ Civil Procedures article 212 supra notes 486 and 476..

⁶²⁰ Civil procedures Article 210 state : "1 - If the litigant parties haven't set, as a condition in the agreement, a date for the arbitration the arbitrator should arbitrate within six month from the date of the session of the first arbitration, otherwise anyone who wanted of the litigant parties may prosecute the litigation to the court or may continue therein before the court if it was prosecuted before that. 2 - The litigant parties may agree, expressly or implicitly, to extend the appointed date, by agreement or by law, and they may authorizing the arbitrator to extend it to a certain date and the court may, according to the request of the arbitrator or one of the litigant parties, prolong the time - limits appointed in the preceding clause to the period which it shall find adequate for deciding in the litigation. 3 - The date shall be suspended as far as the litigation is suspended or severed before the arbitrator and its progression shall be resumed from the date of the arbitrator's acknowledgment of the extinguishment of the suspension or the severance's reason, and if the rest of the time - limit were a month it shall be extended to a month."

⁶²¹ Civil Procedures article 216 supra note 416.

that it was issued after the agreed upon time. Therefore, based on the appealed decision, the first hearing date was determined to be 11/9/2007, since postponing the hearing on that date would not change the fact that it was the first hearing. As such, the court decided to dismiss the appeal for the previous reasons.⁶²²

The cassation court supported the appeals court's decision and interpretation of the award over what the first instance court had decided. This emphasizes the idea that recognizing an arbitral award at the first instance court would not necessarily give it a *res judicata* status. It also illustrates the two methods of interpreting the award that were employed by the courts. The first method was employed by the first instance court, which decided to recognize the award by accepting both the arbitrator's and the appellant's claim in regard to determining the first hearing date. The appeal court decided that the date of the first hearing was the one that the arbitrators decided upon at the start and not the postponed date. This decision takes the litigants back to the start of their dispute without resolving it. Essentially, the parties' right to arbitrate has been forfeited, and they would have to seek the court again to resolve their dispute. This decision also shows the dangers of having a court that tolerates and encourages appeals, especially when it comes to recognizing arbitral awards, since the chances for setting-aside decisions tend to increase through an appeal.

The ability to appeal decisions about appointing the arbitrator is another cause of concern that is repeated more than once, and is not necessarily unique to construction arbitration. This decision exemplifies the idea that there is no boundary on appeals, nor any provisions or clauses that limit or deter appeals.

The third part of the first ground argues that the appellant requested the appointment of an arbitrator, which the court accepted, making this decision un-appealable according to article 204.⁶²³

⁶²² Dubai Court of cassation appeal no.157/2009, issued on the 27th of September 2009.

⁶²³ Civil Procedures article 204 supra note 407.

The court dismissed this argument, stating that article 204/2⁶²⁴ of the civil procedures law indicates that the decisions that are not subject to appeal are the ones that concern the appointment of the arbitrator in accordance with the conditions set in paragraph one of the same article, which is an exception to the general principle regarding appeals. As such, the court is limited when interpreting and applying this article. Therefore, it should be limited to appeals that have to do with the appointment or replacement of the arbitrator and does not extend to other preliminary decisions regarding the appointment decision—such as interpreting the arbitration clause in order to determine if it contained a process of appointment. The first instance court decided to appoint an arbitrator without upholding the procedures mentioned in article 31 of the contract, which states that the arbitrator should be named by one of the parties before starting the arbitration procedure. As such, the appeals court has the right to accept the appeal and determine if these conditions have been met.⁶²⁵

This decision by the court exemplifies that even when there is clear and explicit text in the law that denies appeals, it may not mean that a decision is un-appealable. The court may find a way in which to justify the appeal, such as is the case in this decision. By establishing this rule, the court is essentially stating that article 204/2⁶²⁶ appeal condition cannot be met. In essence, the court is allowing appeals of an appointment decision in contrast to an explicit article in the law, which defeats the legislature's intent of drafting this article to deny appeals intended to hinder the process of arbitration.

Another dispute that involves the FDIC⁶²⁷ contract is one in which the arbitral award was brought for recognition. Even though the cassation court decided to uphold the first instance decision to recognize the arbitral award, there remain certain points that are in need of examination. The first is the nature of construction contracts; the mixed nature of these contracts, and of the parties involved, makes them favorable for arbitration⁶²⁸. The second is the court's interpretation of the arbitration agreement.

The court accepts that due to the nature of the transaction, the parties' acceptance of

⁶²⁴ Id.

⁶²⁵ Dubai Court of Cassation, appeal no. 131/2009, issued on the 14th of June 2009.

⁶²⁶ Civil Procedures article 204 supra note 407.

⁶²⁷ See general Gillard & Savage supra note 65 at 18.

⁶²⁸ See general Turki supra note 11 at 551-553, where the author discusses construction suits, within the confines of the UAE civil procedures law.

the arbitration agreement may not occur in the same document that contains the main agreement.

The appellant argues that the appeals court decided that the letter of acceptance dated 5-03-2006 did not contain any indication of settling the dispute according to the rules of the FDIC⁶²⁹ contract or the arbitration clause, which is emphasized by the fact that the parties did not sign the arbitration clause in that contract. Furthermore, the letter of acceptance of the FDIC⁶³⁰ is a general acceptance that does not involve an acceptance of the arbitration clause of that contract. The appellant argues that this is a binding contract between the parties, and the letter of acceptance shows that the parties intended to settle any dispute arising from the construction contract through arbitration.

The court accepted this argument, stating that articles 203⁶³¹ and 216⁶³² of the civil procedures law imply that arbitration is “the disputants choosing an impartial arbitrator to settle the dispute between them without referring the dispute to the court; this could be in relation to a dispute that occurred or will occur and based upon an arbitration agreement or a clause. The arbitration focuses on the parties’ intent and agreement. This agreement is the main source from which the arbitrator’s authority is derived and in which the parties are able to opt-out of the court, which is the reason the legislature put extra assurances in place—including: the arbitration agreement needs to be in writing, the arbitrator must render an award within the scope of the arbitration agreement, the arbitration agreement is not required to be in a single document and the acceptance of the agreement can be in another document. Moreover, it can be proven in writing or through the parties’ communication and letters whether the documents and letters were signed by the sender; this can be proven through any form of written communication. Arbitration cannot be initiated unless the parties’ intent to arbitrate is proven, which can be proven if the arbitration clause was included in the main contract or in a separate arbitration agreement signed by the parties.” Accordingly, a construction bidding is considered as a construction contract agreement, and the trial court has the right to deduce the parties’ intent to arbitrate from the facts of the dispute without the supervision of the cassation court. The only requirement is that it is based on factual reasoning. The court explains that the reasoning is null if the court’s deduction is not valid from a subjective perspective or if the records show that the court did not understand the facts of the case. Therefore, and based on these facts, the arbitration agreement is considered valid, and the court decided to uphold the first instance rule and dismiss the appeals court.⁶³³

Despite the positive outcome (for arbitration) in this dispute, one must ask why a court’s decision to recognize an arbitral award was subject to appeal. What does accepting such appeals achieve? An arbitral award issued in 2006 and later

⁶²⁹ See general Gillard & Savage supra note 65 at 17-18.

⁶³⁰ id.

⁶³¹ Civil Procedures article 203, supra notes 406, 459.

⁶³² Civil Procedures article 216, supra note 416.

⁶³³ Dubai court of cassation appeal no.73/2010, issued on the 9th of May 2010

recognized by the first instance court went through a full litigation that examined the main contract between the parties to determine whether the dispute would fall under the scope of the arbitration agreement. Also, the arbitral award was set-aside by the appeals court. This outcome seems to defeat the purpose of opting-out into arbitration. Lengthy litigation could have been avoided if the court had been willing to view arbitration as an equal solution.

The next case addresses more than one issue relating to arbitration: the appointment of the arbitrators, the first hearing, determining the parties in the dispute, the affect of arbitration on third parties, what is considered to be court-annexed, and the separability doctrine.

The court dismissed this claim, stating that the court's intervention in the appointment process is limited to the conditions stated in article 204⁶³⁴. One of those conditions states that if the parties have failed to come to an agreement in regard to the arbitrators, and one of the parties sought the intervention of the court to resolve this issue, the parties do not have the right to appeal once the court has answered their request. Based on the facts of the dispute and the sub-construction contract, which states that the parties to the dispute agreed to arbitrate any dispute that arising from this contract, the appellant company stated that the first defendant did not comply when a request was made to appoint an arbitrator to start the arbitration proceedings. This is why the first instance court appointed an arbitrator upon the appellant's request. Therefore, the appellant has no right to appeal in this respect since the court granted their request.⁶³⁵

This piece of the case relates to determining the scope of the arbitration:

The appellant argues that the scope of the arbitration clause does not involve this request, for the arbitration clause scope involves disputes that concern the fulfillment of the construction contract. On the other hand, the appellant is seeking to be paid in exchange for the work done in the project. Furthermore, the arbitration clause has no affect, since the construction contract ended according to article 892 of the civil transaction.⁶³⁶

⁶³⁴ Civil Procedures article 204, supra note 407.

⁶³⁵ Dubai Court of Cassation appeal no. 167/2002, issued on the 2nd of June 2002.

⁶³⁶ Civil Transaction article 892 states: "The contract for work shall come to an end by completing or by rescission of the contract by mutual agreement or by order of the court."

The court dismissed this argument, stating that paragraph five of article 203 of the civil procedures law⁶³⁷ implies that if the parties have agreed to arbitrate, then they have waived their right to litigate in front of the court. In the event that one of the parties disregarded the existence of the arbitration clause and started the proceedings in front of the court and no one argued about the existence of the arbitration clause in the first hearing, then the parties' right to argue on the existence of the arbitration clause would be waived. According to the jurisprudence of the court, the party seeking to uphold the arbitration agreement or clause needs to take a positive action in the first hearing by objecting to the proceedings and requesting the dismissal of the litigation and referring the dispute into arbitration. This requires that the dispute arose between the parties. The court explained what is considered a dispute: if the purpose is the protection of a legal right or the legal status of the parties, then it is a dispute. The scope of the arbitration needs to be identified clearly in the arbitration agreement; otherwise, it would be considered a ground for setting-aside the award according to article 203/3,⁶³⁸ which is the legal relationship over which the dispute arose. Identifying this relationship on its own is sufficient to consider the arbitration agreement valid, even if the agreement did not identify what disputes fall under the scope of the arbitration. Even though that arbitration is limited to what the parties have agreed to, they still have the right to identify what is considered to fall under the scope of the arbitration. The determination of whether a dispute falls under the scope of arbitration is the responsibility of the first instance court.⁶³⁹

The third piece of this case relates to the affect of the arbitration clause on third parties:

The court dismissed this claim stating that article 252 of the civil transaction law states that: "The contract does not impose any obligation on third parties, but may establish a right in their favor."⁶⁴⁰ This implies that the arbitration agreement has no effect against third parties, and its effect is limited to the parties to the agreement, i.e., the parties that helped create the contract and have the will to be bound by it. However, the arbitration clause can extend its effect to third parties in certain circumstances, including, for instance, if the contract were transferred to a third party in this condition, the arbitration clause would affect this party. Moreover, according to article 891 of the civil transaction law,⁶⁴¹ the determination of all of these factors is part of the subject matter court, and based on the facts of this dispute, the first instance court came to the decision by sound reasoning that is supported by evidence, and thus the court decided to dismiss this argument.⁶⁴²

The fourth piece of this case relates to the affect of court-annexed arbitration:

⁶³⁷ Civil Procedures article 203, supra notes 406, 428 and 459.

⁶³⁸ Civil Procedures article 203/3 supra note 428.

⁶³⁹ Appeal no. 167/2002 supra note 635.

⁶⁴⁰ Civil Transaction law article 252.

⁶⁴¹ Civil Transaction article 891 states: "The subcontractor may not have a claim against the master, as regards the dues of the first contractor, unless the latter refers him to the master."

⁶⁴² Appeal no. 167/2002 supra note 635.

The fifth and seventh grounds of appeal argue that the court's decision to refer the dispute into arbitration and to stop litigation until the arbitrator rendered an award and submitted it to the court for recognition is flawed. There is nothing in the law that states that the court should pause litigation until the arbitrator renders an award. By referring the dispute to arbitration, the court essentially gave up its jurisdiction over the dispute and recognized the award. The court dismissed this argument, stating that article 213⁶⁴³ shows that the court's authority over court-annexed arbitration does not end even if it refers the dispute into arbitration; rather, it continues until the arbitrator renders an award that is recognized by the court.⁶⁴⁴

The court's answers in this decision are worth analyzing to determine the factor responsible for the court's change in its language. Regarding the affect on the court's decision of a case being a court-annexed arbitration, it seems that in this situation, the court determined appointment of arbitrators in a court-annexed arbitration allow the court managed to extend its authority over the dispute. In this case, the court established the separability doctrine by dismissing the appellant's argument that the end of the main contract constituted an end of the arbitration clause contained in the contract. The court responded to this argument by establishing the separability doctrine and stating that this dispute falls under the scope of the arbitration clause.

This dispute raises further questions. Is there a separability doctrine? Do all requests for appointment of arbitrators involve a court-annexed arbitration? There is no right answer to these questions and all depends to the court and its willingness to accept or dismiss arbitration.

4.5.1.4 Insurance

The next two decisions show how the court addresses the relationship between arbitration and insurance policies.

The first decision is another illustration of the court's first hearing rule:

⁶⁴³ Civil Procedures article 213 supra note 139.

⁶⁴⁴ Appeal no. 167/2002 supra note 635.

The appellant claims in the first ground of the appeal that the court mixed up the start of the arbitration and the extension of the arbitration by misinterpreting articles 208⁶⁴⁵ and 210⁶⁴⁶ of the civil procedures law in regards to the first hearing. The appellant claims that the first hearing was on 3-7-2008, in which he requested the arbitrator to hold the proceedings until the court rendered a decision in appeal no.../2008. This request was refused, thus making the hearing the first hearing and not a preliminary hearing. The appealed decision claims that this was a preliminary hearing and that the first hearing was on 10-7-2008. Thus, the arbitrator should have issued the award on 2-1-2009 and not 1-2-2009. The appellant upheld this argument as a ground for setting-aside the award based on article 216⁶⁴⁷ of the civil procedures law. The appeals court dismissed this argument based on article 210,⁶⁴⁸ claiming that the hearing on 3-7-2008 was a preliminary hearing. The appellant argues that there is no such thing as a preliminary hearing and that the hearing that comes after the appointment of the arbitrators is the first hearing. The court accepted the appellant's argument, stating that article 208⁶⁴⁹ defines the commencement of the arbitral proceedings to be the hearing in which the parties appear in front of the tribunal or are notified to appear.⁶⁵⁰

Should the determination of the first hearing date be left to the trial court?

Does the nature of the parties and of their dispute affect the court's decision? Since the court does accept or encourage appeals, these questions require answers. The court in a previous decision stated that the trial court has the right to interpret the contract and the facts of the case without the supervision of the cassation court. The only condition that the court set is that this interpretation must have a legal basis and must not violate any public policy or order. As such, the determination of the first hearing can be interpreted in two ways—the way that the first instance and appeals courts interpret it, or the way in which the cassation court did. Thus, the cassation court should have upheld the decision of the appeal and first instance courts and their interpretation, in order to limited appeals submitted to them to on questions of law and not on re-determining the facts of the case.

⁶⁴⁵ Civil procedures law article 208 supra note 618.

⁶⁴⁶ Civil procedures law article 210 supra note 620.

⁶⁴⁷ Civil procedures law article 216 supra note 416.

⁶⁴⁸ Civil procedures law article 210 supra note 620.

⁶⁴⁹ Civil procedures law article 208 supra note 618.

⁶⁵⁰ Dubai Court of Cassation appeal no. 317/2009, issued on the 14th of February 2010.

The parties to the dispute should have affected the court's decision, given that both litigants are companies. This should have eased the court's concerns about arbitration being a dangerous process and that the parties require the court's protection, since the nature of commercial parties and commercial transactions almost always have an embedded risk factor in them⁶⁵¹, and as such they do not require the court's intervention to protect them. This implies that the nature of the parties did not affect the court's decision and was an irrelevant factor in the setting-aside of the award. However, the nature of the transaction between the parties may have affected the court's decision. The contract that contained the arbitration clause was an insurance policy, suggesting that the nature of the dispute is a mixed one, which is why this dispute was submitted to the civil circuit. In essence, this implies that the court's decision is influenced by their view that arbitration is an exception to legitimate jurisprudence and that any interpretation or examination of the awards should be limited and guided by this view.

The second appeal raises the question of the scope of the arbitration clause and whether it involves tort disputes or not. It also raises a question about the extent of the effect of arbitration on third parties such as an insurance company. The appellant (the investment company) in appeal no. 41/2010⁶⁵² tried to uphold the arbitration clause by claiming that the dispute arose from the lease contract between itself and the tenant (the insurer), and that since they both agreed in the lease agreement that the appellant would not be liable for any tort claims, the investment company refused the request to refer this dispute into arbitration. The appeals court's response to this argument is that

⁶⁵¹ Qasim explains this by stating that: "profit is the goal of any trader, and the trader upon seeking this profit has a chance of suffering a loss, since gaining a profit rests on the status of the market." See ALI SAID QASIM, *MBAD'I AL-QANON AL-TJARI FE DWALT AL-EMARAT AL-ARABYAH AL-MTHADAH*, (The Principles of Commercial Law in the United Arab Emirates) 19 (2nd ed. 2011).

⁶⁵² This case had two appeals submitted to the cassation court; see Dubai Court of cassation appeal no. 41 and 74/2010, issued on the 2nd of June 2010.

the defendant's (the insurance company) claims were based on torts and thus did not fall under the arbitration clause. The appellant argues that the insurance company replaced the insurer in the claim, and that thus it does not have the right to raise a claim based on tort, since the lease agreement contained a clause that exempted the appellant from claims of this nature.

[T]he appellant argues in the first and third grounds that they upheld their argument that the court should dismiss the case based on the existence of an arbitration clause in the lease contract between them and the tenant (the insurer), claiming that the court dismissed this argument by stating that they do not have the right to arbitrate. The court also claimed that the defendant (the insurance company) initiated this damage claim not based on the lease contract that contains the arbitration clause, but based on the principle of torts, which makes this dispute fall outside the scope of the arbitration clause. The appellant claims that the insurance company does not have the right to ask for damages based on tort, since the lease agreement contained a clause that exempted them from any suits based on tort. They claim that this agreement does not infringe upon public policy or order and as such the court needs to uphold it. The court dismissed this argument, even though (as it also stated that) its jurisprudence accepts the parties' agreement to exempt tort claims. However, this exemption is limited to the parties' ability to prove that the tort claim accord was due to an act that was a direct result of the other party's action, which exceeds the contractual obligation, and as such they are liable either by the contract or not. Furthermore, the court has the right to identify the basis of the damages on its own without the request of the parties. The agreement between the parties to submit the dispute from a certain agreement into arbitration does not affect third parties that are not bound by that agreement. Furthermore, article 296 of the civil transaction law states that all clauses that exempt the party from tort liability are void.⁶⁵³ The court explained that in this dispute, the parties' liability is based on the principles of the tort and not on the lease contract, since the leaking of the pipes that resulted in damages to the goods is not a part of the lease agreement. Therefore, the appeals court came to the right conclusion in dismissing the appellant's request to arbitrate.⁶⁵⁴

This decision indicates the need to implement the Separability and *kompetenz-kompetenz* doctrine⁶⁵⁵, which would help change the court's view on arbitration and

⁶⁵³ Civil Transaction Law article 296 of the states: "Any condition exonerating from tort liability shall be deemed null and void."

⁶⁵⁴ Appeal no. 41 and 74/2010 supra note 652.

⁶⁵⁵ See Carbonneau supra note 74 at 31. The author explains the Separability doctrine as: "The separability doctrine provides that the agreement to arbitrate is separate from, and independent of, the main contract." and *kompetenz-kompetenz* as: "The *kompetenz-kompetenz* doctrine, also known as

acceptance of appeals; this may in turn minimize parallel litigation. However, even if this doctrine were applied, a mechanism would be needed by which to stop parallel proceedings and to deter the party contesting the arbitrator's jurisdiction from contesting the arbitrator's decision⁶⁵⁶. This mechanism would need to take into account the court's attitude toward appeals in order for such a mechanism to have a real effect.

I found no real difference between arbitration clauses in cases involving insurance policies and those involving construction contracts; the court practices the same level of scrutiny for both.

4.5.1.5 Companies

The five arbitration cases⁶⁵⁷ examined in this section were found in the companies' contracts and presented to the civil circuit court.

The first decision examines the liquidation of companies' assets, and here the court yet again renders the final and binding arbitral award powerless. The court states that the award in itself is not subject to appeal, but the court's decision to recognize the award is subject to appeal. The only exception to this rule occurs in the event that the arbitrators were authorized to mediate the dispute. When interpreting such agreement, the court tries to limit the powers that it gives to the arbitrators, because

jurisdiction to rule on jurisdictional challenges, provides that the arbitral tribunal has the authority to decide on its own authority to rule." See also Redfern & Hunter supra note 62 at 117-120, where the authors discuss separability doctrine.

⁶⁵⁶ Since one of the main attributes of arbitration and certainly one of the attractive features of it is having a final and binding award, see general Redfern & Hunter supra note 62 at 31, when explaining why parties choose to arbitrate in international arbitration they explained that one of the two main reasons is the enforceability of the award, naturally this would entitle that the award should be final in order for it to be enforced. See general Tweedale supra note 72 at 38-39. See Born supra note 65 at 5.

⁶⁵⁷ Excluding the one that was examined in the first section, which is Dubai Court of Cassation, appeal no. 346/1991 supra note 528, which should bring the number of cases to six.

(the court argues) agreements would fall under the article 217/3⁶⁵⁸ exception from the general rule, and this allows parties to appeal the court's decision to recognize an arbitral award. The court justifies their interpretation and their requirement that such power should be explicitly stated in the arbitral clause by saying that arbitration is a dangerous method, since the arbitrator, once given the authority to mediate, would make his award subject to the exception of article 217/3⁶⁵⁹.

[T]he appellant argues on the second ground that the appeals court decided to dismiss the appeal on the ground that the arbitrator was authorized to mediate the dispute between the parties, which is mentioned in the arbitration agreement between the parties that states: "that the arbitral award is final and binding- once the parties agree that the arbitrator is authorized to mediate and the dispute did not end up in front of him through mediation." However, they agreed in the arbitration agreement that the arbitrator is bound to uphold due process and hear the parties' arguments, which does not imply that the arbitrator is authorized to mediate the dispute. Also, the parties' agreeing that the award is final and binding does not mean that they give up their right to appeal the first instance decision to recognize the arbitral award. The cassation court agreed with this ground, stating that article 217⁶⁶⁰ implies that the exceptions to appealing the decision to recognize an arbitral award is limited to the situation in which the arbitrator is authorized to mediate the dispute. The will of the parties to authorize the arbitrator to mediate is not assumed; it needs to be explicitly stated in the agreement. Thus, agreeing in the arbitration agreement that the award is not subject to the rules of the civil procedures and that the award is final and binding does not imply that the parties intended to authorize the arbitrator to mediate the dispute. The court justifies its view in this matter by stating that arbitration that includes a mediation procedure is a dangerous process, since arbitrators that are authorized to mediate are not bound by the law, only to the rules of public policy. What is meant by the waiver of the parties' right to appeal in article 217/3⁶⁶¹ is the parties' explicit waiver of the right to appeal the decision to recognize the arbitral award or set it aside, not the right to appeal the arbitral award, since the award itself is not subject to appeal according to article 217/1.⁶⁶² Even though the court has the right to interpret the parties' agreement, this right is limited, since the court is required to interpret the agreement within the confines of the terms of the agreement. Therefore, the fifth clause of the arbitration agreement, which states: "in regard to the mediation between the parties" and the seventh clause, which states "with the exception of the above, the arbitrator is either authorized to mediate or not, and the award is final and binding for both parties, and they are obliged to enforce it, except if it was in contrast to a public policy rule or the law." This implies that the parties did not authorize the arbitrator to mediate the dispute, and this is not changed by what may have been written in the

⁶⁵⁸ Civil Procedures Law Article 217 supra note 543.

⁶⁵⁹ id.

⁶⁶⁰ id.

⁶⁶¹ id.

⁶⁶² id.

third clause, which states “the arbitrator is not bound by the normal procedures of the court.” Therefore, the parties’ agreement does not imply that they have given the arbitrator the right to mediate the dispute. And, the phrase “final and binding” in the agreement does not mean that they waived their right to appeal the court’s decision of recognition. Thus, the court decided to dismiss the appeal and refer the decision to the appeal court.⁶⁶³

Despite having a commercial element, this dispute did not escape the court’s views on arbitration⁶⁶⁴, implying that there is no barrier to repel or stop parties from appealing the court’s decision on recognition, even if an exception to appeals existed. As is the case in this dispute, the court would find a loophole by using their powers of interpretation on the parties’ agreement.

This dispute involves a request to recognize arbitral awards and contains two companies as parties to that dispute, in addition to having a arbitral institute, and here the court decided to nullify the award:

The appellant appealed this decision to the cassation court, arguing that the appeal court upheld the first instance decision to dismiss the request to recognize the award on the ground that the award lacked a copy of the arbitration agreement, which the court claimed is a ground for setting-aside the award. The appellant argues that an arbitration institute within the UAE, an institute that is recognized by the UAE, issued the award and the court should not undermine the authority of this institute. Moreover, the award was issued according to an arbitration agreement between the parties dated 6/5/2002, which was presented to the arbitration institute in compliance with article 23 of the institute rules. Furthermore, the chamber confirmed sending the award to the court containing the arbitration agreement, and it also sent a copy of the arbitration agreement to the chief justice in the second circuit of the Dubai First instance court. Moreover, the Chamber of commerce testimony that the arbitration agreement has been presented at the start of the arbitration proceedings should have been taken into account by the court when deciding to recognize the award, since this is an institutional arbitration. The court decided to refuse to recognize the award despite all of those facts. The legislature’s aim to present an arbitration agreement with the award is to avoid having an arbitration award issued without an agreement and to prevent the arbitrator from exceeding the scope of the arbitration. For the following reasons, the court should nullify the appealed decision and recognize the award. The court dismissed this claim, citing article 212/5⁶⁶⁵ of the civil procedures

⁶⁶³ Dubai Court of Cassation appeal no. 294/1994, issued on the 26th of November 1994.

⁶⁶⁴ See supra 2.6.5 UAE Courts’ View of the Definition.

⁶⁶⁵ Civil Procedures Law article 212/5 states: “The award shall be in writing and pass in majority and accompanied by the dissenting vote, and it shall be accompanied by the arbitration agreement, a summary of the parties statement and their documents, the grounds and context of the award, the date

law and article 45/3 of the rules of the Dubai chamber of commerce and industry arbitration and mediation institute, which states: “the final award of the Tribunal Shall be in writing and must include: (a) the arbitration agreement....”⁶⁶⁶ In addition to the jurisprudence of this court, this case shows that the award should contain a copy of the arbitration agreement, which is an essential requirement that is required to be presented when recognizing the award, otherwise the award would be set aside. This rule does not change if the arbitration were to be ad hoc or an institutional, and this requirement cannot be fulfilled by presenting a testimony or a certificate from the institute that the agreement had been submitted at the start of the proceedings, a requirement that cannot be completed by a separate paper or by refereeing in the award to the arbitration agreement without presenting it. However, this requirement can be fulfilled by presenting the content of the agreement with the award; the purpose of this requirement is to allow the court to practice its supervisory role over arbitration. Furthermore, the appellant referred to document no.13 as a copy of the arbitration agreement, without explaining the content of this document in order for the court to recognize the award. Thus, the award is null and this fact is not affected by presenting a letter from the arbitration institute, which shows that the agreement had been presented at the start of the proceedings.⁶⁶⁷

Even though an institute that is recognized by the UAE and is working within the confines of the chamber of commerce issued the award, this was not enough for the court to recognize the award. The court set aside the award, because it did not fulfill the requirement of article 212/5⁶⁶⁸ of the civil procedures law. The requirement designed to ensure that the arbitrator did not exceed the scope of the arbitration agreement cannot be amended or corrected later on, according to the court. It needs to be presented with the award and a mere referral to a copy of the award does not fulfill this requirement. From the court’s perspective, building on the fact that arbitration is being treated as an exception⁶⁶⁹, it will take strict measures to enforce the requirement of the law. As such, the court decided that the failure to comply with this requirement (outlined above) cannot be remedied by resubmitting the arbitration agreement to the court. Therefore, this decision establishes that having a valid arbitral award is not

and place and the signature of the arbitrators. If one or more arbitrator refused to sign the award such a refusal shall be stated in the award, however the award is still valid if signed by the majority of the arbitrators.”

⁶⁶⁶ Dubai International Arbitration Center (DIAC) conciliation and arbitration rules of 1994. article 45/3.

⁶⁶⁷ Dubai Court of Cassation appeal no.328/2002, issued on the 23rd of November 2002.

⁶⁶⁸ Civil Procedures law article 212/5 supra note 665.

⁶⁶⁹ See supra 2.6.3 The Arab Jurist View, and Supra 2.6.5 UAE Court View of the Definition.

sufficient to recognize the award; it requires submitting the agreement with the award to the court in order for the court to recognize it. Again, the purpose of this requirement is to confirm that the arbitrator ruled within the scope of the arbitration agreement. The court could have fulfilled this result by accepting the resubmission of the agreement, or by accepting the letter from the institute as an indicator that the award was issued based on an arbitration agreement. The court's decision in this case demonstrates that its hostile view on arbitration greatly impacts its decisions⁶⁷⁰. The court is viewing arbitration as a flawed method of dispute resolution⁶⁷¹, even when dealing with commercial parties⁶⁷² or a commercial arbitration, which creates a situation in which the parties cannot escape having to submit their dispute for a second time in front of the court, which (again) contradicts the purpose of opting-out into arbitration in the first place.

The next dispute addresses the arbitrator's ability to extend the arbitration:

The third and fourth ground argues that the decision to accept the request of extending the arbitration, which has been granted by the court that heard the dispute in regards to appointing the arbitrators, even if it had been rendered by the head judge and signed by him alone it is still a lawful act, thus the court has no authority to nullify that judge's decision. The appellant argues that the decision is null since the court dismissed the main defendant from the suit, and the court dismissed the request that the petition in question not be subject to appeal according to article 204⁶⁷³ of the civil procedures, which applies only to appointment decisions and does not extend to the arbitration procedure. However, this article state that the court's decision in regard to appointing arbitrators is not subject to appeal, which makes the decision that was rendered by the chief justice in regard to extending the arbitration period also not subject to appeal.

⁶⁷⁰ The court in this instance is competing with arbitration for the jurisdiction over the disputes, which ultimately harms both process and subsequently the litigants, see general Paulsson supra note 106 at 265. See general Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Resol. 469 at 473-475 (2006). The author in this article discuss the old judicial hostility towards arbitration, in England and the US, which is similar in this authors view to how the court is viewing arbitration in the UAE in this century.

⁶⁷¹ For the court is viewing arbitration as an exception to the parties right to seek their natural judges and therefore unable to provide the same level of judicial guarantees to the parties, see supra 2.6.3 The Arab Jurist View, and Supra 2.6.5 UAE Court View of the Definition.

⁶⁷² See general Qasim supra not 651 at 19.

⁶⁷³ Civil Procedures law article 204 supra note 407.

The court dismissed this argument, stating that in regard to appeal no. 311/205—in which the court decided to vacate the appeals court decision and submit the dispute back to the appeals court again to hear the dispute over extending the arbitration period, which implies that the court decided to accept the appeal—the appellant has no right to argue in this matter.

The second ground of appeal argues that the ninth clause of the arbitration agreement grants the arbitrators the right to extend the arbitration on their own without submitting a request to the court, and they only have to notify the court about the extension. However, the appealed decision interpreted this clause to the contrary, which resulted in nullifying the extension date. The court dismissed this argument, stating that according to article 210⁶⁷⁴ of the civil procedures law, if the parties did not agree on a time period for the arbitration, then it shall be for six months from the start of the first hearing, and the parties have the right to extend that period either explicitly or implicitly, and they have the right to delegate that right to the arbitrators. The court can also grant the extension based on a request of the arbitrators or one of the parties, and furthermore the court has the right to understand and interpret the contracts and to conclude what the parties have intended to do. Since the appealed decision, the court decided to uphold the first instance decision to nullify the petition dated 4/6/2005.⁶⁷⁵ Therefore, court based its interpretation of the clause on sound reasoning, which makes the appellant's argument void.⁶⁷⁶

It can be deduced from this dispute that the court's interpretation of the arbitration clause requirement to extend the arbitrator's powers to extend the arbitration is guided by its belief that the court is required to protect individuals' right to adjudicate their dispute to the court and their right to appeal. These outweigh the parties' right to freedom of contract⁶⁷⁷ and their right to arbitrate, which is illustrated by the court's interpretation of the arbitral clause in this instance. This in turn makes

⁶⁷⁴ Civil Procedures law article 210 supra note 620.

⁶⁷⁵ Stating that: “ the arbitration clause that the appellant based his argument, is meant to grant the arbitrator the right to seek the court to request the extension in place of the parties, and not as the appellant is stating that it grants them the right to extend the period on their own and notify the court of that extension, and if the appellants claim were true then why did the clause state that the arbitrators are required to notify the court, moreover the court interpreted the clause to grant the arbitrator the right to determine the amount needed for the extension and request the court to confirm that amount. The court came to the conclusion that the arbitrators have upheld this clause by requesting the court to confirm the extension. However, the confirmation was granted from the chief justice on his own which is in contrast to the meaning of the court that is stated in article 210/2.” Dubai Court of Cassation appeal no. 222/2006, issued on the 25th of February 2007.

⁶⁷⁶ id. appeal no. 222/2006

⁶⁷⁷ See general appeal no. 346/1991 supra note 528 and appeal no. 91/1992 supra note 533. See general Najidah supra note 477 at 20-23, Bechor supra note 17 at 147-149, Hindi supra note 103 at 2-3 these authors examine this concept from the point view of an Arabian scholar, see Carbonneau supra note 73 at 24-25.

court-annexed arbitration⁶⁷⁸ closer to being an expert's opinion rather than a separate and equal method of dispute resolution. The arbitration in this case is considered to be a court-annexed arbitration, which should have worked in favor of arbitration.

The next dispute discussed gives an example of the challenges facing the recognition and enforcement of arbitral awards in the UAE. In this dispute, the appellant managed to prolong the dispute by arguing on the subject matter of the dispute, and in particular about the appointment of the arbitrator, which resulted in delaying the enforcement of the arbitral award. The court appointed the arbitrator in this case, which makes turns this arbitration into a court-annexed and as a result should have gained the court's support. What should have been a straightforward decision required almost two years of litigation to receive res judicata status despite having the appellant argue on the subject matter of the dispute:

The court dismissed this argument, stating that according to article 203 of the civil procedures law,⁶⁷⁹ the parties have the right to agree to submit their dispute to a sole arbitrator or a tribunal, which establishes the individual's right to arbitrate and to choose the number of arbitrators they see fit. However, if a dispute arose and the parties did not agree on a number of arbitrators, then the parties have the right to seek the court to appoint an arbitrator.⁶⁸⁰ This dispute shows that the original contract was concluded between the parties on 5/8/2002, and it contained an arbitration clause that did not identify the number of arbitrators. In addition, a request was made by the defendant to the court to appoint an arbitrator, which the court granted by appointing an accounting expert as an arbitrator in the dispute and both parties confirmed and accepted this appointment.

Furthermore, the appellant argues that the arbitrator claimed in the award that he asked the Horse Club to submit its records of transactions with the company, which is an important document required to identify the parties' position in this dispute. The arbitrator claimed he did not receive any reply from the Club. The appellant argues that the arbitrator should have invoked article 209 of the civil procedures law⁶⁸¹ and requested the court's assistance in order to receive those documents. The appealed decision refused the request to resubmit the dispute back to the arbitrator in order to clarify this point.

⁶⁷⁸ See general, Levin supra note 141 at 538.

⁶⁷⁹ Civil Procedures law article 203 supra notes 406, 428 and 459.

⁶⁸⁰ According to Civil Procedures law article 204 supra note 407.

⁶⁸¹ Civil Procedures law article 209/2 supra note 429.

The court dismissed this argument, stating that according to the jurisprudence of this court, when recognizing an arbitral award, the court shall not revise the subject of the dispute, unless it is in conflict to a public policy rule.⁶⁸²

Due to the tolerance and encouragement of appeals, which both the legislature and the court view as a way of upholding due process and by extension to upholding justice, since appeals protect individuals' right to litigate their dispute in front of their natural judge through their right to appeal.⁶⁸³ In essence, the court's practice is changing the nature of the arbitration process from a binding non-appealable award into a pre-litigation process or an expert's report, given that in the event that one of the parties is not satisfied with the outcome of an arbitration, which is likely to occur given the nature of any adjudication method, they are able to contest the award and have it re-examined by the court, which creates a situation in which the parties would have to litigate their dispute for a second time in front of the court. Furthermore, the court stating that "when recognizing an arbitral award the court shall not revise the subject of the dispute, unless it is in conflict with a public policy rule"⁶⁸⁴ contradicts its action in this dispute and the rest of the dispute examined below.

This next case involves a recognition request in which the appellant tried to set-aside the award:

The appellant claims in the third part of the third ground and the second ground that the award is null since it was issued by a non-authorized party and in contrast to what the parties agreed on in the contract, and that the arbitrator failed to notify the appellant of the introduction of a third-party in the proceedings.

The court dismissed this ground, stating that there is nothing in the papers that suggest that the parties of the arbitration were not the ones that agreed to arbitrate; therefore, the claim that a third party was introduced in the proceeding is null and without basis. The appellant's first ground argues that the arbitrator did not uphold the requirements of article 213,⁶⁸⁵ since the arbitrator did not submit the award and the rest of the

⁶⁸² Dubai Court of Cassation appeal no. 72/2007, issued on the 10th of June 2007.

⁶⁸³ See supra 2.6.5 UAE Courts View of the Definition.

⁶⁸⁴ Appeal no. 72/2007 supra note 682.

⁶⁸⁵ Civil Procedures law article 213 supra note 139.

arbitration document within 15 days of issuing the award, which infringes the requirement of that article. The court dismissed this argument, stating that articles 213⁶⁸⁶ and 204⁶⁸⁷ imply that the request for appointing an arbitrator does not mean that it is a court-annexed arbitration, for in this instance the court is simply enabling the parties to arbitrate. As such, the arbitrator did not violate article 213⁶⁸⁸ since he is not bound by the procedures in that article. In regard to the remaining grounds of the appeal, the appellant argues that the court recognized the award without examining his defense in regard to fulfilling their contractual obligation, in contrast to what the arbitrator decided in his award. The court dismissed this argument, stating that the court when recognizing an arbitral award does not examine the subject of the award; furthermore article 216⁶⁸⁹ limits the conditions of setting-aside the award.⁶⁹⁰

The court's odd behavior when compared to other decisions can be explained by the circumstances that surrounded this dispute, which originated in a time in which the courts were flooded with cases due to the international financial crises that had a major impact on the global financial market and on the UAE. The court's attitude toward arbitration in this dispute has significantly changed, and the circumstances mentioned might explain why the court did not label this arbitration as being court-annexed. They may also explain why the court dismissed the appellant's argument, which under normal circumstances it would have been accepted.

Furthermore, this dispute highlights the extended life cycle of the arbitral award, for instead of ending with the trial court, it evolved into a full-blown litigation, despite the circumstances of that time and the court's needs for another outlet for adjudicatory relief for individuals at that time.

4.5.1.6 An Agent Authority to Bind a Principal to Arbitration⁶⁹¹

⁶⁸⁶ Id.

⁶⁸⁷ Civil Procedures law article 204 supra note 407.

⁶⁸⁸ Civil Procedures law article 213 supra note 139.

⁶⁸⁹ Civil Procedures law article 216 supra note 416.

⁶⁹⁰ Dubai Court of cassation appeal no.181/2010, issued on the 26th of September 2010.

⁶⁹¹ This title was taken from an article by Jessica S. Pers, See general Jessica S. Pers, *An Agents Authority to Bind a Principal to Arbitration*, 65 Cal. L. Rev. 355 (1977), the author in here discuss *Madden v. Kaiser Foundation Hospitals* case, in which: "The California Supreme Court upheld an amendment to a standard health care service which required binding arbitration of medical malpractice claims, even though the plaintiff never consented to arbitration nor authorized anyone to consent for

Two decisions highlight the court's practice when it comes to arbitration's relationship with an agent's right to conclude arbitral agreements.⁶⁹²

The first decision illustrates the general difficulties facing the recognition of arbitral awards, and it highlights the agent's right to enter into arbitration:

The sixth ground of appeal argues that the agency agreement between the inheritor and the first defendant only allows the first defendant to agree to arbitrate in regards to the properties that the inheritor owns in partnership with his deceased sister. However, the appealed decision dismissed this argument stating that the courts' jurisprudence doesn't extend to the subject matter of the arbitration.

The court dismissed this argument, stating that the arbitration agreement is being conducted by the agent and extends the agency's contract. The court also stated that the agent's powers as a representative are subject to partial annulment regarding the relationship between the agent and his client and not in regard to these parties. Therefore, the appellants have no right to request the nullification of the award by stating that the agent has exceeded his agency contract.⁶⁹³

In essence, the court established that the parties' waiver of their right to arbitrate needs to be explicitly proven in front of the court; in doing so, the court is protecting the individual's right to arbitrate, which is uncharacteristic of the court and in turn works in favor of arbitration.

The second decision involves an international arbitral institute in the form of the International Chamber of Commerce of Paris,⁶⁹⁴ and the commercial agencies law of the UAE:

[T]he appellant argues that the court's decision to dismiss the appointment request by claiming that the request should have been made to the ICC⁶⁹⁵ in Paris. However, article 18 of the commercial agencies law⁶⁹⁶ gives the jurisdiction to the UAE courts

her. The provision was negotiated by an agent, empowered by the state legislator to act on behalf of plaintiff's behalf".

⁶⁹² See general Redfern & Hunter supra note 62 at 99, where the author examines the effect of third parties on the arbitration agreement, and give an example of: "a principal may find itself bound by an arbitration agreement signed by its agent...".

⁶⁹³ Dubai Court of cassation, appeal no. 222/2005, issued on the 22nd of November 2006

⁶⁹⁴ Despite having a commercial element in this dispute in the form of the parties, this dispute was still being submitted to the civil circuit.

⁶⁹⁵ Many authors examined and discuss the ICC, see general Redfern and Hunter, supra note 62 at 9, where they give a brief overview of the ICC.

⁶⁹⁶ Federal law no. 18/1981, in regard to regulating commercial agencies, amended by federal law no.14/1988, federal law no.13/2006, federal law no. 2/2010, article 18 states:" Any concerned person is

to settle any dispute that rises from the execution of those contracts, which led the appellant to raise the dispute in regard to the appointment to the court. Furthermore, the defendant did not object in the first hearing to dismiss the case based on the existence of an arbitration clause, and they did not reply to the appellant's notification of the appointment dated 17-6-2007, which constitutes a waiver of the right to uphold the arbitration clause and the jurisdiction falls back to the UAE courts.

The court dismissed this argument, stating that based on the courts jurisprudence the arbitration clause cannot be taken in part and should be taken as a whole, and that amending the clause regarding the appointment of the arbitrator should not be assumed, and that both parties should consent to this amendment, which falls under the discretion of the court to understand the facts of the case and the contract. Furthermore, article 204/1⁶⁹⁷ implies that disputes in regard to appointing the arbitrator should be submitted to the court that has the jurisdiction to hear the dispute, in the event that the arbitration agreement lacks the process of the appointment. However, if the clause or the agreement identified a process of appointment, then the court cannot step in. The clause in this instance referred to the ICC, which state in articles 8 and 9 that the appointment of the arbitrator shall be concluded through the arbitral tribunal after submitting the dispute to the ICC, and they shall appoint the arbitrators if one of the parties refused to appoint their arbitrator.

Therefore, the appellant has no right to submit a dispute to the court after agreeing to arbitrate, and the appellant's plea that the defendant failed to counter claim in the first hearing to the existence of the arbitration clause and they did not accept the notification to the appointment has no affect, since the appointment process has been stated in the clause to be conducted under the rules of the ICC. Thus, the court decided to dismiss the appeal.⁶⁹⁸

Why did the court dismiss this plea? Even though the court uses this plea as a ground for taking back its jurisdiction, in this dispute certain aspects have influenced the court's reasoning, most particularly the way the arbitration clause was drafted by referring to the rules of the ICC and the nature of the parties of the dispute. Lastly, the dispute revolved around appointing an arbitrator, and neither of the parties were in the process of inviting the court to take back its jurisdiction.

In essence, referring in the arbitral clause to the rules of the ICC is one of the main reasons to upholding the sanctity of the arbitration clause and the parties' freedom of contract implies that the court trusts the ICC to uphold the parties' right

allowed to obtain from the competent authority an extract of the registration sheet in the register and also he shall obtain a certificate of non-registration."

⁶⁹⁷ Civil Procedures law article 204/1 supra note 407.

⁶⁹⁸ Dubai Court of Cassation appeal no. 272/2008, issued on the 25th of January 2009.

and freedoms. Is this trust limited to the ICC? In comparison to other domestic institutes, it seems that the court is favoring the ICC, based on the fact that the court is willing to give up its jurisdiction and interpret the clause in this manner, which is similar to how the court is treating lease disputes that fall under the jurisdiction of the lease committees.

The other notable factor here is the nature of the parties. Despite the court categorizing the case as a civil case, the parties in this dispute both are commercial companies, and the nature of the dispute relates to the commercial agencies law. However, the dispute was given to a civil circuit, yet the nature of the parties in this particular dispute had a positive factor in the court's interpretation and the conclusion that the court reached, exemplifying the importance of the nature of the parties and of the dispute to the court.

Lastly, the appellant's request to appoint an arbitrator was not an attempt to contest the arbitration agreement or the jurisdiction. The appellant simply was trying to initiate the arbitration procedure. This affected the court's decision, since both parties agreed to settle their dispute through arbitration; as such, the court interpreted this fact in favor of the arbitration agreement.

Both decisions illustrate how the court's role and interpretation can be used to promote arbitration. The court can interpret the agreement or the clause in a way that promotes or undermines it. By interpreting the arbitration clause as an exception, the likelihood of having the court take its jurisdiction back would be high. The court would not prevent individuals from presenting their dispute to their natural judge. The court's interpretation is influenced largely by the way the arbitration clause is drafted and the nature of both the parties and the dispute. The court allows commercial parties

and disputes to engage in a risky dispute settlements such as arbitration, given that the court interprets commercial transactions to have a risk factor embedded within them

4.6 Federal Supreme Court of the UAE

This section examines twenty-three cases issued by the civil circuit of the UAE's Federal Supreme Court, divided as follows:

- **General:** general disputes related to arbitration, such as the appointment and recognition of awards and the period before the introduction of the federal civil procedures.
- **Construction**
- **Insurance**
- **Employment**

4.6.1 General

To gain a sense of how the courts interacted with arbitration before the introduction of the civil procedures law, I examine three disputes—one related to an insurance policy and another that involves a construction contract.

The first decision demonstrates the affect of an arbitral clause in insurance policies in relation to article 1028 of the civil transaction law.⁶⁹⁹ At issue in this case is the question of whether the decision to refer a dispute to arbitration is appealable. The court's decision—again, issued before the enactment of the Federal civil procedures—suggests that an arbitral clause in an insurance policy

⁶⁹⁹ Civil Transaction law article 1028/d states: "The following conditions in a policy of insurance are void: d- The arbitration condition included in the printed general conditions of the policy and not as a special agreement distinct therefrom...".

obligates the parties to prepare a separate document that includes their arbitration agreement.

[T]heir appeal was based on two grounds. First, they claimed that the trial court issued a decision on the subject of the dispute by agreeing to refer the dispute into arbitration. This implies that they ended the dispute as a result. Regarding whether the decision to arbitrate is subject to appeal, the appeals court upheld that decision, in contradiction to the requirement of article 1028/d of the civil transition law,⁷⁰⁰ which requires the arbitration clause to be stated in a document that is separate from the insurance policy and excluded from the general clauses of that policy.

The Supreme Court accepted this argument, stating that the defendant made a request to the first instance court to register the arbitration clause according to article 95/2 of the civil procedures law of 1970.⁷⁰¹ By accepting the request to arbitrate and dismissing the appellant's counter claim⁷⁰², the court ended the dispute over identifying which authority was competent (had jurisdiction) to hear the dispute. As such, this dispute was subject to appeal.⁷⁰³

In terms of the relationship between arbitration agreements and insurance policies, the significance of article 1028/d is the binding affect that it has on arbitration clauses that are included in insurance policies. This significance extends beyond the domestic sphere and could certainly have an impact on international arbitral awards that is similar to decision no. 713/27,⁷⁰⁴ in which the court re-established jurisdiction over the dispute by stating that disputes between commercial agencies can only be resolved in the courts. Based on this, the court set aside an international arbitral award that had been brought for recognition⁷⁰⁵. If an international arbitral award based on an insurance policy were brought in front of the

⁷⁰⁰ id.

⁷⁰¹ There is no record of which civil procedures law this refer to, however, it can be assumed that given the fact that this dispute was submitted to the AD courts that this would refer to the AD civil procedures law.

⁷⁰² The appellant counter claim that the arbitration clause is null and that the defendant doesn't have the right to request the submission of the dispute into arbitration.

⁷⁰³ Federal Supreme Court of the UAE, appeal no. 7/14, issued on the 19th of April 1992.

⁷⁰⁴ See infra note 732, Federal Supreme Court of the UAE, appeal no. 713/27.

⁷⁰⁵ Which undermines the parties faith in arbitration, especially when seeking to recognize awards in the UAE, which as Redfern and Hunter puts it: "Once this decision has been made in the form of an award, it is an implied term of every arbitration agreement that the parties will carry it out. To put the point beyond doubt, this implied term is generally set out in international and institutional rules of arbitration." Redfern & Hunter supra note 62 at 621

court in the UAE for recognition, the chances of that award being set aside would be high, provided the insurance company and the insurance policy in question were subject to the rules of the Federal civil transaction law. A domestic arbitral award that meets the same conditions (the inclusion of the arbitral clause in the insurance policy) would also have to be set aside. Therefore, while this decision was made before the enactment of the Federal civil procedures law, its influence can still be noticed, since article 204/2⁷⁰⁶ of that law states that decisions about the appointment of arbitrators are not subject to appeal⁷⁰⁷. However, this study has noted several examples of the court disregarding this article, which indicates the influence of earlier (pre-civil procedures law) decisions on the court's views and policies regarding the acceptance of appeals, as well as on their views on arbitration.

Thus, it seems some of the Federal Court's views about arbitration were established before the enactment of the civil procedures law. The court's decisions about which jurisdiction should hear a dispute emphasizes this idea as well; for example, the court established that the decision about which local jurisdiction may settle the dispute was not a matter of public policy. They also established that upholding the right to identify the competent authority to hear the dispute would be waived once a party began to argue about the subject of the dispute. The court explained that the parties' agreement is the essence of an arbitral clause, which it said also does not relate to public policy.

[T]he appellant did not object to this act at the time, and the appealed decision shows that the court have indeed responded to the appellant's argument in this regard. In

⁷⁰⁶ Civil Procedures law article 204/2 supra note 407.

⁷⁰⁷ Since the main request in this disputes was to refer the dispute into arbitration, which implies that they would also appoint an arbitrator through the court and therefore would fall under the provision of article 204/2: "The defendant started the suit in front of the first instance court, by asking the court to refer the dispute between them and the appellant into arbitration..." there is no record of the first instance decision, see appeal no. 7/14 supra note 703.

addition, the local jurisdiction is not a matter of public policy. As such, the litigant's right to object to the court's jurisdiction is waived once the litigant argues the subject of the dispute. Moreover, the objection about the existence of an arbitration clause is based on the parties' agreement to arbitrate, which is also a matter that does not relate to public policy and can be waived either explicitly or implicitly by arguing the subject of the dispute. The appellant argued the subject of the dispute and started a separate litigation with this claim, which implies that the litigant waived the right to arbitrate.⁷⁰⁸

The reasoning given by the court in this decision mirrors that of their practice after the enactment of the federal civil procedures and the codifying this rule in article 203/5.⁷⁰⁹ This adds to the understanding of why this rule was codified and why the right to arbitrate is considered waived once the parties argue the subject of the dispute. The decision discussed above involves the relationship of public policy to the parties' right to arbitrate, as evidenced in how the court explained the nature of the arbitral clause. Ruling that the arbitration clause is born out of the will of the parties makes it a matter that, in the courts view, does not relate to public policy⁷¹⁰.

Therefore, the parties have the right to waive this right. This seems an understandable and a logical interpretation of the nature of the arbitral clause; namely, if you have the right to agree to arbitrate because of your own free will⁷¹¹, there should not be a limit on your right to withdraw from that agreement. In essence, the court went further than simply establishing the parties' right to withdraw from the arbitration agreement by stating that this right can be "implicitly waived."⁷¹² In doing this, the court is ensuring that it has the right to interpret the parties' actions, as it did in the above case.

⁷⁰⁸ Federal Supreme Court of the UAE, appeal no. 5/14, issued on the 20th of May 1992.

⁷⁰⁹ Civil Procedures law article 203/5 supra note 442.

⁷¹⁰ In explaining the freedom of contract principle in the UAE, Najidah explained that this principle shouldn't be undermined, and that the legislations that emerged started to put shackles on this principle, which can explain this phenomena in arbitration and how the court is treating arbitral clauses, see Najidah supra note 477 at 20. See general Carbonneau supra note 74 at 25.

⁷¹¹ See general Najidah supra note 477 at 20-23.

⁷¹² In there explanation of the parties right to waiver the arbitration agreement, Redfern & Hunter gave examples from number of jurisdictions that supports the individual right to withdraw from the arbitration agreement, however, unlike the courts in the UAE they require the parties to explicitly waiver this right. See Redfern & Hunter supra note 62 at 149.

The third dispute examines the period in which the courts in Abu Dhabi rescinded from the federal court system⁷¹³. The appeal in this case revolves around which authority is competent to hear a request to recognize an arbitral award.⁷¹⁴

The court responded by stating that since the emirate of AD decided to rescind from the Federal System, then the determination of the jurisdiction between the federal courts and the local authority is a matter that relates to public policy, based on articles 204⁷¹⁵ and 213.⁷¹⁶ This implies that the award issued by an arbitrator that was appointed by the court is a court-annexed arbitration, and as such it would fall under the conditions mentioned in those articles. In regard to the procedure of recognizing a court-annexed arbitral award, in this instance, it would fall under the jurisdiction of the Federal First Instance court of Abu Dhabi.⁷¹⁷

The court reclaimed jurisdiction over the dispute by labeling the arbitration in this instance a court-annexed arbitration,⁷¹⁸ implying that the arbitrator would have to abide by the rules required for issuing a court-annexed award.

A second set of decisions, examined below, deals with the arbitral award and how it is recognized. The first decision examined revolves around the affect of translating documents into Arabic and how this can affect the arbitral award.⁷¹⁹

The court decided to dismiss this claim, stating that in order for this ground to be enforced, the court should have based its decision on those documents or on the documents that were presented without the other party's knowledge. However, the

⁷¹³ See supra note 55.

⁷¹⁴ The appellant appealed on one ground, "claiming that the court decided that the Federal courts of Abu Dhabi has the authority to hear the request of recognizing the arbitral award. However, since this is not a court-annexed arbitration as such the parties are not required to present their requests or dispute to the federal court, based on the fact that the jurisdiction in this dispute falls to the judicial authority of the Emirate of Abu Dhabi. See Federal Supreme Court of the UAE appeal no. 325/2010, issued on the 28th of December 2010.

⁷¹⁵ Civil Procedure law article 204 supra note 407.

⁷¹⁶ Civil Procedure law article 213 supra note 139.

⁷¹⁷ Appeal no. 325/2010 supra note 714.

⁷¹⁸ Which is due to the fact that the court was responsible for appointing the arbitrator. See general, Levin supra note 141 at 538, also supra note 378.

⁷¹⁹ The appellant second grounds of the appeal states 'argues that the court refused their request to set-aside the award, they argue that the court should set-aside the award since it was based on a foreign document that was not legally translated into Arabic, which constitute a ground for setting-aside the award according to the civil procedures law', see Federal Supreme Court of the UAE, appeal no. 142/17, issued on the 28th of November 1995.

appealed decision was based on facts that were accessible to the appellant and were contested by the appellant in the arbitration procedure, and it was not based on those papers that were not translated.⁷²⁰

The court dismissed the appellant's claim, but it still provided a test for accepting such claims in cases that involve translating foreign documents. The test that the court established is whether the arbitrator's decision was based on that translated document. If so, this may be used as a ground for setting aside the award. However, one further condition also must be met: the parties must state a procedure in the arbitration clause or agreement that outlines how they will present their documents.

Another decision that addresses the recognition of arbitral awards involves the examination of the parties' right to waive jurisdictional pleas.

The appellant appealed that decision to the Supreme Court on two grounds. The first ground argues that they pleaded in front of the first instance court in case 315/94⁷²¹ that the contract between the parties had ended. However, the court decided to dismiss this plea, stating that this plea concerns the execution of the contract, and since the parties agreed in that contract to resolve their dispute through arbitration, this plea falls under the arbitrator's jurisdiction. The appellant claims that he upheld that argument in front of the arbitrators and in front of the first instance and appeal courts, and that despite this, the appeals court stated that the appellant did not uphold that argument in front of the arbitration tribunal, and that the appellants right to argue on this jurisdictional issue had been waived.

The court agreed with this argument, stating that the waiver of the right should be proven without any doubt, and that the court's decision to refer the dispute to arbitration does not imply that the appellant has waived his right to this argument.⁷²²

This dispute began as a request to the court to recognize an arbitral award. However, it turned into an argument over the parties' right to contest the arbitrator's jurisdiction. The court established certain rules in this dispute. The first rule states that the court does not presume that the parties have waived their right to jurisdictional

⁷²⁰ Id.

⁷²¹ Abu Dhabi Federal Court of First Instance, case no. 315/94.

⁷²² Federal Supreme Court of the UAE, appeal no. 95/18, issued on the 23rd of June 1996

pleas; subsequently, the courts decision to refer the dispute into arbitration and relinquish jurisdiction does not imply that the parties have waived their right to jurisdictional pleas⁷²³. Also, the appellant's appearance in front of the arbitration tribunal to argue the subject of the dispute does not constitute a waiver of the appellant's right to jurisdictional pleas in front of the court⁷²⁴, nor is it an indication that the appellant has agreed to arbitrate. In the event that the appellant upheld this request in front of the arbitration tribunal and in front of the court, then the court will shift the burden of proof to the party trying to uphold the arbitration agreement, be it the party seeking to recognize an award or the court deciding to dismiss an attempt to set aside an award. In doing so, the court is ensuring that such decisions are appealed, which often creates a never-ending cycle of appeals.

The court's policy on appeals and its affect on arbitral awards is illustrated by the appeal no. 157/19,⁷²⁵ which emphasizes the harmful affect on the arbitration policy as a whole in the UAE of the court's policy of supporting appeals of arbitral awards. This case illustrates the ease with which the same dispute reached the Supreme Court three times,⁷²⁶ emphasizing the idea that nothing deters parties from appealing any decision made by the court, even those that receive *res judicata* status.⁷²⁷ Therefore, this policy affects arbitration twice as much as it affects normal

⁷²³ Which is in turn an extension to how the courts view arbitration as an exception to the individual right to seek their natural judge, and in turn the court would minimize the affect of this right as they see fit, see supra 2.6.5 UAE Courts View of the Definition.

⁷²⁴ See general Redfern & Hunter supra note 62 at 149. See general Najidah supra note 477 at 20-21.

⁷²⁵ Essentially this next decision is a continuation of the previous one, which is appeal no. 95/18.

⁷²⁶ After the Supreme Court vacated the appealed decision they referred the dispute back to the appeal court, which decided to recognize the arbitral award that decision was appealed to the Supreme Court in appeal no. 157/19, which decided to vacate the appealed decision and refer the dispute back to the appeal court, which decided to recognize the award, which meant that it was appealed for a third time to the Supreme Court.

⁷²⁷ The appellant based their appeal on two grounds, the first argues that the arbitrators didn't define the scope of the arbitration and that one of the parties to the arbitration agreement didn't have the capacity nor the authority to conclude the arbitration agreement, for the agency agreement doesn't allow him to enter into an arbitration agreement. The appellant second ground of appeal argues that the first instance decision no. 315/94 supra note 721, which decided to accept the defendant's request of referring the

disputes. The same dispute has been brought to the court for a third time, even though it was already settled through arbitration and recognized more than once. The civil procedures law prohibits such appeals,⁷²⁸ which is why the court came to the same result and supported it with the same reasoning; this never-ending circle of appeals delays the enforcement of arbitral awards.

Below is another decision that addresses the recognition of arbitral awards. It explores the affect of the commercial agencies law on arbitration—more precisely, its affect on a foreign arbitral award being recognized in the UAE. The case illustrates the court’s view on arbitration even when faced with a commercial arbitral award.⁷²⁹ The court responded to the appellant’s request to recognize the award by dismissing the appellant’s argument.

The court dismissed this argument stating that article 235⁷³⁰, which addresses the issue of recognizing and enforcing foreign arbitral awards, allows the enforcement of those foreign awards by the court after the court examines them and decide whether it has jurisdiction over the dispute. Moreover, article 6 of law no. 18/81 in regard to

dispute into arbitration didn’t answer the appellant’s plea, which argued that the arbitration clause has ended. See, Federal Supreme Court of the UAE, appeal no. 605/21, issued on the 24th of May 2000.

⁷²⁸ Civil Procedures law Article 187, states: “It is not possible to appeal against the cassation decisions through any of the appeal manners, and that with the exception of what has been issued there from in the litigation source where it shall be possible to appeal therein through the petition of reexamining the cases stipulated in clauses 1,2 and 3 of article 169.”

⁷²⁹ One thing to note about this decision it occurred before the UAE acceded to the NY convention. See supra note 6.

⁷³⁰ Civil procedures law article 235 states: “1-The execution of the decisions and orders delivered in a foreign country may be mandated in the state of the United Arab Emirates under the same conditions decided in the law of that country for executing the decisions and the orders delivered. 2-The execution order shall be requested before the court of first instance in which area the execution is required, through the usual procedures of the action prosecution, and it shall not be possible to order the execution before the verification of the following: a-That the state's courts are not authorized to examine the litigation in which the decision or the order has been delivered and that the foreign courts which have delivered it are authorized therewith according to the international rules of the judicial jurisdiction decided in their law. b-That the decision or the order has been delivered from an authorized court according to the law of the country in which it has been issued. c-That the litigant parties, in the action in which the foreign decision has been delivered, have been assigned to attend and have been properly represented. d-That the decision or the order has acquired the power of the decided order according to the law of the court which delivered it. e-That it does not conflict with a decision or an order delivered previously from a court in the state nor does it include what breaches the morals or the public order therein.”

regulating commercial agencies, and its amendment in law no. 14/88,⁷³¹ imply that an arbitral clause that refers to a foreign arbitral tribunal in the contract is a void clause, and if one of the parties to that contract seeks a foreign arbitral tribunal and requests the courts in the UAE to recognize an award, then the court is obliged to refuse to recognize the award and to dismiss the request. As such, their decision is valid given that it is based on the law. Thus, the court decided to dismiss the appeal.⁷³²

The affect of this decision on international commerce is significant, as is its affect on international commercial arbitration and the arbitral awards that are issued from those arbitration hearings⁷³³. This decision emphasizes the need for the court to accept arbitration as an equal method of dispute resolution, since the courts may find legal loopholes to reclaim jurisdiction over disputes. Which is also emphasized the courts decision in appeal no. 267 and 297/20⁷³⁴, which illustrates of the challenges facing the recognition of arbitral award in the UAE, for this particular dispute reached the steps of the Supreme Court twice first in appeal no. 404/18⁷³⁵ and the second in appeals 267 and 297/20

The next decision⁷³⁶ illustrates the court's doctrine when it comes to extending the arbitration period. It also establishes the affect that interim measures have on the arbitral award⁷³⁷. Regarding the ability to extend the arbitration period, the court established what is required for arbitration extension requests, as well as whether such an extension can be explicitly or implicitly made by the parties. For example, are they

⁷³¹ Commercial agencies law article 6 states that: "The commercial agency contract shall be deemed for the mutual interest of the contractors, the States courts shall be competent to adjudicate any dispute arises from its execution between the principal and the agent, any agreement to the contrary shall be annulled."

⁷³² Federal Supreme Court of the UAE, appeal no. 713/27, issued on the 6th of May 2009.

⁷³³ Redfern & Hunter states that: "most States are broadly content to restrict the challenge of arbitral awards to excess of jurisdiction and lack of due process... Other States are prepared to offer a limited measure of judicial review on questions of law, if this is what the parties wish; but the possibility of the review of an award on issues of fact is truly rare." Redfern & Hunter supra note 62 at 616-617. (on the contrary it seems that the UAE courts are more than willing to extend the measures of judicial review, which in turn would have harmful affects on arbitration and arbitral awards, especially international one).

⁷³⁴ Federal Supreme Court of the UAE, appeals no.267 & no.297/20, issued on the 14th of May 2000.

⁷³⁵ Federal Supreme Court of the UAE, appeal no.404/18.

⁷³⁶ Federal Supreme Court of the UAE, appeal no. 266/2009, issued on the 21st of October 2009.

⁷³⁷ See general Redfern & Hunter supra note 62 at 520-522.

able to explicitly state an extension procedure in the arbitration agreement, or to explicitly express the desire to extend by submitting an extension request to the court? The court also established that such a request may be deduced from the parties' actions. The court provides an example of an implicit extension, which would be considered to have occurred if a party appeared after the end of the arbitration period and argued the subject of the dispute. The court would view this as an implicit acceptance by that party of the extension of the arbitration period.⁷³⁸

The second thing the court explored in this dispute is the affect of a court issuing interim measures to the arbitrators, and whether such measures would have any binding affect on the arbitrators. The court established that an interim measure given by the court does not establish any affect on the arbitrators, and that the purpose of having interim measures would be to ensure that rights are not affected and do not cease to exist before a final decision is made. Interim measures (if given) would be put in place to protect the existence of rights and the parties' ability to act on them.⁷³⁹

⁷³⁸ The court stated "according to the court jurisprudence that the determination of a date for the end of the arbitration procedures doesn't mean that it cannot be extended either explicitly or implicitly or by authorizing the tribunal, as well as the court ability to extend this time based on the parties request or of that of the tribunal, the only requirement is that this extension should be connected and not interpreted" see appeal no. 266/2009 supra note 736.

⁷³⁹ Stating that "article 68 of the civil and commercial evidence law, implies that the purpose of such claims are to prove a certain legal status, which they are in fear of being changed, as such it doesn't concern the establishment of individuals rights and doesn't mean that the parties are not able to seek the court to settle their dispute. Furthermore, the decisions issued based on a summary ruling does not bind the court, it is a temporary ruling in which the judge views it is necessary to establish and confirm the existence of a certain legal status or condition; as such the court has the right to over rule this decision; the appealed decision upheld this rule, which renders this argument void." Appeal no. 266/2009 supra note 736. Article 68 of the evidence law states: " 1- Whoever apprehends the loss of the features of a fact that may constitute an object of dispute before the courts, may request, in the presence of those concerned and in the usual manner, from the judge of summary matters to proceed with the survey and in this case, the preceding provisions shall be observed. 2 - In the foregoing case, the judge of summary matters may delegate an expert to move, survey and hear witnesses without oath; the judge then shall fix a hearing to take knowledge of the observations made by the parties to the litigation on the expert's report and acts. The rules provided for in the Title concerning Expertise shall be followed."

The last dispute discussed in this section⁷⁴⁰ that deals with the recognition of awards is a case that highlights how the court supports arbitration. In this instance, the court dismissed the appellant's three arguments. The court's explanation for rejecting the appellant's argument is essential to understanding how the courts function⁷⁴¹.

The appellant's second argument—directed against the arbitral award and the fact that it lacked a draft and the arbitrator's signature on each page of the award—implies that the appellant views the requirements for an arbitral award to be similar to those of the court. This further implies two things about the appellant and his attorney: (1) the parties to a dispute may have little knowledge about the practice of arbitration and of the requirements of the civil procedures law; and (2) a request for an extension may be an attempt by one of the parties to delay the recognition of the award. Given that the UAE's court system that is still wary of arbitration and does not view it as an equal form of dispute resolution, the likelihood of an arbitral award

⁷⁴⁰ See Federal Supreme Court of the UAE appeal no. 427/2009, issued on the 29th of October 2009 in the appendix.

⁷⁴¹ The appellant's first argument—which revolved around the participation of the public prosecution office in civil suits, which is required if a minor were to be present in the civil suit (Just being named as a party is sufficient to invoke this rule)—the court clarified that the participation of the prosecution office can be fulfilled by a letter that explains the office's opinion about the dispute. The appellant's argument was based on article 61 of the civil procedures law, which states: "With the exception of the summary actions, the public prosecution should intervene in the following circumstances, otherwise the decision shall be null: 1-The actions which it has been allowed to prosecute by itself. 2-The appeals and the requests submitted before the supreme federal court, with the exception of the appeals of cassation in the civil matters. 3-The actions related to the incapacitated, those whose capacity is defective, the absentees and the missing persons. 4-The actions related to the charitable endowments, donations, wills devoted to benefaction. 5-The actions for the recusals of judges and the prosecution members and for litigating them. 6-Any other circumstance in which the law stipulates the necessity of the public prosecution intervention." which requires the presence of the prosecution office in civil suits that involve a minor. The court's response was guided by article 64 of the civil procedures, which state:" 1-The public prosecution shall be considered representative in the action when it submits a pleading with its opinion therein and it shall not be bound to attend unless the law stipulates that. 2 - And in all circumstances, the public prosecution shall not be bound to attend the judgment's delivery." See general Turki supra note 11 at 242-267.

being set aside is high. Therefore, requesting an extension from a court as a tactic to have an arbitral award dismissed would likely succeed.⁷⁴²

The appellant's third ground of appeal argued about the signature on the sales contract:

[The argument] maintains that the appellant did not sign the sales contract, and that his wife was not his agent at the time of the sale. Moreover, he argues that the sales contract is void, claiming that his wife entered into the contract when she was ill and on her deathbed, which can be proven by doctors' reports. As such, this act conducted on her deathbed is void, and the sale of the farm contradicts the Emirates Ruler's decree that such farms are not subject to sale. The court dismissed this ground, establishing that a plea to set aside an arbitral award is subject to the requirements of article 216.⁷⁴³ Those grounds addressed the arbitral award as being an act of a law, and as such they were concerned about a flaw in the procedures and not a flaw in the determination of the facts of the dispute...⁷⁴⁴

It can be inferred from this dispute that the court is not reinventing the process of setting-aside the award; it is simply applying the law. While all the court levels were in agreement about dismissing the appellant's request, because of how the civil procedures law is constructed, the appellant was able to contest the award. This is a reoccurring phenomenon in nearly all of the decisions explored in this thesis; namely, that the tolerance of appeals overshadows what is established in actual court decisions. Even though the court establishes various rules in various decisions, the proper application of these rules in practice remains in question because of the ability to appeal decisions—even decisions like arbitral awards that have received res-judicata status. By allowing these appeals, the court is essentially rendering powerless

⁷⁴² The court dismissed this argument, stating that “based on the jurisprudence of the court and on article 212, which grants the arbitral award the same status as a courts decision. However, the fact remains that it is not a decision issued by the court and since the civil procedures states that the arbitrator is not bound by the courts procedures in issuing the award, except in regard to upholding the rules mentioned in the arbitration chapter and since those rules do not require the arbitrators to sign every page and include a draft this argument is void”. See appeal no. 427/2009 supra note 740.

⁷⁴³ Civil Procedures law article 216 supra note 416.

⁷⁴⁴ See appeal no. 427/2009 supra note 740.

the rules that it establishes in its own decisions, since its practice contradicts those rules.

The last two decisions examined in this section relate to how the court addresses appointment disputes in general, and how it rules on the first hearing. Starting with the appointment dispute, it is crucial to understand that this decision occurred shortly before the introduction of the civil procedures law; therefore, it helps us understand the Federal court's stance on this subject. Here, the appellant argued that because the court decided to appoint the arbitrators, this ended the dispute, to which the court responded:

[T]he decisions of the appointment do indeed end the dispute, and as such are subject to appeal. Therefore, the court decided to nullify the appealed decision and refer the dispute back to the appeals court to render a decision.⁷⁴⁵

This decision highlights the court's practice when it comes to interpreting article 204.⁷⁴⁶ It also illustrates that the court's practice in this regard was not changed by the introduction of the Federal law; it was carried on and implemented after the enactment of the law. It exemplifies that this view is influenced by the court's intent to preserve the individual's right to seek his or her natural judge and his or her right to appeal, and it also illustrates the court's view on arbitration in general.

The second decision concerns the court's rule on objections submitted in the first hearing. The court's application of this rule mirrors its action in the other decision, as highlighted by this statement:

[A]rticle 210/1⁷⁴⁷ allows the parties to agree to arbitrate their dispute, even if the dispute has already been submitted to the court, with the condition that the court has

⁷⁴⁵ Federal Supreme Court of the UAE appeal no. 194/13, issued on the 28th of April 1992.

⁷⁴⁶ Civil Procedures law article 204 supra note 407.

⁷⁴⁷ Civil Procedures law article 210 supra note 412.

not issued a decision in the dispute. However, it also requires the party upholding that agreement to express his or her will to arbitrate through a positive action by submitting the request to arbitrate in the first hearing. Otherwise, it would constitute a waiver of the right to arbitrate and the vacating of the clause under article 203/5.⁷⁴⁸ As such, the parties in this dispute agreed to a later date, after the dispute had been submitted to the court, to refer the dispute into arbitration. Accordingly, they drafted an arbitration agreement on 21/2/2007. The defendant's attorney appeared in front of the court on 18/6/2007 after the parties agreed to arbitrate, however, their attorney failed to make the request to refer the dispute into arbitration in that hearing, which is considered to be the first hearing in this instance. As such, their right to arbitrate has been waived.⁷⁴⁹

Should this rule not act as a buffer against the individual abusing the right to arbitrate? Should it not be employed to stop parallel litigation? Indeed, this seems to be the intent from how this rule was applied in this case. This would mean that article 203/5⁷⁵⁰ is not the issue here; rather, the application of this article by the court is what is at issue. The court must strike a balance between the party's right to arbitrate and ensuring that this right is not abused.

4.6.2 Employment

The next dispute highlights the relationship between labor law⁷⁵¹ and arbitration. In this dispute, the court upheld the arbitration clause between the parties, and the appellant's attempts to establish the court's jurisdiction were turned down, indicating that the court was interpreted the arbitral clause and the civil procedures law in a way that supports arbitration. This is illustrated by how the court responded to the appellant's plea.

[The appellant] argued that the court dismissed the suit based on the existence of an arbitration clause, and this implies that the jurisdiction in this dispute fell under that arbitral clause. The appellant argued that at the time of the dispute, the arbitrator (the Indian ambassador) was outside the country. Furthermore, the appellant claimed that

⁷⁴⁸ Civil Procedures law article 203/5 supra note 442.

⁷⁴⁹ Federal Supreme Court of the UAE, appeal no.357/2009, issued on the 18th of November 2009.

⁷⁵⁰ Civil Procedures law article 203/5 supra note 442.

⁷⁵¹ Federal Law no. 8/1980 Concerning the Regulation of Labor Relations.

he had already presented the dispute to the previous ambassador; however, he failed to initiate the arbitration proceedings.

The court dismissed this claim, stating that as the appealed decision explained, the reason for dismissing the claim was “the will of both parties to resolve their disputes through arbitration; this will has been manifested through clause fifteen of the school’s constitution, which states that in the event of a dispute between board members, this dispute shall be resolved through arbitration, that the arbitrator shall be the school’s owner, and that his decision shall be final and binding on the parties. Therefore, this clause prohibits the parties from asking the court to resolve the disputes. Moreover, the appellants disregarded this clause and the rules of article 203,⁷⁵² both of which prohibit the parties from asking the court to resolve the dispute in the presence of an arbitration agreement.” This interpretation by the appeals court has a basis both in the agreement and in the law, and as such falls under the court’s power of interpretation, which makes the appellant’s argument void.⁷⁵³

This dispute falls under the spectrum of the labor law in the UAE, due to the nature of the dispute and the parties involved, and also because the drafters of the labor law intended to balance power between the employer and the employees by protecting the weaker party—in this instance, the employee⁷⁵⁴. This emphasizes the importance of this decision, especially for understanding how the court views arbitration as an exception to the court’s jurisprudence and a dangerous process. When this view is combined with the nature of the parties—in this instance, an employee trying to contest the arbitration jurisdiction and seek to be heard in the court—it seems uncharacteristic and in contract to the court’s typical behavior to dismiss the request. However, at the same time it is an indication of the extent of the power that the court has and how this power can be harnessed to promote and enforce arbitration agreements.⁷⁵⁵

⁷⁵² Civil procedures law article 203 supra notes 406, 428 and 459.

⁷⁵³ Federal Supreme Court of the UAE, appeal no. 62/17, issued on the 20th of June 1995.

⁷⁵⁴ Which is also one of the flaws that the freedom of contracts creates, Carbonneau explains this as: “Freedom of contract, therefore, can be rendered ineffectual where power relationships are uneven.” Carbonneau supra note 74 at 25. see general Carbonneau supra note 74 at 499-503, (were the author discuss some challenges that faces employment arbitration in the U.S.)

⁷⁵⁵ Despite having this positive outcome of supporting the arbitration agreement in this dispute, the court on the other hand wasn’t willing to forsake their practice of accepting appeals, which can be noted from the ease in which the parties are able to reach the Supreme Court, another factor that need to be taken into account is the arbitrators identity, being the owner of the school and at the same representing the government of India could be viewed as a contributing factor in the courts decision,

4.6.3 Insurance

Two decisions highlight how the federal court addresses arbitration clauses in insurance policies.⁷⁵⁶ The first case examined began before the enactment of the civil procedures law and ended after the enactment of the law.⁷⁵⁷ This dispute is unique in that the court labeled the policy as a commercial policy that was excluded from the rules of civil transaction law article 1028-d⁷⁵⁸ that requires arbitration clauses or agreements to be written in a separate document and not included in the insurance policy. The appeals court viewed this transaction from a commercial perspective, and thus came to the conclusion that it was allowed for an insurance company to include arbitral clauses in its policy, as if it were a commercial insurance policy. However, the supreme court had a different interpretation:

[s]tating that law no. 1/1987⁷⁵⁹ made an exception when it came to a commercial transaction being governed under the civil transaction law. However, based on the general rules of adjudication and article 1028-d,⁷⁶⁰ which implies that any arbitral clause that is included in an insurance policy is null unless the parties agreed to arbitrate in a separate document, the court stated that this rule was put in place due to the importance of this clause and the need to protect the insurer. Furthermore, the court stated that this is a general rule that applies to both commercial and civil insurance policies, and as such, this arbitral clause is null, because it was included in the insurance policy and not in a separate agreement.⁷⁶¹

Thus, the court views insurance policies as falling under the requirements of the civil transaction law.

for having the participation of a representative of a foreign government as an arbitrator would ease the courts concerns when it comes to arbitration.

⁷⁵⁶ A third case has already been discussed at the start of this section, which is appeal no. 7/14 supra note 703, which also occurred before the enactment of the civil procedures.

⁷⁵⁷ The case started in front of the first instance court in 1990; see Abu Dhabi Federal Court of First Instance, case no. 635/1990, issued on the 13/5/1992 and ended in 1995.

⁷⁵⁸ Civil transaction law article 1028-d supra note 692..

⁷⁵⁹ which is the civil transaction law.

⁷⁶⁰ Civil transaction law article 1028-d supra note 692, states:” The following conditions in a policy of insurance are void: d- the arbitration condition included in the printed general conditions of the policy and not as a special agreement distinct therefrom.”

⁷⁶¹ Federal Supreme Court of the UAE, appeal no. 249/15, issued on the 26th of March 1995.

The second dispute considered here indicates the affect of the time period in upholding an arbitration agreement and in recognizing an arbitral award. In terms of extending the arbitration period, the court stated that this could be done in theory either explicitly or implicitly. However, this dispute indicates that the court holds the determination of this kind of extension to a high standard, exemplified by the court's reexamination of the trial court's decision. This indicates that the trial court's ability to interpret the facts of the case falls under the supervision of the supreme court, contrary to what the court stated.

Furthermore, the parties have the right to explicitly or implicitly extend the arbitration period or to authorize the arbitrator to extend that period. Also, the court has the right to extend the arbitration period upon the request of the parties. This indicates that the law obliges the arbitrator to issue a decision within the agreed period and did not authorize the arbitrator to extend that period on his own unless the parties agreed to this extension either explicitly or implicitly or by a court order. Furthermore, the court has the right to interpret the facts of the dispute and to determine whether the parties agreed to extend that period or not. Therefore, it can be deduced from the facts of the case that the arbitrator issued the award after the passing of the time period.⁷⁶²

With this decision, the supreme court is turning to another form of appeal or a trial court and not to a court of law, since the parties were given the ability to litigate their dispute in front of the court for a third time. The results were that the dispute received *res judicata*⁷⁶³ status only at the level of the supreme court, which is a significant concern when it comes to arbitration. It also applies another requirement to the parties; they are required to explicitly agree on the extension period or to authorize the arbitrator to determine the extension period on his own. Otherwise, a similar dispute would result that would end with a decision that would be determined based on the parties' ability to explicitly establish this extension. For this decision to have reached a different outcome, the trial court would have needed unfettered authority to

⁷⁶² Federal Supreme Court of the UAE appeal no.42/23, issued on the 13th of April 2004.

⁷⁶³ See general Redfern & Hunter supra note 62 at 561-562.

interpret the facts of the case (i.e., the supreme court would have had to remain uninvolved). Had this principle of interpretation been applied, the court would not have come to this conclusion in their decision. Therefore, this decision exemplifies the court's double standards when applying its own principles.

4.6.4 Construction

The last case to be examined in here relates to the construction contract and how the court addresses arbitration that relate to construction contracts. Eight disputes are examined here.⁷⁶⁴ The first decision shows the relationship among translating evidence, the need for proper delegation, and the need for the arbitrator's signature, on the recognition of arbitral awards. It also provides insight into the origin of these doctrines in the courts, especially since this decision was issued before the enactment of the federal law.

Furthermore, according to article 12 of law no.8/81 in regard to regulating the translation profession⁷⁶⁵—which dismisses any document that is not translated by a certified legal translator, which is a rule that relates to public policy—the arbitral tribunal is not at liberty to breach this rule. Therefore, the court is required to supervise the arbitration proceeding. In order to fulfill this role, the court is required to ensure that the arbitral award is issued according to the requirement of law no. 3/1970⁷⁶⁶, which can only be achieved if the court ensures that the arbitral award fulfills all of these requirements by ensuring that the arbitral award is supported by the documents presented in front of them. Subsequently, the arbitral tribunal should have dismissed any document that was not legally translated into Arabic. By basing its decision on documents that were not officially translated, the tribunal is basing its decision on its own knowledge, which is not admissible in the court or in the arbitral tribunal. Therefore, having the arbitrator correct the translation submitted to him by a legal translator is a breach of this rule.⁷⁶⁷

The court issued this decision despite agreeing in the same decision that arbitrators are not bound by the normal procedures of the court.

⁷⁶⁴ Excluding appeal no.5/14 supra note 708, which has been examined earlier.

⁷⁶⁵ This author was unable to find this law, which was mentioned in the courts decision.

⁷⁶⁶ Which is the Civil Procedures law for the emirate of Abu Dhabi. However, this author was unable to have a copy of that law.

⁷⁶⁷ Federal Supreme Court of the UAE, appeal no. 121/14, issued on the 27th of December 1992.

[T]he court accepts the fact that the arbitral tribunal is not bound by the normal procedures of the court in order to ease and accelerate the decision making process, in addition to the fact that in some cases, the arbitrators are not lawyers. However, this rule is bound by the principles of justice and by the rules that relate to public policy and to preserving due process. This includes delegating the facts of the case before rendering a decision, which needs to be proven through the documents and the facts of the case.⁷⁶⁸

The above decision also leads the court to request the presence of a draft and the signature of all the arbitrators when recognition of the award is requested.

Therefore, based on the established principles in the law and within the court's doctrine, the arbitral award is required to have a draft. The purpose of having a draft is to prove that due process has been followed and that the tribunal delegated the dispute before issuing the award. Moreover a signature from all of the members of the tribunal is required according to law no. 3/1970. This requirement does not breach the confidentiality principle in arbitration.⁷⁶⁹

This decision emphasizes the idea that the court's theories on arbitration were formulated well before the enactment of the federal law; traces of these theories can be found in the federal law and the court's decisions.

The next case discusses whether an individual has the right to appeal the court's decision to recognize an arbitral award. The general rule is that these decisions are subject to appeal, which on its own is of concern. The legislature provides an exception to this rule in the event that the parties agree to waive their right to appeal or if the arbitrators are authorized to mediate the dispute.⁷⁷⁰

[T]his article implies that the legislature's intent was to prohibit appeals of decisions that recognize the arbitral award, or appeals that arise in cases in which the parties agreed to waive their right to appeal, which is an exception to article 158.⁷⁷¹ Moreover, the appeals court's decision is subject to appeal according to article 173,⁷⁷² even if article 150/1⁷⁷³ allows the parties to waive their right to

⁷⁶⁸ id

⁷⁶⁹ id.

⁷⁷⁰ Civil procedures law article 217/3 supra note 543.

⁷⁷¹ Civil procedures law article 158 supra note 545.

⁷⁷² Civil procedures law article 173 supra note 546 and 578.

⁷⁷³ Civil procedures law article 150 states: "1- The appeal against the decisions shall not be possible unless brought by the convicted, and it shall not be possible to be brought by that who accepted the

appeal. However, in order for this waiver to be granted, it should be explicitly identified. Since the appeals court decided that the decision was not subject to appeal, even if the parties agreed to waive their right in front of the court in the hearing dated 13/5/1992. However, the arbitration agreement that was submitted to the court shows that it was concluded on a later date, and it does not include any limitation or waiver of the parties' right to appeal. This implies that the parties have amended that condition and as such, the court accepted the appeal.⁷⁷⁴

This interpretation of the court, whether intentionally or not, undermines or limits the powers of arbitration and floods the court's docket with cases that have already been decided through arbitration.

Another decision that highlights the court's power of interpretation established certain rules: the court's authority to correct material errors without setting aside an award is bound by not affecting the entire award. Also, the appointment of the arbitrator by the court requires the request of one of the parties.⁷⁷⁵

Appointing the arbitrators is the subject of the next dispute. The court responded to the appellant's attempt to request the appointment of an arbitrator by denying this request for the following reason:

The court has the right to interpret the facts of the case and to weigh the evidence presented to them. Furthermore, clause 14 of the sub-construction contract implies that the process of appointment should start with an agreement between the parties. If they fail to agree on the arbitrator, then the parties have the right to seek the head of the chamber of commerce to appoint an arbitrator on their behalf, and if that fails, then they have the right to seek the court. Furthermore, the appellant's claim that he fulfilled this procedure is a new claim, which should be presented in front of the trial court, and cannot be presented for the first time in front of the Supreme Court.⁷⁷⁶

sentence expressly or implicitly, or by that whose requests have been judged, unless the law stipulates otherwise. 2 -The appellant shall not be harmed with his appeal."

⁷⁷⁴ Federal Supreme Court of the UAE appeal no. 263/18, issued on the 8th of December.

⁷⁷⁵ The civil procedures law identifies conditions that must be met in order for the arbitral process to be paused. The arbitral award shall be enforced only after it is recognized. The court has the right to partially recognize the award; however, only on the condition that such partial recognize will not affect the entire award, see Federal Supreme Court of the UAE appeal no. 9/20, issued on the 13th of February 2000.

⁷⁷⁶ Federal Supreme Court of the UAE, appeal no. 49/20, issued on the 14th of May 2000.

Does the court's action here help in extending the time of the dispute or not? The first scenario may be that the claim was made as an attempt to persuade the court to grant them their request, even if the appellant has not in fact fulfilled the requirement of his request, in which case the court would have been right to dismiss the appellant's request. The second scenario may be that the appellant did fulfill the requirements of the arbitral clause. Since the court's decision (above) does not definitely answer the fact of whether the appellant fulfilled this request or not, room is left for speculation. In such a case, the court denying the appellant the right to a decision that would settle his claim may be seen as a form of injustice. To the court, this is certainly not the case. The court is more concerned with preserving the individual's right to fair trial and their right to appeal, which includes having the opportunity to present a claim in more than one level of the court⁷⁷⁷. A claim that is brought for the first time in front of the supreme court, even if this claim were later to be proven to be valid, would still be dismissed by the court, since it are tasked with preserving the right to appeal⁷⁷⁸. The court in both scenarios extends the time required for the dispute to be settled by allowing the appellant the opportunity to argue his claim more than once. The court, whether intentionally or not, is rendering ineffective the party's choice to arbitrate a dispute, in this instance⁷⁷⁹, the court upheld the arbitral clause, but the parties disputed for four years whether the court had the authority to appoint the arbitrators before they were able to move to getting a decision that would settle their main dispute.

Another dispute worth exploring is one that highlights the similarity between the federal civil procedures law and the procedural laws in each emirate. This case

⁷⁷⁷ See general Turki supra note 11 at 379-381.

⁷⁷⁸ id.

⁷⁷⁹ See appeal no. 49/20 supra note 776.

indicates the influence that these laws had on the drafters of the federal law, and it also indicates that the court's doctrine was established before the enactment of the federal law. Finally, the case illustrates the harmful effects of the court's policy on appeals when applied to arbitration. This dispute originated from an arbitration procedure that took nearly sixteen years from the time the arbitrator was appointed to the time it reached the stage at which the court became involved. That is, it originated before the enactment of the federal law on civil procedures and continued after the enactment of that law. In this dispute, the appellant argued that the arbitrator withdrew from the arbitration process without grounds, resulting in a long delay that inflicted damages on the appellant and the unusually lengthy litigation. The litigation began in 1993, and it took nearly a decade for the court to determine whether the arbitrator was liable or not. This delay could have been avoided if the court had a stricter policy on appeals to the Supreme Court⁷⁸⁰. Nevertheless, the court's determination of the arbitrator's liability was governed by article 86/1 of civil procedure law no. 3/1970, which requires the arbitrator to present a justifiable reason to withdraw from the hearing; this requirement is also listed in article 207/2.⁷⁸¹ Otherwise, the arbitrator would be liable and subject to questioning in the event one of the conditions of that article⁷⁸² was not met.⁷⁸³ The court stated the following:

[b]ased on article 86/1 of civil procedures law no. 3/1970⁷⁸⁴, which implies that the legislature gives an arbitrator the right to withdraw from an arbitration proceeding if one of the conditions was met, the arbitrator is required to provide a justifiable reason to withdraw from the arbitration. This complies with what the Federal civil procedures law requires in article 207/2.⁷⁸⁵ Moreover, the determination of whether

⁷⁸⁰ This decision was brought twice to the Supreme Court in this appeal and in appeal no.219/18, see Federal Supreme Court of the UAE, appeal no. 219/18, issued on the 26th of October 1997.

⁷⁸¹ Civil Procedures law article 207/2 states: "If the arbitrator has withdrawn, without serious reason, from his work after his acceptance of the arbitration, it shall be possible to inflict indemnities on him."

⁷⁸² *id.*

⁷⁸³ See Federal Supreme Court of the UAE, appeal no. 503/20, issued on the 15th of October 2000.

⁷⁸⁴ Which is the civil procedures law of the Emirate of Abu Dhabi.

⁷⁸⁵ Article 207/2 *supra* note 781.

the arbitrator's reason may be considered a justifiable reason falls to the trial court's discretion.⁷⁸⁶

The next decision established certain rules: (1) requests to arbitrators are considered by the court to be jurisdictional pleas, and as such they are subject to appeal to the Supreme Court; and (2) determining the scope of the arbitration is necessary in order for the arbitration to be lawful.

[T]he legislature requires the arbitration agreement to properly identify the scope of the arbitration, or the parties should determine the scope in front of the arbitrators if the agreement did not contain a determination of scope. However, if the arbitration agreement lacked the determination of scope, and the parties failed to agree on the scope in front of the arbitrator, then the arbitration shall be null and void. Moreover, if the arbitration agreement between the parties does not contain the scope of the arbitration, this fact is not change by delegating that right to the arbitrator. The clause involved is a general one that includes all disputes between the parties and does not specify the scope of the arbitration or the subject of the dispute. This resulted in the parties drafting a term of reference in front of the arbitrator in order to determine the scope of the arbitration; had the scope been properly determined in the agreement, the parties would not have had to resort to that solution. However, the parties did not agree on the scope in front of the arbitrator, which can be inferred from the fact that the arbitral hearing occurred without an agreement on scope being reached. This in turn nullifies the arbitration agreement, which is not changed by the appellant's request in case no. 390/1998 to determine the scope of the arbitration. The court does not have the right to intervene in such a case to determine the scope instead of the parties, given the fact that arbitration is based on the will of the parties.⁷⁸⁷

These rules are a continuation of the court's practice of allowing individuals the opportunity to appeal disputes.

The next decision emphasizes the court's ruling on the subject of the first hearing.

[T]he second ground argues that the first instance court decided to dismiss the appellant's request to dismiss the dispute based on several factors: the existence of an arbitration clause, and the fact that it was not presented in the first hearing, even though the appellant's representative pleaded to the existence of the award in the postponed hearing dated 3/10/1998. The court dismissed this argument, stating that this plea relates to public policy, and it should be presented before arguing on the

⁷⁸⁶ Appeal no. 503/20 supra note 783.

⁷⁸⁷ Federal Supreme Court of the UAE, appeal no. 620/21, issued on the 19th of December 2000.

subject matter of the dispute. Otherwise, it would be considered a waiver of the right to arbitrate according to article 84⁷⁸⁸ of the civil procedures law.⁷⁸⁹

It is clear that the parties are required to submit their request to arbitrate in the first hearing, and that a postponed hearing is not sufficient to fulfill this requirement. This suggests that the court considers this rule as the highest form of preserving justice, since it protects the parties' from entering into a arbitration that may endanger their rights; however, this view disregards the freedom of contract principle.

The last decision is an example of the court upholding an arbitration agreement and the jurisdiction of the ICC⁷⁹⁰ over the dispute. However, this dispute was already decided by the Supreme Court in appeal no. 38/12,⁷⁹¹ in which the court came to the same conclusion and dismissed the case, stating that it lacked the proper jurisdiction to hear it.

[T]he parties agreed in the arbitration agreement to settle the dispute according to the ICC rules, which does not mean that the parties agreed to submit their dispute to be administered under the ICC institute. It only means that the parties agreed to apply the same rules used by the ICC to the appointment of the arbitrators, and that the courts in the UAE should still supervise the dispute. The court dismissed this argument, stating that the procedure of registering the arbitration agreement in the court was a procedure that was required under AD civil procedures law no. 3/1970, which was succeeded by the introduction of the Federal civil procedures law no. 11/1992. As such, jurisdiction in regard to the registration of this dispute and the start of the proceedings should occur through the ICC.⁷⁹²

⁷⁸⁸ Civil procedures article 84 states: "1-The plea to local jurisdiction and the plea to forward the action to another court for setting the same litigation there before, or for engagement, and the refutation of nullity which is not related to the public order, and all of the pleas related to the discontinuing procedures, should be revealed together before presenting any other procedural plea, request, defense in the action, or disapproval, otherwise the right of what hasn't been revealed thereof shall be extinguished, and also the right of the appellant shall be extinguished in such pleas if he hasn't revealed them in the appeal initiatory pleading. 2-It shall be imperative to exhibit together all the aspects on which the plea, related to the procedures which are not connected to the public order, shall be based, otherwise the right to what hasn't been revealed thereof shall be extinguished."

⁷⁸⁹ Federal Supreme Court of the UAE, appeal no. 225/23, issued on the 6th of March 2003.

⁷⁹⁰ Many authors examined and discuss the ICC, see general Redfern and Hunter, supra note 62 at 9, were they give a brief overview of the ICC.

⁷⁹¹ Federal Supreme Court of the UAE, appeal no.38/12, issued on the 6th of December 1990.

⁷⁹² Federal Supreme Court of the UAE appeal no. 304/23, issued on the 24th of March 2003.

This dispute exemplifies the harmful effects of having a system that tolerates and accepts appeals in cases involving arbitration, and the fact that re-litigation defeats the purpose of opting-out into arbitration in the first place. This problem cannot be amended by a decision several years later that establishes which entity has the jurisdiction to oversee the arbitration.

4.7 Conclusion

These fifty-four decisions were issued by different high courts in the UAE and are varied in nature, although all are labeled as civil transaction disputes and were submitted to the court's civil circuit chamber. Analysis of these cases highlights many of the issues facing the arbitration process in the UAE.⁷⁹³ They do not touch on every aspect of arbitration, but they provide an indication of how the system works. They also provide an example of the average time a dispute that goes to arbitration would take, which in turn emphasizes the need to limit court intervention and demonstrates the drawbacks of mixing legal processes; i.e., allowing a case that was arbitrated to be moved into the court system. The cases demonstrate how judicial review undermines the arbitral process,⁷⁹⁴ leading to uncertainty and confusion and, more importantly, undermining the finality of the arbitral award.⁷⁹⁵

Those concerns, which Reuben has raised in regard to the FAA, are clearly identified when it comes to the arbitration process in the UAE. The decisions

⁷⁹³ Given the fact that not all of the High Courts decision are published, and most of the lower courts decision as well.

⁷⁹⁴ See general, Richard C. Reuben, *Symposium- Rethinking the federal Arbitration act: an examination of whether and how the statute should be amended: article: process purity and innovation: a response to professor Stempel, Cole, and Drahozal*, 8 Nev. L.J. 271, 271-272 (2007) (The author in here discusses the relationship between codifying the judicial review and its affect on the arbitration process).

⁷⁹⁵ Id at 313, the author also states that in doing so it would: "produce a process that frustrates rather than furthers traditional arbitration values..."

examined highlight the affect that judges' interpretations⁷⁹⁶ have on arbitral decisions, and suggests that judges believe arbitration to be incapable of protecting the legal rights of individuals. The process that these cases went through—from arbitration into the court system—further suggests that the court believes it is necessary in many instances to subject the arbitration process to the court's supervision. Moving an arbitration to the court requires judicial review—an appeal—and as the cases show, even when the legislature clearly states there is no room for appeals,⁷⁹⁷ many arbitrated awards are still being appealed. The court can be seen in these cases to interpret certain provisions very narrowly, in order to facilitate an appeal that would bring the case back into the court system for review. In this practice, the court is supported by certain articles of the civil procedures law. For example, article 203,⁷⁹⁸ which governs the parties' right to arbitrate, also establishes the automatic waiver of this right in the event the parties fail to uphold this right in the first hearing. This is an exception to the general rule that addresses the submission of objections, which concerns the court's jurisdiction that is also mentioned in article 85.⁷⁹⁹ The existence of article 203⁸⁰⁰ is an indication that the drafters of the legislation share the same concerns as the judges about arbitration.

The cases examined in this study suggest that the courts in the UAE are creating an environment in which it is difficult for the arbitral process to reach its full potential, and in many cases, the work of the arbitrators is undermined almost entirely. The appeals process that moves many arbitrated cases into the courts for

⁷⁹⁶ The judge's interpretation of arbitration has been discussed in the UAE judge's definition of arbitration, in which they defined arbitration as an exception to the individuals right to seek their natural judge, supra 2.6.5. UAE Court View of the Definition.

⁷⁹⁷ Such as the case in dispute that relates to appointing an arbitrator, see civil procedures law article 204 supra note 407.

⁷⁹⁸ Civil Procedures law article 203 supra notes 406, 428 and 459.

⁷⁹⁹ Civil procedures law article 85 supra note 395.

⁸⁰⁰ Civil Procedures law article 203 supra notes 406, 428 and 459.

multiple rounds of review and appeals means that arbitration is adding to, rather than easing, the caseload that floods the courts.⁸⁰¹ This then means that the government must increase spending on the courts in order to help judges with the overwhelming caseload.

This discussion raises the question of whether it is wise to promote the use of civil arbitration. A further dissection of the cases examined in this section will help answer this question. Of the 54 cases considered, 23 were decided by the federal supreme court of the UAE and 31 by the cassation court of Dubai; the average time the cassation court took to reach a decision was two years, while it took nearly three and a half for the supreme court to reach a decision, which brings the average time for both courts to about three years, which is a normal amount of time for a litigation case to take.

However, as the case studies show, many parties did not wish to submit their disputes to the court⁸⁰², and forcing those parties to spend years litigating their disputes is a clear breach of their contractual obligation and of their freedom of contract. Moreover, it undermines the parties' choice to opt-out into arbitration in the first place by raising questions about the practicality of this choice. Instead of arbitration being a solution and aid to the court's problem of an overload of cases, arbitration becomes a contributor to this problem.

⁸⁰¹ See Justice Philip Talmadge, *Alternative dispute resolution comes of age in Washington*, 53 Wash. St. B. News 23, 23-24 (1999), (the author addresses the necessity of having ADR to combat the issue of having "few judges and too many criminal cases").

⁸⁰² Which is evident by the fact that they opted-out into arbitration in the first place, see general Carbonneau supra note 74 at 1, see general Redfern & Hunter supra note 62 at 1-2, (both authors when asking themselves what is arbitration? came to the conclusion that it's a process in which the parties seek a final and binding decision "without reference to a court of law" see Redfern & Hunter supra note 62 at 2).

The other notable factor is the varying nature of the disputes that have been examined by these courts; in some instances, there is a commercial element and in others a civil, and some are a mix of both. The cases also range from purely ad-hoc arbitration to being court-annexed. In some instances, an arbitral institute is present in addition to the dispute over the recognition and enforcement of an arbitral award—this variety indicates that the civil circuit is capable of accepting all kinds of disputes that involve arbitration, which increases the opportunity for these disputes to evolve from arbitration into a normal suit. It also emphasizes the important steps that the court should take in order to limit such submissions.

Despite the variety in the nature of submissions, the constant factor in all of the disputes considered in this study is the role that the court's interpretation plays. The court's interpretation of the arbitral clause and the arbitration agreement particularly hinder arbitration and keep it from achieving its purpose. The court's interpretation is influenced by its view of arbitration and its willingness to fight for jurisdiction over cases⁸⁰³. The UAE courts are more than capable of sustaining this fight through governmental assistance, which is quite similar to what the US court system experienced in the early nineteenth hundreds, when "America was a rich country, full of adventure and could afford a considerable volume of disputes at a high cost of settlement."⁸⁰⁴

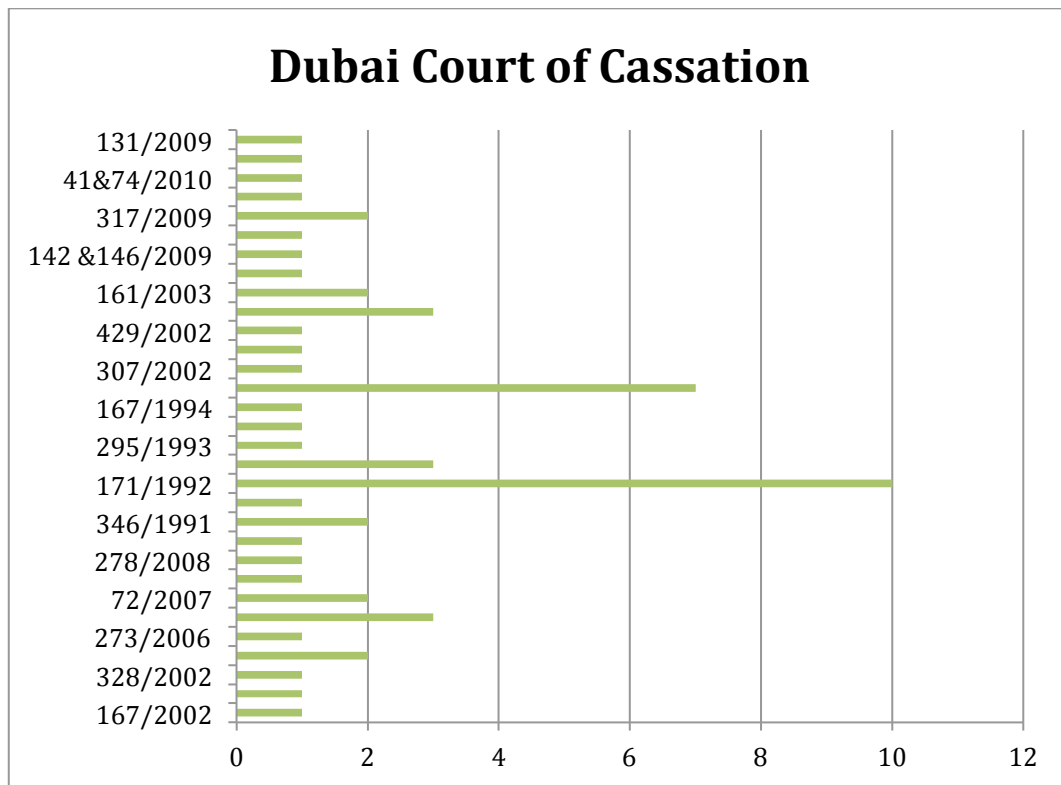
This quote describes the current status of the UAE judicial institute, which is one of the main reasons that the court is in no rush to allow arbitration to ease its case load. Many judges believe they hold the original jurisdiction over disputes, and

⁸⁰³ See general Carbonneau supra note 74 at 45. (Were the author examined the period of hostility in the US and states that: "Arbitration, in their view, was makeshift justice. Courts were reluctant to compel parties to arbitrate." Which is similar to how the courts in the UAE view arbitration.)

⁸⁰⁴ Kellor, supra note 58, at 6.

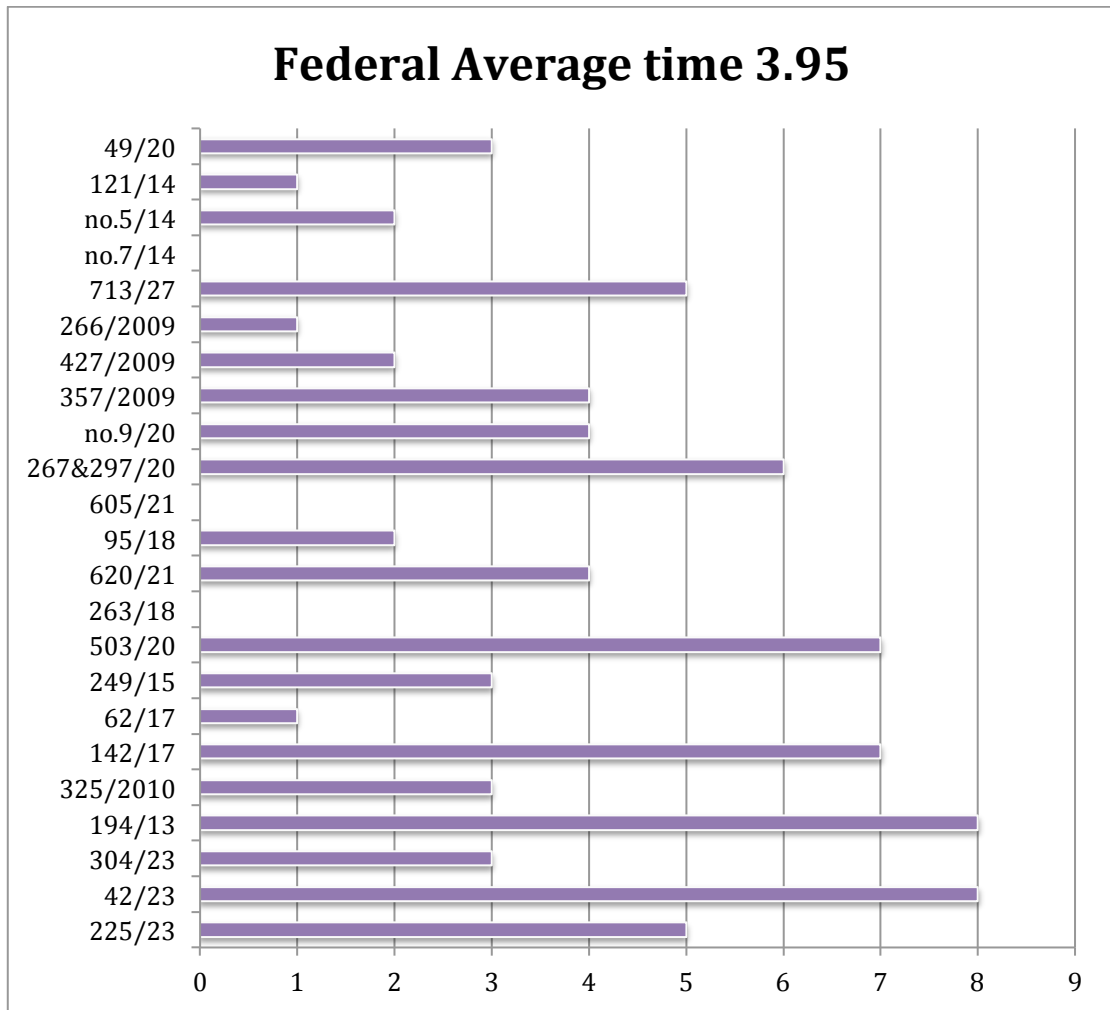
currently, the UAE’s courts are well-funded entities willing to seek ways of reclaiming jurisdiction. As a result of the struggle for jurisdiction that bogs down the arbitral process, arbitration may soon “lose its allure.”⁸⁰⁵

This discussion highlights one of the common features presented in the 58 disputes studied, which is the relative ease with which decision are being appealed. This puts individuals seeking to arbitrate at a crossroads—either accept the risk of having their arbitration dispute metamorphose into a litigation, or submit their dispute from the start to the courts. One of the reasons for opting-out into arbitration in the first place is to be granted a final decision without the possibility of appeals,⁸⁰⁶ but this outcome seems insecure at best and unlikely at worst, given the court’s willingness to entertain appeals, as illustrated by the decisions examined here.



⁸⁰⁵ Paulsson supra note 106 at 51.

⁸⁰⁶ See general Kim Karelis, *private justice: how civil litigation is becoming a private institution- the rise of private dispute centers*, 23 Sw. U. L. Rev. 621, (1993-1994), where the author discusses the reasons why individuals are frustrated with the courts.



This situation raises another concern, which is whether it is necessary for the courts to review the arbitral process or the award in the first place? There are two foreseeable outcomes for this question. First, the court's current position and practice, which leads to reviewing the arbitral process and the subsequent appeals that usually follow from such a judicial review, will become the norm. The court's continued involvement in arbitrated cases would imply that the court favors protecting the individual's right to a fair trial and to appeal over that individual's freedom of contract and right to arbitrate. It also would imply that the court has concerns about the ability of arbitration and toward ADR in general to provide the same protections that the courts provide to individuals. Ultimately, the court's continued involvement

would suggest that they fear arbitration may create a system of “unequal judicial systems; one for the rich and one for the poor.”⁸⁰⁷

The other outcome would be for the court to cease its practice of reviewing the arbitral process, which would suggest that it favors the individual’s right to freedom of contract and freedom to arbitrate over that individual’s right to appeal. It would also suggest that the court is accepting the fact that arbitrators are capable of preserving the individual’s right to a fair trial. However, the cases examined suggest that the court is adopting the first view—the necessity of reviewing the arbitral process through appeals—as evidenced by the ease with which a dispute involving arbitration is subject to appeal, which essentially transforms an arbitration dispute into a litigation.

Again we must then pose the question of whether it is practical to promote the use of civil arbitration in the UAE. While not all of the disputes that were submitted to the civil circuit are purely civil, the majority of them are; therefore, examining the input and views of the civil circuit courts is key to promoting arbitration. The benefits of having a functional arbitration system are immense, especially for the courts, since they would be directly affected. Allowing arbitration would help the court achieve one of its main goals of providing justice to individuals, and of providing that justice without long delays. The advantages of having both systems (courts and arbitration) coexist would seem to outweigh allowing one to dominate the other, and thus there is “no reason why they cannot work as partners rather than adversaries.”⁸⁰⁸

⁸⁰⁷ id at 622.

⁸⁰⁸ Id at 623.

For this goal to be achieved, the court's view toward arbitration needs to change, and it would need to limit the scope of its reviews. This suggestion is neither innovative nor new. A study conducted by Angell and Feulner⁸⁰⁹ in 1988 examined the civil procedures law of the UAE and focused on its arbitration provisions; they highlighted the difficulties facing arbitral awards in the UAE, stating: "an arbitration award, even one rendered in the UAE, cannot be enforced directly in any UAE court but must first be reduced to a court judgment."⁸¹⁰ Today, thirty years later, the same issue still exists within the courts, as does the same process: "...this requires application to a local court (unless the arbitration is already under the court's supervision) and the opportunity for all parties to submit their objection to the award."⁸¹¹ This is the exact practice and view that the court holds today.

To promote the use of civil arbitration would require judges to change their attitude and practice toward arbitration. Promoting arbitration without providing the necessary tools for it to flourish would be a waste of time; rather, it would ultimately create a situation in which more disputes would exist because of the increasing number of users of this form. The success of this proposal depends on the existence of two factors. The first is a successful promotion campaign of arbitration, and the second is for the judges and the courts to change their current practice towards arbitration.

Therefore, succeeding in promoting the use civil arbitration, without addressing the shortcomings that currently face the use of arbitration, in particular the courts hostility towards arbitration, would create a situation in which arbitration

⁸⁰⁹ Nicholas B. Angell and Gray R. Feulner, *Arbitration of Disputes in the UAE*, 3 Arab L. Q. 19, (1988).

⁸¹⁰ Id at 25.

⁸¹¹ Id at 25.

becomes a funnel of disputes towards the court. However, a successful promotion campaign of arbitration could lead to three outcomes: (1) the increased number of users of this form could affect the judges and force them to change their views toward arbitration and subsequently amend their practice; (2) a counter affect, in which the court would feel threatened by a new competitor (arbitration) and would take steps to react and counter this new competitor; and (3) a continuation of the current status quo, in which the court's current practice is upheld.

Naturally, the first outcome is one that favors arbitration and is the goal of any scheme trying to promote the use of arbitration. However, based on the way the judges are currently addressing issues related to arbitration, it is unlikely that the first outcome will occur. Judges' actions will more likely lead to either the second or third outcome, both of which are unfavorable toward arbitration.

Thus, the promotion civil arbitration requires certain necessary tools—logistical support in the form of proper legislation and the presence of a judicial institute that accepts arbitration and is willing to see it function and succeed. “Judicial institute” refers not just to the judges or the court, but to the entire judicial branch of government. However, those with the greatest impact on whether arbitration will succeed are the judges, as their actions directly affect the arbitration process, and they hold important roles in the government's judicial branch. If the courts were willing to accept civil arbitration, their acceptance might translate into decisions that promote the practice of this form.

Finally, the key to answering any question about how to promote the use arbitration in the UAE begins and ends with the court and the judges, for their support is critical to the success of any scheme that promotes arbitration.

Chapter Five

Conclusion and Recommendations

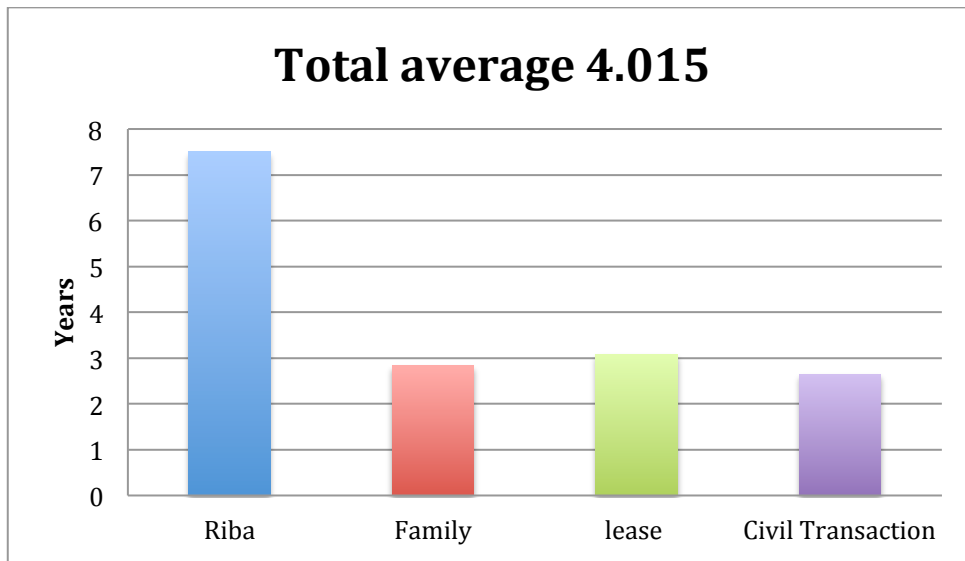
5.1 Introduction

Arbitration is an essential tool for developing the adjudication process in the UAE. For this tool to reach its full potential—namely, to become an effective method of dispute resolution—a structure must be put in place that allows arbitration to flourish and successfully mediate disputes to acceptable and enforceable resolutions. This structure should be tailored to fit the culture of the UAE, as well as the country's needs as a developing society. This requires addressing certain current issues and preventing them from reoccurring in the future. In addition, a legislative arbitral structure should anticipate potential issues that might arise from implementing changes intended to establish arbitration, and it should leave room for improving this structure.

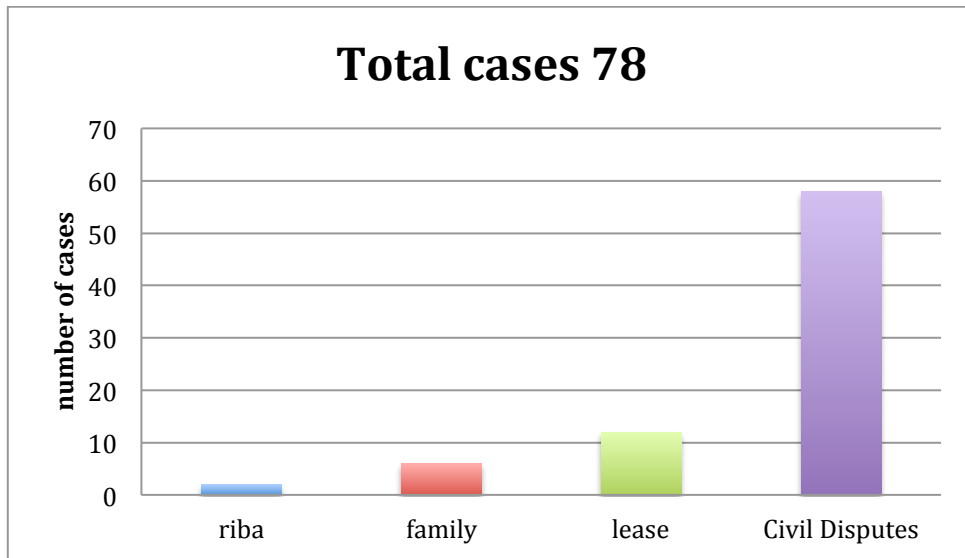
The cases examined in this research highlight the issues that have delayed the acceptance and evolution of arbitration. The most important issue revolves around the ease with which disputes may be pulled out of arbitration and brought in front of the courts, transforming them into litigation; once subject to the courts' procedures, these cases are subsequently subject to appeal. This occurs in part because of the way the courts typically view arbitration: as an exception to the litigation standard and to an individual's right to seek his or her "natural judge."⁸¹² As such, courts in the UAE to date have tended to view arbitration as a dependent system that requires court supervision.

⁸¹² See supra 2.6.5 UAE Court view of the Definition.

When an arbitrated case is remanded to the court system, the time required for the dispute to be fully resolved is directly affected. The average time that the court takes to resolve the cases examined in this research was nearly four years, which is an alarming figure⁸¹³. Admittedly, the cases examined in this study may represent only a small fraction of the total number of arbitrated disputes that are submitted to the courts; the small sample size is due to the fact that not all of the high court's and trial courts' decisions are published. Nevertheless, these disputes provide an example of how the courts function and of what happens once the court steps into the process. The case studies highlight that court involvement in arbitral proceedings lengthens the time of the dispute.



⁸¹³ Due to the fact that in some cases litigants received an arbitral award, which should be a final decision and then have to spend time re-litigating their dispute in front of the court, or they agreed to arbitrate and then have to defend their decision, without resolving their main dispute.



This delay may be attributed at a high level to three factors:

- The legislation
- The courts
- Conflicting views

The civil procedures law is the main regulator of the arbitral process in the UAE. Upon examining this law, one may conclude that it enables court supervision over all aspects of arbitration, and it also gives the court the authority to interpret arbitration clauses and agreements. This law allows disputing parties to opt-out of their contractual obligation to arbitrate before an arbitral award is made.⁸¹⁴ In addition, it allows parties to appeal arbitral awards, as well as to question various elements of the decision-making process that occurs during the arbitral process. All of these elements suggest that legislators lack faith in the arbitral process.

The existence of legislation that gives individuals and the courts the opportunity to opt-out of the arbitral process, either through appeals or by entering

⁸¹⁴ Civil Procedure law article 203/5 supra note 442.

into a procedure that transforms the parties' dispute from an arbitration into a litigation—or in the best case scenario, into a court-annexed arbitration—undermines the arbitral process as a whole and deprives it of meaningful and consistent authority.

The courts also play a role in evacuating the significance of arbitration. However, the courts also hold the key to solving this problem. Their practice in cases that involve arbitration stems from their views on arbitration and their adherence to the civil procedures law, which they cite to justify their practice of accepting appeals of arbitral awards and taking over jurisdiction of arbitral cases.

Finally, conflicting views about the usefulness and integrity of the arbitral process contribute to its tenuous state as a viable method of conflict resolution. Those who advocate arbitration are on one side (pro-arbitration, naturally), and the courts and legislation are on the other. The case studies presented in this research demonstrate that the courts and the legislature share the same views when it comes to arbitration, which conflict with the principles of arbitration. For example, one of the pillars of arbitration is the finality of the award⁸¹⁵; once the parties agree to arbitrate, they are supposed to be bound to this procedure and should not be allowed the opportunity to present their dispute under any other form in front of the courts. Otherwise, arbitration cannot achieve finality nor be seen as an independent adjudication procedure.⁸¹⁶

Arbitration requires the guarantee of finality and independence from the courts in order to produce what is expected from it. It cannot evolve into an accepted method

⁸¹⁵ See general Redfern & Hunter supra note 62 at 31-34 (were the author asks and discuss the reason behind the individual opting-out into arbitration). see general Carbonneau supra note 74 at 1.

⁸¹⁶ Redfern & Hunter supra note 62 at 520 and 561, (were the author discusses the final award and the effect of awards “Res Judicata”).

of resolving disputes in the UAE while facing resistance from the courts and the legislature.

As it stands now, an arbitral award is treated more like an expert opinion⁸¹⁷ or report, rather than as a binding legal decision. This may be seen in the way in which courts address arbitration. This undermines the arbitral process and its autonomy and affects how well the arbitral process works, since the ability to contest an arbitral award or indeed the entire arbitral process, undermine the process and render it ineffective.

5.2 Recommendation

Understanding the challenges facing the arbitral process in the UAE's civil circuit court raises certain important questions:

- How may arbitration be developed into a “one-stop shop”⁸¹⁸ that limits recourse to the courts?
- How may “arbitration [be used] as a solution to crowded court dockets”⁸¹⁹?
- How may arbitration be made accessible to the public?⁸²⁰

Any solution must include elements of education, legislative intent, judicial intent, and the provisions prescribed in existing legislation. Successfully promoting the use

⁸¹⁷ See general, Al Tamimi supra note 12 at 58-59, (the author explains the courts view on experts opinions, which is quiet similar to their view on arbitration.)

⁸¹⁸ I have borrowed this term from my conversations with my supervisor Thomas E. Carbonneau when he describes what is expected from arbitration and the need for it to be a one stop shop as he puts it.

⁸¹⁹ Rayner supra note 5 at 38.

⁸²⁰ Kellor supra note 58 at 8, (the author describes the early patterns of the American arbitration scene, in which he attributes the lack of accessibility, to the absence of organization.)

of arbitration will require considering these four factors, the most important of which is education.

➤ Education

“ Although arbitration had found a foothold in chambers of commerce as early as 1768 in New York, 1794 in New Haven, and 1801 in Philadelphia, the examples thus set had not resulted in its general acceptance by other chambers of commerce; and even when established it was not generally used because little effort was made to educate the public in its use....”⁸²¹

This statement shows the important role that education plays in developing arbitration. The UAE is a relatively new and still developing country, and its legal education system is still developing.⁸²² Not all practitioners of law in the UAE are UAE nationals, nor are all judges: “Almost 90 per cent of Judges in the UAE courts are from Egypt, Syria...”⁸²³ Judges with different legal backgrounds and education may be influenced by how arbitration is perceived in the jurisdiction from which they come (in which they were trained). This may influence junior judges in the court system, and it certainly means that jurisprudence in the UAE is affected by multiple views on arbitration that derive from a number of different sources.

Diverse opinions about jurisprudence may be seen as positive; however, uncertainty will remain if these disparate sources are not eventually shaped into a unified view, or tailored to suit the UAE’s unique judicial needs. This brings us back to the importance of education, which has the potential to change the views of the public about the utility and authority of arbitration.

⁸²¹ Id at 7, (al-mulla raised a similar recommendation in regard to the importance of education and the participation of law scholars and practitioners in this process), supra note 345 at 42.

⁸²² Al- Tamimi supra note 12 at 6, (Al-Tamimi highlights this fact and states that the first law school in UAE, was only established in 1978.)

⁸²³ Id at 6

Educational reform should target judges as well as the practitioners of law in general, i.e. lawyers, arbitrators and law students. It should also be addressed to individuals that choose arbitration over litigation. Finally, the legislative branch of the government should be educated about arbitration toward the following goals:

- Changing the courts' views about arbitration from viewing it as competing with the courts' jurisdiction to embracing it as an asset with equal authority
- Exemplifying the importance of the autonomy of arbitration and the arbitrators
- Establishing the importance of the finality of arbitral awards
- Exemplifying the negative affect that appeals have on arbitration
- The importance of the courts role in promoting arbitration and limiting (for example) the appeals process that undermines it

➤ Legislative Intent

Reforming a law requires the backing of the policy makers. If they spearhead reform, other parts of the legal system should follow. Consider the U.S. model, in which “The court discovered in the FAA a strong federal policy supporting arbitration and a congressional command to the courts to enforce it.”⁸²⁴ Moreover, the U.S. Supreme Court is tasked to defend the sanctity of arbitration.⁸²⁵

Without legislative intention to support the use of arbitration, the arbitral process may remain be stuck in a loophole.

➤ Judicial Intent

⁸²⁴ See, Carbonneau, supra note 74 at 127. See also, Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Justice*, 47 UCLA L. Rev. 949 at 989 (2000), where the author emphasis the need of “Public Policy strongly supports the use of binding dispute resolution techniques..” in order to overcome “the legitimacy barrier”.

⁸²⁵ Based on this federal policy See, Carbonneau, supra note 74 at 127.

Judicial intent is also key to reforming and developing a legitimate arbitral process in the UAE. If the courts remain hostile toward arbitration, no reform would fully succeed. Implementing a policy regarding arbitration similar to that of the U.S.⁸²⁶ might only result in more litigation if the courts remained hostile toward arbitration. Given the nature of procedural law⁸²⁷ and the vast powers that UAE courts hold to interpret laws and engage arbitration agreements, a court that disagrees with a pro-arbitration policy might find ways to hinder its implementation; this could create dysfunction, increase arbitration-related litigation, and shake people's faith in the arbitral process.

➤ Legislation

Arbitration in the UAE needs a law that encompasses all of the principles required for it to function properly. The drafters of such a law must consider the following factors:

- The law would have to be **compatible** with the principles that underpin society in the UAE and be derived from the same sources of law upon which the UAE was founded.
- The law must erase any **judicial hostility** toward arbitration, which is easier said than done. The success of a law that protects the arbitral process will depend on its ability to compel the courts' cooperation.
- To prevent **confusion** about the use of the law, it would have to be clearly drafted. As noted earlier, some of the provisions that regulate arbitration in the current civil procedures law contradict each other and create confusion

⁸²⁶ id.

⁸²⁷ Especially in the UAE and the articles relating to arbitration, which allow courts to complicate legislation with which they don't agree.

as to their purpose and proper implementation. This gives the courts room to interpret them on their own.

- The law would have to uphold the **finality** of arbitral awards and be drafted in a way that supports arbitration and the decisions that arbitrators render.

A law regarding arbitration was drafted and published in the UAE in 2010. Why it has not been enforced yet, and whether it supports arbitration, remains in question.

This law is modeled after the Egyptian arbitration law. While UAE jurisprudence and legal studies owe much to Egyptian jurists,⁸²⁸ the time has come for the UAE to create its own laws and not be limited to following or recreating the practices of other countries. What may work for one nation may fail in another, or at the very least create confusion. The UAE needs arbitration legislation created specifically for the UAE.

Seven years have passed since the 2010 arbitration law was drafted without being enforced, which suggests that arbitration is not high on the legislature's agenda and may also indicate that some legislators doubt whether the civil procedures law provisions that deal with arbitration have the ability to effectively regulate it.

Whether the 2010 Draft law would support arbitration depends on the final draft of this law, and on whether judges accept it. However, having a separate law

⁸²⁸ In 2012 I met with Dr. Mustafa Al-Bandary, at the time he was working as an advisor in the Dubai Rulers Court, and he provided me with his commentary on the draft law, in our discussion he came to the conclusion that this draft law is a copy of the Egyptian Arbitration Law, which is in turn modeled after the UNCITRA model law. See general El-ahdab and El-ahdab supra note 37 at 777-829 (the authors in the chapter discussing the UAE examines the new draft law as well.)

that governs and regulates arbitration would be a significant, and necessary, step forward, even one it is flawed or based on ideas about arbitration that come from another country.

Returning to the two questions posed earlier:

- How may arbitration be developed into a “one-stop shop” that limits recourse to the courts?
- How may “arbitration [be used] as a solution to crowded court dockets”?⁸²⁹
- How may arbitration be made accessible to the public?

In order to make arbitration a **one-stop shop**, it must first gain independence from the courts, which will only occur if the following conditions:

- The courts must step-down from their **supervisory role** over arbitration, which will involve courts changing their views about arbitration. Courts would need to view all forms of arbitration in the same way that they view family arbitration—they must feel they have a moral obligation to enforce all arbitral awards (not just those that arise in matters of family law).⁸³⁰
- A proper **judicial school** must be established in the UAE, and it should focus on increasing research and study of law in general and of arbitration in particular. Research and findings would ultimately be used to encourage the development of arbitration within the UAE. Moreover,

⁸²⁹ Rayner supra note 5 at 38.

⁸³⁰ Which was also mentioned by al-mulla, supra note 345 at 42.

such a school would help educate the public about the importance of the arbitral process.⁸³¹

- A **unified Supreme Court** should be established to manage the current situation in which there is more than one high court with its own jurisprudence, and principles regarding the same subject are not uniform. This undermines judicial stability, which is essential for development. There have been calls in the past to unify the high courts from dignitaries such as a retired judge and the first head of the Federal Supreme Court of the UAE, Dr. Abdul-Wahab Abdul.⁸³² Abdul argues that it is necessary to unify the courts in order to unify all judicial principles within the UAE, which would help erase the contradictions and conflicts that occur between local and federal courts.

These three factors are required for arbitration to become a system that is independent of the courts and become truly **accessible to the public**. This might be achieved by means of one of the following solutions:

- Accelerating **the enactment of the arbitration law**, which should reinforce the independence of arbitration and ensure people's faith in the arbitral process. However, this solution will not produce results without the courts relinquishing their views about arbitration treating it as an equal process. Arbitration will always need the courts' support to enforce arbitral awards.⁸³³

⁸³¹ See Kellor, supra note 58 at 8, where he explained that "Education in the knowledge or use of arbitration was unheard of, nor was there source material available, nor had teachers thought of instruction in the subject." Which exemplifies the important role that education plays in this process. See also al-mulla supra note 345 at 42.

⁸³² Supra note 35.

⁸³³ al-mulla mentioned the need of enacting modern laws on arbitration, supra note 345 at 42.

- **Creating specialized circuits** within the court, which specialize in questions relating to arbitration and produce their own jurisprudence regarding arbitration. In order for these circuits to reinforce the arbitral process, their procedures would need to fall outside the scope of normal litigation. As such, their decisions—unlike those of the other circuits—would not be subject to appeals. This solution would address the problem of arbitration’s overly close relationship with the courts and ultimately lead to the creation of a support system within the courts for arbitration. However, it would require significant resources, including the selection of judges that specialize in arbitration. Arbitration is a specialized field, and there are not many specialists in the UAE, thus finding enough judges to populate a special arbitration circuit may prove very difficult. As Reuben notes:

ADR processes yields greater return than expanding funding for trial processes through the creation of more judgeships, specialty courts and other administration devices that merely restructure case management rather than reduce the flow of cases by preventing unnecessary conflict escalation.⁸³⁴

The problem of funding can be resolved in part by having the judicial institutes in the UAE, which are responsible of training the perspective judges, to be ordered to give them courses on arbitration. However, the application of this solution implies that the number of disputes relating to arbitration is sufficient, to justifies the creation of those circuits and the delectation of those

⁸³⁴ See Reuben, Supra note 824 at 1104, also al-mulla mentioned the same idea, supra note 345 at 41.

resources. In addition, to what Reuben states of being a mere restructure of case management.⁸³⁵

Both of those solutions would address certain symptoms, but neither provides a complete solution. The first provides a partial solution to the problem, and the second looks promising in theory but faces a number of practical problems.

5.2.1 Hybrid Tribunal System

A more viable solution to the dilemma of how to establish arbitration properly in the UAE may be the creation of a hybrid tribunal system, modeled in part after the rent dispute committees. Rent committees may provide a useful model for this hybrid system, because the courts already view these committees as an extension of the courts' power. They are an established part of legal practice in the UAE, and such a tested structure might serve as a solid base for an arbitral system and might also garner government support. Rayner proposed that the government support of an arbitration scheme would attract public attention and subsequently increase the use of arbitration.⁸³⁶

The first step in establishing a new system in the UAE revolves around changing the courts' views to the point that they accept a new establishment. Therefore, any such system would need to be created through an emirate's decree in order for to have the legal justification needed to ease the courts' concerns regarding the ability of arbitration to protect individuals' rights. A decree from an emir would

⁸³⁵ Id.

⁸³⁶ See Rayner, *supra* note 5 at 73, (the author mentioned that the government would have to be involved in the training of arbitrators, or assisting in the funding of arbitration schemes, and in creating a legislation that support such scheme.)

help to ensure the courts acceptance and would overcome, as Reuben called it, the “legitimacy barrier”⁸³⁷

The second step would enforce the independence of the arbitral committees (if they were indeed created) by ensuring that the courts were unable to have any supervisory role over them. Independence also means that arbitral awards would not be subject to appeals in the courts; without this protection, the committees would have no power or utility and the opportunity to opt-out into arbitration would also lose its meaning. In the worst-case scenario, establishing arbitral committees and not protecting the finality of arbitral decisions may in fact increase the number of disputes submitted to the courts.⁸³⁸

The third step may involve following examples from other countries. Many similar arbitral structures are already in use around the world. Policy makers in the UAE could choose one of these as a model for the UAE’s own system.⁸³⁹ They could choose a structure they believe would best suit the needs of the UAE and design a structure that is acceptable to all parties that has already been tested in another country.

The fourth step would be characterized by these arbitral committees serving as an umbrella over all aspects of arbitration disputes, ranging from concerns regarding the scope of the arbitration agreement, to the appointment of the arbitrators, to the recognition and enforcement of arbitral awards. These committees would serve

⁸³⁷ See Reuben, Supra note 824 at 989.

⁸³⁸ Rayner supra note 5 at 38, (the author raised the same concern regarding the scope of appeals, stating” it may well be that a new form of appeal will have to be fashioned. Again, the scope of appeal may very depending upon whether the parties voluntarily chose arbitration or had arbitration forced upon them. Finally the scope of appeal may depend upon the policy underlining the scheme. If the purpose of the scheme is to lessen the court’s burden, a broad right of appeal would tend to undermine that purpose.”)

⁸³⁹ Rayner, mentioned a number of such schemes used around the world, id at 39, were he mentioned examples of such schemes in the US, UK.

as the last resort for any concerns regarding arbitration, help resolve any matters that the arbitrator is unable to mediate (and which under the current system would be brought in front of the courts). Arbitral committees should have these powers in order to satisfy the needs of the courts and of the participants in the arbitral process. A committee that oversees all aspects of the arbitral process, and that is sanctioned by the government, might erase the courts' concerns about the ability of arbitration to protect the individual right to a fair trial. It might also ensure that individuals would be more willing to voluntarily uphold their contractual obligations, be it upholding their arbitral agreements or honoring the awards handed down.

Therefore, having an arbitral structure in the form of a committee, which has the same powers as the court and at the same time is separate and independent, is the only way to establish an arbitration system in the UAE that functions, that is accessible to the public, and that would gain the trust of both the courts and the public. Would such a system succeed in functioning “as a solution to crowded court dockets”?⁸⁴⁰ If not, is it then advisable to implement such monumental changes in the UAE's jurisprudential system? The solution proposed in this dissertation (which is admittedly theoretical) has the potential to succeed, and the continuous use of the arbitral committees outlined above, with the protection and support of the government,⁸⁴¹ likely would in time cement arbitration's place as a valid option for dispute resolution, working alongside the courts to achieve the common goal of providing justice to individuals.⁸⁴²

⁸⁴⁰ Id at 38.

⁸⁴¹ Rayner theorizes that the government assistance of such programs is necessary to increasing the use of arbitration. Id at 73.

⁸⁴² Reuben theorized that in time “the wall between the public and private dispute resolution systems will become imperceptibly thin” and his theory of having “a unitary system of dispute resolution will begin to align.”, see Reuben supra note 824 at 1104.

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Appendix

Civil Procedures Law

- **Domestic Arbitration**⁸⁴³

- 1) Article 203- Arbitration concept and requirements**⁸⁴⁴

This article codifies the use of arbitration, either by contract or an agreement between the parties, therefore, this article establishes the parties' right to freedom of contract in arbitration. In addition, to identifying the method of recording the arbitration agreement to be exclusively in writing, which raises concerns when it comes to verbal and electronic agreements, since according to this article they would be dismissed.⁸⁴⁵ Furthermore, this article requires the proper identification of subject of the dispute or the scope of the arbitration, which should be clearly identified in the term of reference or during the hearing, this requirement doesn't change if the arbitrator is authorized to reconcile; therefore, the failure to uphold this requirement would result in nullifying the arbitration, as a result, the parties have the obligation to determine the scope of the arbitration without leaving any room for doubt or interpretation by the court.⁸⁴⁶

The article also limits the use of arbitration to matters that can be reconciled, moreover, it identifies the party that has the legal right to enter into the arbitration agreement, this article raises questions when it comes to the power of an agent to enter into an arbitration agreement, and whether are not his action would be permissible.⁸⁴⁷

⁸⁴³ The translation of these articles are provided by the ministry of justice of the UAE.

⁸⁴⁴ Federal Law no. 30 dated 30/11/2005 amended this article.

⁸⁴⁵ Article 203/2 state "The agreement shall not be recorded except in writing"

⁸⁴⁶ Article 203/3 states "The scope of the arbitration should be established in the arbitration agreement or during the examination of the suit, even if the arbitrators were authorized to reconcile, otherwise the arbitration shall be void."

⁸⁴⁷ Article 203/4 state "It shall not be possible to arbitrate in the matters in which the reconciliation is not possible, and it shall not be valid to agree on the arbitration unless by those who have the capacity of disposition in the litigated right."

Lastly, this article establishes that in the event the parties agreed to arbitrate they are bound to arbitration, as a result of this they are unable to seek the court for relief. However, this right is limited, and is subject to automatic waiver by the parties, in the event they failed to uphold their right to arbitrate in the first hearing⁸⁴⁸ either by the parties or through their legal representative, it would be considered, a waiver of this right by the court, which is an exception to article 13, which accepts a procedure even if it had an error, in the event that the goal of that procedure were achieved, implying that the legislator goal from this article is not to preserve the parties right to freedom of contract, rather to preserve their right to seek their natural judge, by giving them the opportunity to opt-out from their agreement.

2) Article 204- Appointment of the Arbitrators

This article addresses any issue or dispute relating to the appointment of an arbitrator, it requires the parties to submit their dispute through the normal procedures of filing a suit; moreover, it establishes that the courts decisions in this regard, are not subject to appeal.⁸⁴⁹

It can be deduced from this article, that the legislator is trying to solve any issue regarding the appointment of arbitrators, by subjecting the parties to the normal procedures of filing a suit, which under normal circumstances would in turn subject

⁸⁴⁸ Article 203/5 state “If the litigant parties have agreed on the arbitration in some litigation, it shall not be possible to prosecute an action therewith before the judiciary, however, if one of the two litigant parties has resorted to prosecute the action without taking into consideration the arbitration condition and the other party hasn't objected at the first sessions, the action should be examined and the arbitration agreement shall be void.”

⁸⁴⁹ Article 204 state: “1- If the litigation has occurred and the litigant parties haven't agreed on the arbitrators, or one or more arbitrators, who was agreed on, has abstained from the work, has retired there from, has been dismissed there from, or his refusal has been decided, or a hindrance has prevented his undertaking therein, and there were not an agreement between the litigant parties concerning that, the court which is principally authorized to examine that litigation shall appoint whoever shall be needed of the arbitrators, and that on the grounds of a request from one of the litigant parties, through the usual procedures of the action prosecution. The number of those appointed by the court should be equal to the number agreed on between the litigant parties or completing thereto. 2- It shall not be possible to appeal against the decision issued in that through any of the proceedings of appeal.”

the parties to the normal course of appeals, however, the legislator tried to avoid this outcome by exempting that those decision from appeals. Despite this statement, there is no mechanism that exist in order to deter the parties from appealing those decisions, moreover, the court has no obligation to dismiss those appeals, nor are they willing to dismiss them without examining it fully. Implying that the second paragraph of this article, has no practical affect on the courts nor the parties.⁸⁵⁰

3) Article 205- Authorizing the Arbitrators to act as mediators⁸⁵¹

This article addresses the parties right to allow the arbitrators to act as a mediator in the dispute; it requires their names to be stated in the arbitration agreement or in a subsequent document, and in the event that their names were not stated clearly they won't be granted this power.

Therefore, in the event that the parties failed to clearly state the names of the arbitrator, either, in the arbitration agreement or in a subsequent agreement, this would constitute a ground for nullifying the arbitral award if it was based on a mediation. In essence, the legislator is stating that agreeing to delegate the power of mediation to the arbitrators is insufficient, they should be clearly identified, which implies that the legislator is viewing this as an act that contains additional risk to the parties, as such it requires further protection through additional regulation.

4) Article 206- The Arbitrator Requirements⁸⁵²

This article establishes the arbitrator competence to rule; the arbitrator cannot be a minor or legally incapacitated or deprived of his civil rights, the number of arbitrators shall be an odd number if the arbitrators were more than one, all of which

⁸⁵⁰ The courts decision that would be examined in this chapter supports the idea that this article has no affect on the court.

⁸⁵¹ Article 205 state: "It shall not be possible to authorize the arbitrators for the reconciliation unless they were mentioned by their names in the agreement on the arbitration or in a subsequent document."

⁸⁵² Article 206 state:" 1-The arbitrator should not be minor, legally incompetent, deprived from his civil rights because of a criminal penalty or bankrupt unless he has been rehabilitated. 2- If there were many arbitrators their numbers, in all circumstances, should be odd."

are normal requirement for any arbitrator to have, in order to insure that the parties right would be protected, since it is inconceivable to have an individual to preside over an adjudication process, without providing a minimum requirement.

5) Article 207- Accepting and Dismissing the Arbitrators.

This article requires the arbitrators to accept their appointment by writing, or by establishing his acceptance in the arbitration hearing.⁸⁵³ In the event that the arbitrator has withdrawn from the arbitration, without providing any proper justification, the parties have the right to seek the court to compensate for any damages.⁸⁵⁴ The dismissal of an arbitrator requires the approval of all parties, except if the arbitrator willfully neglected to act according to the arbitration agreement, then the court has the right to dismiss the arbitrator based on a request by one of the parties.⁸⁵⁵ This is based on reasons occurring after his appointment, and the grounds of dismissal are the same ones that a judge may be dismissed upon or deemed incompetent to rule⁸⁵⁶. Lastly, the legislator provided a time limit for the parties to raise those challenges to the court, which are five days.⁸⁵⁷

⁸⁵³ Article 207/1 state: "The arbitrator's acceptance should be in writing or by proving his acceptance in the session minutes."

⁸⁵⁴ Article 207/2 state: "If the arbitrator has withdrawn, without serious reason, from his work after his acceptance of the arbitration, it shall be possible to inflict indemnities on him."

⁸⁵⁵ Article 207/3 state: "He may not be dismissed except with the consent of all the litigant parties, however the court which was principally authorized to examine the action, and on the grounds of one the litigant parties request, may dismiss the arbitrator and give order to appoint a substitute in his place in the manner in which he was appointed in the beginning, and that in the case of proving that the arbitrator has intentionally neglected the work according to the agreement of the arbitrators in spite of drawing his attention, in writing, thereto."

⁸⁵⁶ Articles 114-124 of the civil procedures, which addresses the circumstance under which a judge is incompetent to hear the dispute, such as being related to one of the litigants. Articles 197-202 addresses challenges to the Judges and the Members of the Public Prosecution office that deal with fraud and flagrant acts or similar circumstances.

⁸⁵⁷ Article 207/4 state: "It shall not be possible to refuse him from the arbitration except for reasons which would occur or appear after his personal appointment, and the refusal shall be requested for the same reasons for which the judge is refused or because of which he shall not be competent to arbitrate. The refusal request shall be prosecuted to the court, which is principally authorized to examine the action within five days from the litigant party's notification with the arbitrator appointment or from the date of the occurrence of the refusal reason or the acknowledgement thereof if it were next to his notification with the arbitrator appointment. In all circumstances, the refusal request shall not be accepted if the court's decision has been issued and the pleading in the case has been closed."

Therefore, this article clarifies the extent of the power that the legislator has given to the court in those disputes, which is a supervisory role over all aspects of appointment, and the sole jurisdiction to settle any challenges raised against the arbitrator.

6) Article 208- Arbitrators Obligation⁸⁵⁸

This article explain what is required from the arbitrator, for instance the maximum time required to notify the parties of the date of the first hearing, and of the venue, and fixing a date for the parties to submit their documents, the arbitrator has the right to decided based on the submission of one of the parties, in the event that the other failed to submit their documents within the agreed upon time period. Lastly, if more than one arbitrator were present, then all of them should be present in the hearing and sign the minutes of the session.

In essence, the legislator is allowing the parties the right to dispute the arbitrator, in the event that one of those provisions are not met, implying that the legislator is viewing the failure to meet those requirements, as a breach of the parties right to fair trial.

7) Article 209- The Termination of the Arbitration proceeding

This article governs the parties right to terminate the arbitration proceedings, in the event that one of circumstances mentioned in this provision are met.⁸⁵⁹

Furthermore, if a preliminary measure is required, on which is outside the power of

⁸⁵⁸ Article 208 state:” 1 - The arbitrator shall, within thirty days at most from the acceptance of the arbitration, notify the litigant parties with the date of the first session fixed to examine the litigation and with its meeting place and that without obligation to the rules settled in that law for the notification and he shall fix for them a date to submit their documents, briefs and defense aspects .2 - It shall be possible to arbitrate according to what one side shall submit if the other party failed to do on the appointed date. 3- If the arbitrators were many they should undertake, together, the investigation procedures and each of them should sign on the reports.”

⁸⁵⁹ Article 209/1 state: “ The litigation shall cease before the court if one of the reasons of the litigation severance, set in this law, has emerged, and the severance shall result in its effects which were legally set unless the action has been held for judgment.”

the arbitrator or a challenge has been filed regarding a counterfeited document or criminal proceedings, then the arbitrator shall suspend the proceedings until a final judgment has been passed, in addition the arbitrator has the right to suspend the proceedings and refer it to the court to issue a decision in three circumstances:⁸⁶⁰

- To penalize a witnesses that fail to appear or refuse to give a statement.⁸⁶¹
- To order the parties to submit necessary documents in their possession.⁸⁶²
- To order judicial writs.⁸⁶³

In this article the legislator is giving the legal right to the court or the parties to terminate the arbitration proceedings and an obligation on the arbitrator to cease the proceedings as well; subject to resolving the preliminary issue that raises, the only requirement is that the hearing is still open, and a decision is not yet made. Moreover, if one of the circumstances that are present in section two of this article were present, then the arbitrator would have to cease any action in the dispute, pending a final decision by the court, not only that the legislator mentions three circumstance in which the arbitrator is obliged to cease the proceeding, they are also obliged to refer the dispute to the court in order to issue a final decision.

It can be deduced that the legislator is trying to create an environment of cooperation, between the judges and the arbitrators by working together to reach a common goal.

However, is it necessary to postpone the arbitral proceedings pending a courts decision? In some circumstances the answer would certainly be yes, in which the

⁸⁶⁰ Article 209/2 state: “2- If a priority matter which is not related to the arbitrator's authority, or an appeal against a paper falsification, or a criminal procedures have been taken in its falsification, or in another criminal incident has been exposed during the arbitration, the arbitrator shall stop his work until a final decision shall be issued therein, and the arbitrator shall also stop his work in order to refer to the authorized court's president to proceed...”

⁸⁶¹ Article 209/2 paragraph A state: “The sentence with the penalty legally set on the witnesses who fail to attend or abstain from answering.”

⁸⁶² Article 209/2 paragraph B state: “The decision charging the others to show a documents in his possession which is necessary for the decision in the arbitration.”

⁸⁶³ Article 209/2 paragraph C state: “The decision in the judicial writs.”

preliminary matter is essential to issuing of the award, yet in some cases it is not essential to cease the proceedings. The legislator is assuming that any of the circumstances mentioned in this articles, which deal mostly with issues of a criminal nature and some that are outside the arbitrators power requires the suspension of the arbitral proceedings. However, isn't more efficient to leave the determination of whether or not the arbitral proceedings should be held or not be left to the arbitrators discretion, especially since the arbitrators have a good grasp and understanding of the subject of the dispute and whether or not this matter would affect their decision or not.

Delegating this power of determination to the arbitrators would in theory, cut the amount of litigation and the load on the courts, which in turn help in accelerating the arbitral process. On the other hand, even by delegating this power to the arbitrator, there is no mechanism that deter the parties from seeking the court. Therefore, even if this process were to evolve, without providing the necessary tools to deter the parties from seeking the court, it would have a reverse effect on the time the parties spend adjudicating their dispute.

8) Article 210- The Date to issue the Award⁸⁶⁴

This article regulate the date that an award should be issued in, if the parties were to fail in specifying a date in their agreement, it also gives the parties the right to explicitly or implicitly agree to extend the date of the hearing, and to the court to order the extension based on the arbitrator or one of the parties request. The period of

⁸⁶⁴ Article 210 state : “1 - If the litigant parties haven't set, as a condition in the agreement, a date for the arbitration the arbitrator should arbitrate within six month from the date of the session of the first arbitration, otherwise anyone who wanted of the litigant parties may prosecute the litigation to the court or may continue therein before the court if it was prosecuted before that. 2 - The litigant parties may agree, expressly or implicitly, to extend the appointed date, by agreement or by law, and they may authorizing the arbitrator to extend it to a certain date and the court may, according to the request of the arbitrator or one of the litigant parties, prolong the time - limits appointed in the preceding clause to the period which it shall find adequate for deciding in the litigation. 3 - The date shall be suspended as far as the litigation is suspended or severed before the arbitrator and its progression shall be resumed from the date of the arbitrator's acknowledgment of the extinguishment of the suspension or the severance's reason, and if the rest of the time - limit were a month it shall be extended to a month.”

arbitration will cease to run when the arbitration is discontinued or terminated and shall recommence once the arbitrators are notified of the removal reason, and if the remaining period is less than a month it shall be extended to one full month.

Therefore, this article is providing a solution, in the event the parties failed to mention a time limit for rendering an award, by providing a minimum time for the arbitrator to issue their award in, it also implies the importance of determining the date of the first hearing, for based on this date an award or a proceeding would be deemed lawful or not.

9) Article 211- Taking an Oath⁸⁶⁵

This article gives the arbitrators the right to ask the witness to give their statements under oath, it also establishes that providing a false statements in front of the arbitrators is an act of perjury, and the witness could face criminal charges.

This provision is essential in order to ensure the success of the arbitration process, for having the backing of the courts would ensure the success of the arbitral process and bolster its position, by giving the arbitrators the right to call witnesses and protecting the statements given in front of the arbitrators. This collaboration between the judicial branch of the government and the arbitrators, is what is needed in order to develop the arbitral process.

10) Article 212- Arbitral Award

This article states that the arbitrator is bound when issuing the award with the procedures mentioned in this chapter, and to enabling the parties to submit their

⁸⁶⁵ Article 211 state: “The arbitrators should administer an oath on the witnesses and everyone who shall perjure before the arbitrators shall be considered a committer of the crime of perjury.”

documents. Nevertheless, the parties have the right to agree on the procedures that the arbitrator must follow.⁸⁶⁶ Therefore, the arbitrators are not bound to the rules of the civil procedures law, except to what is mentioned in this chapter, in addition to giving the parties the right to design their process.

It also requires that the award must be issued in conformity with this law, unless the arbitrator was authorized to mediate the dispute in which case they are not bound to those rules, except in matters relating to the public policy.⁸⁶⁷ Implying, that an arbitrator who's authorized to mediate, are not bound to the rules of this law or to the parties agreement in regard to issuing the award, in the event that the arbitrator managed to end the dispute through mediation and before submitting the dispute into arbitration, in which case this provision would apply and the only requirement for the award in this instance is to not breach any public policy rule.

The award shall be enforceable according to the rules of the summary execution.⁸⁶⁸ Which, are the rules in articles (227-234)⁸⁶⁹, which shows that the legislator intent in here is to expedite the process of enforcement.

This article states that this law applies to the awards issued within the UAE.⁸⁷⁰ Otherwise, the rules of enforcing foreign decisions and awards would apply, which is mentioned in articles (235-238)⁸⁷¹, in addition to the provisions of the New York

⁸⁶⁶ Article 212/1 state: "The arbitrator shall deliver his decision without being bound to the civil procedures except to what has been mentioned in this chapter and the procedures concerning the litigant parties' action and hearing their defense's aspects, and enabling them to submit their documents, however, the parties may agree on certain procedures according to which the arbitrator should proceed."

⁸⁶⁷ Article 212/2 state: "The arbitrator's decision shall be according to the rules of the law unless if it were authorized with the reconciliation, then it shall not be obliged with such rules except with those related to the public order."

⁸⁶⁸ Article 212/3 states: "The rules related to the summary execution shall be applied on the arbitrator's decisions."

⁸⁶⁹ See general, articles 227-234 in the civil procedures law for more details, supra note 5.

⁸⁷⁰ Article 212/4 state: "The arbitrator's judgment should be delivered in the state of the United Arab Emirates, otherwise the rules set for the arbitrators' decisions delivered in a foreign country shall be followed therein."

⁸⁷¹ Article 235-238 of the civil procedures law.

convention.⁸⁷² It also establishes the requirements that an award should contain, such as having the award in writing and passing it in a majority,⁸⁷³ it also emphasizes on the importance of having the award issued in Arabic, otherwise it shall be accompanied by a legalized translation.⁸⁷⁴ Lastly, it determines the date in which the award is considered issued, to be the date in which the arbitrators sign the award.⁸⁷⁵

This article exemplifies the number of procedures and requirements that an arbitral award is required to meet in order for it to be enforced and recognized, as such the arbitrators are bound to follow these rules and take them into consideration when drafting their awards and conducting the arbitral process for the failure to comply with these rules, would result in setting-aside the award, indicating that this process is designed to give the courts a supervisory role over the arbitral process, in order for the court to ensure that the arbitrators have upheld the parties' rights to a fair trial, which in turn is an indication that the legislator shares the same fears that arbitration is incapable of preserving those rights, in addition to having the same views of that of the court, that arbitration is an exception to the individual right to seek their natural judge.

11) Article 213- Court-annexed⁸⁷⁶ and Ad hoc Arbitration

⁸⁷² 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.

⁸⁷³ Article 212/5 states: "The award shall be in writing and pass in majority and accompanied by the dissenting vote, and it shall be accompanied by the arbitration agreement, a summary of the parties' statement and their documents, the grounds and context of the award, the date and place and the signature of the arbitrators. If one or more arbitrator refused to sign the award such a refusal shall be stated in the award, however the award is still valid if signed by the majority of the arbitrators."

⁸⁷⁴ Article 212/6 states: "The decision shall be compiled in Arabic unless the litigant parties have agreed otherwise, in such case, an official translation should be attached thereto when it is deposited."

⁸⁷⁵ Article 212/7 states: "The decision shall be considered delivered from the date of the arbitrators' signature thereon after writing it."

⁸⁷⁶ Levin defines court-annexed arbitration as a mandatory arbitration and the arbitrators are typically assigned by a third party and the award is not binding and is typically assigned by a statute, and in some cases subsequent to filing a case. See, A. Leo Levin, *Symposium: reducing court costs and delay: court-annexed arbitration*, 16 U. Mich. J.L. Reform 537, 538 (1983).

This legislator regulates court-annexed arbitration in section one of this article.⁸⁷⁷ Section two states that if arbitration was in connection to an appeal, then the submission of the award should be made to the appeal court that has jurisdiction to consider the appeal.⁸⁷⁸ The third section addresses Ad-hoc arbitration, the arbitrator is required to provide each party with a copy of their award within five days, and the court considers whether the award shall be recognized or not.⁸⁷⁹

The first thing to note about this article is the slight leniency shown by the legislator when regulating court-annexed arbitration compared to ad-hoc; when it comes to court-annexed the legislator gave the arbitrators a fifteen days from issuing the award, to submitting it to the court clerk for recognition, the courts clerk would then notify the parties, by providing them with a copy of the award within five days and the court would schedule a hearing to recognize the award. On the other hand, in ad-hoc arbitration the arbitrators have the responsibility to notify the parties of the issuing of the award, and providing them with a copy of the award, the party seeking to recognize the award would then have to submit the award to the court through the normal procedures of filing a suit.

Therefore, in court-annexed arbitration the legislator limits the procedures on the parties and arbitrators, when it comes to submitting the award for recognition; by providing a longer time-period for submitting the award to the court and taking on the responsibility to provide the parties with a copy of the award, and scheduling a hearing on their own without the need for the parties to request it, which in turn would limit the opportunities for a procedural error and increase the chances to recognizing the award. On the other hand conducting arbitration without the courts supervision, such is the case in ad-hoc and institutional arbitration, the procedural burden on the

⁸⁷⁷ Article 213/1.

⁸⁷⁸ Article 213/2, id.

⁸⁷⁹ Article 213/3, id.

parties and the arbitrators would increase, the arbitrators would have to deliver a copy of the award to each party within five days of issuing the award; then the burden of requesting the court to recognize the award would fall to one of the parties.

To recap, this article indicates that the courts share the procedural burden with the parties in court-annexed arbitration, on the other hand, parties in ad-hoc arbitration are left without the court support and with a shorter amount of time to submit their awards for recognition.

12) Article 214- Reviewing the Award⁸⁸⁰

The legislator gave the court the authority while recognizing the award to refer it back to the arbitrators, either to clarify a matter in the award or to decide on something that they missed, in the event that those errors would deter the enforcement of the award, it also gives the court the right to ask the arbitrators to issue a new award with those changes; and it is not subject to appeal on its own, it requires appealing it alongside the court's decision of recognizing the arbitral award.

The authority to clarify an arbitral award is a common practice among courts, yet in here this simple process does not escape the legislators' over-regulation, even though the legislator has stated that this decision is un-appealable, it requires appealing it alongside the decision to recognize the arbitral award. Implying that this might be used as a ground for setting-aside the award, or at the very least it is a

⁸⁸⁰ Article 214 states: "The court may, during the examination of the authentication request of the arbitrators' decision, return it to them in order to examine what they have failed to arbitrate in the arbitration matters therein or to clarify the decision if it were not definite in a way that makes it impossible to execute, and the arbitrators should, in both cases, deliver their decision within three months from the date of their notification with the decision unless the law shall decide otherwise. It is not possible to appeal against its decision except with the final sentence delivered with the authentication of the sentence or its invalidation."

ground for accepting an appeal, suggesting that the outcome of applying this article would most certainly be an appeal.

13) Article 215- Enforcing Arbitral Awards⁸⁸¹

This article addresses the process of recognizing and enforcing arbitral awards, it requires from the party seeking to enforce the award to file it through a suit to the appropriate court, upon which the court will review the award and the arbitration agreement, the court also has the right to correct the material errors on their own, upon the request of one of the party, the jurisdiction of enforcing the arbitral award falls to the execution judge.

In addition to establishing the process of recognizing an award, there is no condition deterring the parties from appealing this decision, since the legislator requires the court to not only review the arbitral award but to correct any material errors in the award on their own, which in turn increases the chances of appealing the award, especially when viewing arbitration as an exception, which implies that the court would hold the award to a higher standard.

Does this article suggest that all arbitral awards are appealable? The legislator requires the arbitral award to be recognized by the court, in order to ensure that it meets the jurisdiction requirements of enforcement, and to ensure that the arbitrators issued their award in compliance with the arbitration agreement, and they upheld the parties adjudication rights and due process; which in turn would leave the award open for appeal, especially since the legislator didn't state that those decisions are not final,

⁸⁸¹ Article 215 state: "1- The arbitrators' decision shall not be executed except if the court in which clerk's office the decision was deposited, has authenticated it, and that after looking into the decision and the arbitration document and verifying that there is no prohibition to execute it, and such court shall be authorized to amend the material errors in the arbitrators' decision according to the request of the concerned persons through the proceedings set for amending the arbitrations. 2- The execution judge shall be authorized with all that concerns the execution of the arbitrators' decision."

which leaves those decisions subject to appeal. However, according to this article an award, wouldn't have to only be recognized by the court, the second requirement is to submit it to the execution judge in order to enforce it, which leaves the award subject to contesting at this stage as well.⁸⁸²

14) Article 216- Grounds for Setting-Aside the Arbitral Award

This article should be viewed in conjunction to the previous one, since it's a continuation of the previous discussion it addresses the rules for setting-aside the arbitral award⁸⁸³ in three grounds:

First, if the award was issued without an arbitration agreement, or was based on invalid reference or an agreement, which has expired through time, or if the arbitrator exceeded his authority.⁸⁸⁴ Second, if the arbitral award was issued by an arbitrator who is not appointed in compliance with the law, or by an arbitrator who is not authorized to issue an award in the absence of the parties, or according to a null arbitration agreement that didn't specify the scope of the arbitration or by an arbitrator who doesn't meet the judicial requirements.⁸⁸⁵ Third: "If a nullity in the decision or a nullity in the procedures which has affected the decision has occurred."⁸⁸⁶ Fourth: if

⁸⁸² A friend of mine mentioned a quote, which describes the enforcement process: "enforcement is the graveyard of decisions."

⁸⁸³ Article 216/1 state: "The litigant parties may request the nullity of the arbitrators' decision when the court examines its authentication and that shall be in the following circumstances..."

⁸⁸⁴ Subsection 'A' state: "If it has been delivered without an arbitration report or delivered according to a void document or a document that has been extinguished by the failure to observe the date or if the arbitrator has gone beyond the document's limits."

⁸⁸⁵ Subsection 'B' state: "If the decision has been delivered by arbitrators who were not assigned according to the law or it has been delivered by some of them who were not allowed to give the decision in the absence of others, or delivered according to an arbitration document in which the litigation facts have not been determined, or delivered by a person who had not the capacity of the arbitration agreement, or by an arbitrator who did not fulfill the judicial conditions."

⁸⁸⁶ Article 216/1/C.

“The acceptance of the nullity shall not be restrained by the litigant party's relinquishment of his right therein before the delivery of the arbitrators' decision.”⁸⁸⁷

Most legislations contain provisions on setting-aside arbitral award, which are similar to those, and act as an insurance to the parties that the arbitrators would uphold the highest forms of due process possible in their decision. However, what is of concern, is the way in which the courts apply those rules; since the court is capable of extending or minimizing the effect of those rules, for a court that extends those rules would be viewed as hostile towards arbitration, on the other hand those that limits the effect of those rules would be viewed as a court that supports arbitration.

However, when viewing this article in connection to the courts own view on arbitration, and the other articles mentioned in this law, it can be deduced that it can be used as a blueprint to an infinite number of appeals and disputes, which at the very least would create a lengthen the time of the dispute.

15) Article 217- Appealing the Award

This article establishes that arbitral awards are not subject to appeal by any means⁸⁸⁸. However, in the second section of this article it adds an exception, which concerns the courts decision on recognizing arbitral award, which in turn are subject to appeal.⁸⁸⁹ The third section establishes that awards, which have been issued by arbitrators that have the authority to mediate, are exempt from the previous section, or

⁸⁸⁷ Article 216/2.

⁸⁸⁸ Article 217/1 states: “The arbitrators' decisions shall not accept the appeal therein through any of the appeal proceedings.” This is the ministry of justice translation, which essentially means that arbitral awards are not subject to appeal.

⁸⁸⁹ Article 217/2 states: “As for the decision delivered for the authentication of the arbitrators' decision or by its nullity, it shall be possible to appeal against it by the appropriate appeal proceeding.”

if the parties have expressly waived their rights to file an appeal, or if the amount of the dispute didn't exceed ten thousand dirhams.⁸⁹⁰

When examining the first section of this article in conjunction to the previous requirements of this law, it can be foreseen that this section has no real affect, a fact that is supported by the second section of this same article, which exclude recognition decisions from the exemption mentioned in the first section, and since arbitral awards are required to be recognized by the court, in order for them to be enforced, it is unforeseeable then that the first section of this article would have any real practical affect, and that the status-quo is that arbitral awards are in fact subject to appeals.

A fact that becomes more transparent in the third section of this article, which requires the arbitrators to have a special authority to mediate, or for the parties to explicitly waiver "their right to appeal" in order for the courts decision on recognition to not be appealable.

Therefore, it can be concluded from this article that the legislator intended to have the arbitral awards fall under the courts supervision by subjecting them to appeals. Suggesting that the right of appeals is the standard, which the courts are expected to uphold.

16) Article 218- Arbitrators Fees⁸⁹¹

Concerns the arbitrators fee, and it gives the parties the right to seek the court to amend that fee.

⁸⁹⁰ Article 217/3 states: "With the exception of the preceding clause terms, the decision shall not be subject to the appeal if the arbitrators were authorized for reconciliation or the litigant parties have expressly relinquished the right to appeal, or the litigation value were not exceeding ten thousand Dirham."

⁸⁹¹ Article 218 state: "The arbitrators shall be allowed to valuate their fees and the arbitration expenditures, and they may inflict all or part of them on the losing party , and the court , on the basis of the request of one of the litigant parties , may amend that valuation with what shall be adequate to the effort done and the litigation nature."

17) The Execution Judge⁸⁹²

After recognizing the award the party seeking to enforce the award is required to present the courts decision to the execution judge⁸⁹³, to receive a writ of execution⁸⁹⁴ in order to enforce the award.

Even at this stage there is nothing stopping the parties from contesting the execution judges decision, the legislator establishes the circumstance in which the parties are able to appeal those decisions.⁸⁹⁵

▪ Foreign Arbitral Awards

The process of enforcing foreign arbitral awards is governed by both the civil procedures law and the treaties in which the UAE are part of such as the New York convention of 1958⁸⁹⁶, and other bilateral and regional treaties⁸⁹⁷. In regard, to the civil procedures law the foreign arbitral awards fall under the chapter regulating enforcement of foreign decisions, orders and bills⁸⁹⁸.

▪ The recognition of foreign arbitral award

⁸⁹² This process is being regulated through articles (219-224) of the civil procedures law.

⁸⁹³ Article 220 states: “1-The execution judge shall be exclusively authorized to execute the executive document and to decide in all the temporary litigations of the execution with a summary proceeding. Moreover, he shall be authorized to deliver the sentences, decisions and orders related thereto.....”

⁸⁹⁴ Articles 225-226 of the civil procedures law regulates this procedure, supra note 5.

⁸⁹⁵ Those conditions are mentioned in detail in article 222 of the civil procedures, supra note 402.

⁸⁹⁶ supra note 3.

⁸⁹⁷ Al-Tamimi, mentioned fourteen treaties, thirteen of which the UAE have acceded to in regard to judicial cooperation and the enforcement of judgments, such as the GCC agreement of 1996 and the Riyadh convention, supra Al-Tamimi note 9 at 167-171. There are other treaties, which the UAE have acceded to in regard to judicial cooperation, such as Arab League Convention of 1952, which the UAE acceded to in 1972, which was repealed by the Riyadh convention, see supra note 35 El-Ahdab & El-Ahdab at 889, the UAE acceded to that convention based on the federal decree no. 93/1972.

⁸⁹⁸ Which is regulated through articles 235-238. The execution procedure is regulated in articles 239-243 and the objection to execution is governed in articles 244-246.

Foreign arbitral awards are subject to enforcement in the UAE after they meet the requirements of the law ⁸⁹⁹, moreover, the court is required to supervise and verify the presence of those requirements, after receiving a request through the normal procedure of filing a suit⁹⁰⁰, those requirements are as follow:-

- To ensure that the UAE courts has no jurisdiction over the dispute, and that the foreign court or arbitrator has the authority to issue the decision according to international rules⁹⁰¹ and the law of the country that the decision or the award were issued in.⁹⁰²
- That the parties of the dispute were notified of the start of the process and have been properly represented.⁹⁰³
- That the decision or order received res judicata status according to the law of the county in which it was issued.⁹⁰⁴
- To ensure that it doesn't contradict nor in conflict with a decision or order delivered in the UAE, nor breach public order and policy requirements.⁹⁰⁵

Even though the main purpose of this article, is to regulate the recognition of foreign decisions and orders, it also applies to foreign arbitral awards⁹⁰⁶, the legislator doesn't distinguish between arbitral awards and court decisions. Therefore, subjecting arbitration to the same set of rules and standards that is required from a foreign decision, not to mention that the ability to appeal the courts decision is also embedded in this article as well, since it states that the request should be submitted to the first

⁸⁹⁹ Article 235/1.

⁹⁰⁰ Article 235/2.

⁹⁰¹ Article 235/2/a.

⁹⁰² Article 235/2/b.

⁹⁰³ Article 235/2/c.

⁹⁰⁴ Article 235/2/d.

⁹⁰⁵ Article 235/2/e.

⁹⁰⁶ Article 236.

instance court through the normal course of filing a suit,⁹⁰⁷ which suggests that such decision would fall under the normal requirements of appeal.

This fact is emphasized by article 236, which specifically states that the requirements of recognizing and enforcing foreign decisions apply to arbitration, in addition to having the court examine whether the arbitration is allowed under the laws of the UAE, as well as ensuring its enforceability according to the foreign jurisdiction laws.⁹⁰⁸

Therefore, the arbitral award needs to meet both the requirements of article 235 and 236, in essence, a dispute that cannot be arbitrated in the UAE cannot be subject to enforcement according to this article, moreover, it suggests that the court when reviewing the arbitral award would subject it to the same test used to recognize domestic awards, in addition, to the test used for recognizing foreign awards and decisions. Making the chances of failing either tests or one at the very least highly probable, and then it would have to be sent to the execution judge⁹⁰⁹ in order to enforce the award. These articles govern the process of recognition, for the awards that do not meet the requirements of the NY convention, and for the awards that were sought to recognize before the accession to the convention by the UAE.⁹¹⁰

Article 237- Mediation and Reconciliation

In contrary to the process of recognizing arbitral awards, which is submitted to the first instance court, in here the request of recognizing and enforcement is being

⁹⁰⁷ Article 235/2.

⁹⁰⁸ Article 236.

⁹⁰⁹ Even then it wont escape the process of appeal after submitting it to the execution judge for enforcement, see above The Execution Judge.

⁹¹⁰ See supra note 3.

directed to the execution judge, without the need to go through the first instance court, thus, shortening the process in comparison to arbitration.⁹¹¹

Article 238- Treaties

The legislator requires that the laws and regulations stated in the above articles shall not breach the rules of the treaties between the UAE and any other countries⁹¹².

Which, in turn leads to two outcomes, arbitral awards issued in non-treaty States shall fall under the provisions of this law and its requirements, or it would fall under a treaty then they won't be subject to those requirements. However, in both instances they would have to be presented to the court for recognition, and even if the award was recognized it would still need to be enforced and would have to go through the execution judge chambers to be legally enforced in the UAE, which in turn raises the probability of appeal.⁹¹³

The Process of Enforcement

a. Articles 239-243 The Execution Procedures⁹¹⁴

Arbitral and courts decisions either domestic or foreign are required to meet the procedures mentioned in those articles in order to be enforced in the UAE. The procedural requirements that an award is required to meet, increases the possibility of appeal since it would increase the possibility of failing to uphold those procedures. However, those procedures are being set in order to ensure individuals rights and

⁹¹¹ Article 237.

⁹¹² Article 238, see general note 406, which gives an example to the treaties that the UAE acceded to.

⁹¹³ Which is emphasized by the cases that shall be examined in this chapter.

⁹¹⁴ Article 239-243 of the civil procedures, supra note 5.

justice, which would naturally require the individuals to present their case in front of the court.

b. Article 244-246 Objections to the Execution⁹¹⁵

Even after the enforcement request has been granted the legislator left the door open for the parties to object on this process, in order, to ensure that justice has been met. In the event that a temporary procedure is required, the enforcement officer would have to halt the process and refer it back to the enforcement judge to issue a decision⁹¹⁶,

Although, the legislator intention in here is to clear any errors that happen during the enforcement process, they still leave a room for the parties to abuse their right given that those decisions are open to appeal.⁹¹⁷ In doing so the legislator is perpetuating appeals in order to leave no doubt in the minds of the individuals that justice is being upheld, at the expense of lengthening the dispute time and flooding the court with disputes.

⁹¹⁵ Article 244-246 of the civil procedures, supra note 5.

⁹¹⁶ Article 244/1.

⁹¹⁷ Given that the legislator didn't prohibit such appeals in articles 244-246, implying that the enforcement judge is subject to the supervisions of the court.

Cases

Family Disputes

1 Appeal No. 372/25 to the Federal Supreme Court of the UAE⁹¹⁸

The dispute in this case began long before the parties submitted their claim to the courts. The proceedings commenced once the claim was submitted to the mediation tribunal,⁹¹⁹ in front of which the parties agreed to certain conditions, most of which had ordered the appellant (i.e., the husband) to abide by certain conditions. The defendant (i.e., the wife) began proceedings by requesting that the court divorce them, based on the existence of *thrar*⁹²⁰ and to determine the amount of alimony necessary to support their children. The husband appealed to the first instance court to rule on the *ta'h*⁹²¹ and to dismiss his wife's requests. The court then learned that the claims had previously been submitted in two separate cases,⁹²² as well as that both parties had agreed to submit their dispute to two arbitrators.⁹²³ In 2003, the agreement to arbitrate was established, and according to the arbitral award, the disputing appellant and the defendant were already divorced.⁹²⁴ The first instance court confirmed and enforced the award that divorced the parties, on the condition that the defendant

⁹¹⁸ Federal Supreme Court of the UAE, Appeal no. 372/25, issued on the 12th of June 2004.

⁹¹⁹ When it comes to issues involving family law it obligatory for the parties to first submit their dispute to mediation, the mediators here are experts in family disputes and work within the court consultation department for family disputes, Article 16 of the personal status which puts a condition on submitting family disputes to the court that it needs to be submitted to the family conciliation department within the court.

⁹²⁰ ABO-RKHAYH & AL-JBORI, supra note 222, at 176-181. Which is also governed by the personal status in Articles 117-123.

⁹²¹ This literally means obedience this term or concept in Shari'a would result in the continuing of the marriage and the dismissal of the request to divorce. Which was the case No.665/2002. See general, ABO-RKHAYH & AL-JBORI, supra note 222, at 105-108, which explains the rights of the husband.

⁹²² The defendant of the appeal brought proceedings in case no. 88/2001 and the appellant in case no.116/2001.

⁹²³ However the case do not show if this agreement has been fulfilled at that time, for the court in 12 March 2003 agreed to refer the dispute to arbitration based on the previous agreement.

⁹²⁴ In Islamic Shari'a this form of divorce is called *khal'a*, the divorce is called *Khal'a* when the wife gives up here right to the remainder of the Mahr. This is governed by federal law no. 28 on personal status in book two Articles (110 and 111).

surrender her right to claim the remainder of her *mahr*⁹²⁵ and ordering that the appellant should pay a monthly alimony, provide a suitable residence for the defendant and the children, confirm the defendant's custody of the children, and dismiss the counter claim (case no. 665/2002.)⁹²⁶

This decision was appealed,⁹²⁷ however, the appeals court dismissed that appeal, and the husband then appealed to the Supreme Court. His claim was centered on four grounds, the first three of which stated that the previous decision failed to uphold Shari'a law and the rule of law, since it failed to state the amount of damages before referring the matter to an arbitrator. The appellant (again, the husband) also stated that during the proceedings in front of the arbitrators, he had asked the defendant take an oath to certify her claim in the arbitration, which she refused to do. The appellant further argued that the arbitrators had ruled in the defendant's favor without examining her claims and had exceeded the bounds of arbitration, failed to examine the amount of *thraar*,⁹²⁸ and did not explain the reason for granting the divorce according to *khal'a* in exchange for the return of the remainder of the *mahr*. Additionally, as became clear, the appellant claimed that the first instance court had failed to uphold Shari'a principles in appointing arbitrators, since Shari'a law requires that arbitrators for this form of arbitration be related to a disputing party's family.⁹²⁹

The Supreme Court dismissed these claims, stating that the courts reserved the right to examine the amount of damages and that, in this case, they had decided to

⁹²⁵ Which translates to dowry, the husband in the marriage requires to pay a dowry to the wife this is either paid in full before hand or in a two installment first in the commencement of the marriage and later in the event of a divorce.

⁹²⁶ Federal Court of First Instance of Abu Dhabi, Shari'a circuit case no. 655/2002.

⁹²⁷ Federal Appeal Courts of Abu Dhabi, Shari'a Circuit Appeal no. 95/2003 issued on 14 June 2003.

⁹²⁸ This means damages or injury.

⁹²⁹ Articles 118-121 of the personal status law, also this is based on verse 35 of Surat Al Nisa' (The Women) "if ye fear a breach between the twain, appoint (two) arbiters, one from his family, and the other from hers; (549) if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things." Supra ALI, note 179 at 44.

appoint arbitrators, which constitutes an act within the court's authority.⁹³⁰ Furthermore, the Supreme Court found that the defendant reissuing the complaint formed reason for the appointment and that, according to Maliki jurists and Madhab, the marriage was no longer able to continue with *thraar*—in this case, it was deemed to constitute severe *thraar*. Ultimately, determining the amount of the damages was left to the court's discretion.

At the same time, the Supreme Court appealed to an exception of the rule requiring that arbitrators be relatives of a disputing party's family; namely, that in the event that no one from among the relatives of the parties can fulfill the role of an arbitrator, then the obligation to determine the arbitrator falls to the court.⁹³¹ Moreover, once arbitrators have been appointed and have determined an award, according to the Maliki *madhab*, not only is that award considered to be binding and final, but the court is also obliged to confirm and enforce the award, even if it conflicts with the judge's *madhab*⁹³² or one of the parties dispute the award.

In this case, the appellant did not dispute the appointment of arbitrators when the court named them, nor did he request the appointment of different arbitrators.

⁹³⁰ Which is mentioned in Article 118 of the personal status: "1- in case the prejudice is not established, the discordance is still continuing between the spouses and the family orientation committee as well as the judge were not successful in reconciling them, the judge shall a judgment appointing two arbitrators from among their parents, if possible, after asking each of the spouses to nominate, in the next hearing at most, his arbitrator from his parents, if possible, otherwise from those who have the experience and ability to reconcile. Should one of the souses procrastinate in nominating his arbitrator or abstain from attending this hearing, the judgment shall not be subject to any appeal. 2- The judgment appointing the two arbitrators must include the starting and closing dates of their assignment provided it does not exceed ninety days extendable by decision of the court. The court shall notify the two arbitrators and shall ask each of them to take oath that he will perform his assignment with equity and probity." In addition the civil procedures code have Articles that gives the court authority to appoint arbitrator in Article 204.

⁹³¹ See, MOHAMMAD ARFAH al-DESOKI', HASHYAT' al-DESOKI AL'A al-SHARH al-KABIR [al-Desoki footnote on the Great Explanation] Volume II 346 (publisher Dar Ahya' al-Ktab al-Arabya') (1230 hijri, 1814 C.E.); see also ALI ibn ABDULALSLAM al-TSOLI', al-BHJAH FE SHARH al-THFAH [The Bhjah the explanation of the Thfah] Volume I 489 (1st. ed. 1998); see also ABDUL-AZIZ al-MUBARAK, TBYEN al-MSALIK [The clarification of the Msalik] Volume III 112 (2d. ed. 1995). Those three prominent Maliki jurists were cited by the court in their decision.

⁹³² *id*, For instance if an arbitrator issued an award according to Shafii thought, yet the judge adheres to Maliki madhib, the judge is obliged to enforce that judgment.

Therefore, the court decided to dismiss his plea based on the aforementioned reasoning.

ii. Appeal No. 149/24 to the Federal Supreme Court of the UAE⁹³³

The defendant (i.e., the wife) commenced proceedings against the appellant (i.e., the husband) in front of the First Instance Court of Sharjah by requesting that her divorce in the form of *Khal* be recognized by the court,⁹³⁴ which the defendant claimed the parties had agreed upon in writing in a document bearing both parties' signatures, and in accordance with Egyptian law no. 1/2000,⁹³⁵ which allowed the defendant to request *khal'a* and to surrender her Shari'a-based rights⁹³⁶ and any other rights. In a counter claim, the appellant requested that the same court refuse the defendant's requests.

Since the first instance court had dismissed the defendant's claims and ruled that the marriage should be continued, the defendant appealed the decision to the appellate court,⁹³⁷ which decided to amend the decision by granting the defendant her request of *khal'a* and allow her to divorce her husband. This decision prompted the appellant to appeal the decision to the Supreme Court on three grounds, the third of which concerned Shari'a-based arbitration. Specifically, the appellant argued that the court

⁹³³ Federal Supreme Court of the UAE, Appeal no. 149/24 issued on the 31st of May 2003.

⁹³⁴ Which is essentially a form of a mutual agreement between the two parties to terminate their marriage, supra note 214, Article 110 states that: "1- Divorce for consideration is a contract between the spouses whereby they agree to terminate the contract of marriage against consideration to be paid by the wife or by another person. 2- the amount to be paid as a consideration shall be governed by the same rules as dowry but it is not allowed to agree on forfeiture of the children's alimony or their fostering. 3- should the consideration to be paid in case of divorce by agreement be not validly determined, divorce shall occur and the husband shall be entitled to the dowry. 4- Khul' is rescission. 5- by exception to the provisions of clause 1 of this Article, where the husband is unduly obstinate in his rejection and it was feared not to observe God's will, the judge shall decide the " Mukhala'a " (divorce) against an adequate consideration."

⁹³⁵ The disputing parties in this case both hold an Egyptian nationality. Khal is governed in Egyptian law no. 1/2000, concerning Personal Status law, chapter three section one Articles 16-25; Article 20 addresses the issue of Khal.

⁹³⁶ Her right to receive the remainder of her dowry for example or any other rights that the Shari'a gives her or the law.

⁹³⁷ Sharjah Federal Court of Appeals,, Shari'a Circuit appeal no.161/2001, issued on 25/11/2001.

had not abided by Shari'a law when it accepted the arbitral award handed down by the arbitrators appointed by the first instance court. Those arbitrators had issued an award involving *khal'a*, to which the appellant did not agree. He also argued that the court did not take into account the third arbitrator's ruling on this matter; that arbitrator did not agree to divorce the parties of the dispute.

The Supreme Court dismissed these grounds, stating that according to the Maliki Madhab, the Court was obliged to stand behind and enforce the decisions of arbitrators and did not have the right to change or amend an arbitrator's decision, even if the court disagreed with the decision.⁹³⁸ Furthermore, the court ruled that the parties in any arbitration—here, the husband and wife—are bound by the arbitral decision. Moreover, the court argued that the appeal court had amended the First Instance court's decision by abiding with the arbitrators' decision and upholding the rules of the Islamic Shari'a. In this case, the third arbitrator's appointment was found to have no legal basis, since the court had appointed only two arbitrators; therefore, his decision was deemed to have no legal merit.

The appellant also argued that Egyptian law no.1/2000 was one of the bases on which the court based its decision, and that by doing so, it contradicted Article 27 of the Civil Transaction Law.⁹³⁹ Moreover, he argued that the court failed to fulfill the requirements of Egyptian law, which requires the involvement of public prosecution in the case and the mediation of the dispute before deciding *khal'a*. He further argued that the arbitrators should have been sworn in by the court and that the defendant should have returned what she received from the *mahr*.

⁹³⁸ See AHMAD IBN MOHAMMAD al-DARDIRI, al-SHARH al-SAGEER la AQRAB al-MSALIK ale MADHAB al-IMAM MALIK [The little explanation to the nearest route into Imam Malik Madhab] Volume II 514, see also al-DESOKI' supra note 225 at 346, also al-TSOLI' Supra note 225 at 491.

⁹³⁹ which state: "The provisions of the law indicated by the foregoing provisions may not be applied in case they are contrary to the Islamic Shari'a, public policy or morals in the United Arab Emirates State."

The Supreme Court dismissed these arguments, since the appeals court's decision had been based on two grounds: (1) the arbitrators' decision—which alone was enough to enforce the court's decision—and (2) that the court is free to interpret the content of Egyptian law. Further, Article 21 of the Civil Transactions Code⁹⁴⁰ forces the court to abide by UAE laws, which do not require the involvement of the prosecution, the swearing in of the arbitrators, the mediation of the parties, or any requirement that *Khal* decisions are not subject to appeal. Therefore, the court decided to dismiss the appeal.

iii. Appeal No. 264/24 to the Federal Supreme Court of the UAE⁹⁴¹

This case dates to 31 October 2001, when the court refused to divorce two disputing parties.⁹⁴² When the wife refused to continue in the marriage, the appellant (i.e., the husband) commenced proceedings in the first instance court on 23 May 2002.⁹⁴³ The defendant (i.e., the wife) requested that she be divorced from her husband, to which the court responded by appointing two arbitrators as agreed upon by both parties. The arbitrators issued an award that granted the divorce based on *thraar*,⁹⁴⁴ which the first instance court decided to confirm and enforce by divorcing them. Though the decision was appealed,⁹⁴⁵ the appellate court decided to dismiss the appeal and uphold the rulings of the first instance court. Once the decision reached the Supreme Court, the public prosecution⁹⁴⁶ submitted a plea to both the Court and the

⁹⁴⁰ Id, which states: “The rules of jurisdictions and all procedural matters shall be governed by the law of the State where the case is filed or where procedures take place.”

⁹⁴¹ Federal Supreme Court of the UAE appeal no. 264/24 issued on 26th of June 2004

⁹⁴² The facts of this case were mentioned in an earlier decision of this court dated 6/5/2004. Therefore most of the facts were not repeated in here and were referred back to that earlier decision. Moreover the parties got divorced twice before in 1986 and 1994.

⁹⁴³ Khor Fakkan Federal Court of First Instance case no.3/2002.

⁹⁴⁴ In here the court mentions the award as a report by the arbitrators although they look at it as a binding report, which is enforceable to them, this view of the arbitral award as an expert report is repeated by the court in other decisions.

⁹⁴⁵ Fujairah Federal Court of Appeals, appeal no. 14/2002 Shari'a Circuit issued on 19/6/2002.

⁹⁴⁶ The Intervention of the Public prosecution is regulated in title four of the civil procedures law, Articles 60-69.

respondent to the appeal that the appeal be dismissed.

The appellant argued that the appealed decision failed to abide by the law and Shari'a law, as well as failed to apply due process. He also argued that proceedings had commenced with a request for *ta'h*; since the respondent to the appeal did not request the divorce in a counter case, (rather, she did so through an interlocutory request), the appellant claimed that the court should have either granted the request or dismissed the case. Since the court decided to divorce them without doing either, the decision should be nullified.

The Supreme Court responded by dismissing this claim, stating that the courts reserved the right to understand the facts of the case and to evaluate the evidence. Since Article 97 of the Civil Procedures Code⁹⁴⁷ allows both parties of a dispute to submit interlocutory requests, and since, according to the Maliki Madhab, a husband's desertion of his wife is not allowed under Shari'a law,⁹⁴⁸ the request for divorce had occurred. Furthermore, it argued that the arbitrator's decision was enforceable, even if the parties disagreed with the decision, as well as that the court was bound by the arbitrator's decision; hence, the appeal was dismissed.

iv. Appeal No. 307/26 to the Federal Supreme Court of the UAE⁹⁴⁹

The proceedings of this case commenced with a request to the First Instance

⁹⁴⁷ Which state:" 1 - The prosecutor and the prosecuted may submit any of the interlocutory requests which are relevant to the original request in a way that shall help the progression of justice if both shall be examined together. 2 - Such requests shall be submitted to the court through the usual procedures of the action's prosecution, or with a request presented verbally at the session, in the presence of the litigant party, and shall be recorded in its minutes."

⁹⁴⁸ For Imam Abi Dawud narrated in his Sunan the following Hadith:" Mu'awiyah asked: Messenger of Allah, what is the right of the wife of one of us over him? He replied: That you should give her food when you eat, clothe her when you clothe yourself, do not strike her on the face, do not revile her or separate yourself from her except in the house. Abu Dawud said: The meaning of "do not revile her" is, as you say: "May Allah revile you." IMAM ABU DAWUD SULYMAN as-SIJISTANI, SUNAN ABI DAWUD, Book 12 Hadith 97. <http://sunnah.com/abudawud/12> it was also narrated by Imam Ahmad Bin Hanbal, and cited by the court in this decision.

⁹⁴⁹ Federal Supreme Court of the UAE Judgment 307/26 issued on 2nd of May 2005.

Court of Abu Dhabi⁹⁵⁰ from the respondent to an appeal (i.e., the wife) against the appellant (i.e., the husband) asking the court to divorce them based on *thraar* and a monthly alimony of AED 12,700. The appellant submitted a counter claim⁹⁵¹ in front of the same court, requesting that the court grant him *taa'h* over his wife, provide him with their children's passports and birth certificates, and prevent her from travelling with the children abroad. The court issued two interim measures; the first granted a temporary alimony of AED 2,500, and the second appointed two arbitrators to settle the dispute. When the arbitrators decided to issue an award divorcing the couple, the first instance court confirmed and enforced the decision.

After being appealed in an appellate court⁹⁵² and dismissed, the decision was consequently appealed before the Supreme Court, at which time the prosecution's office⁹⁵³ submitted a note to the Court stating that it would delegate its power to the court.

The appeal was based on three grounds. First, the appellant argued that the first instance court did not have the right to appoint arbitrators, since the defendant had commenced proceedings there by requesting divorce and complaints are required to be repeated before a court may fulfill any request to appoint arbitrators. As such, the initial decision made regarding the arbitral award was argued to be null and void.

The Supreme Court dismissed this argument, as the appellant had agreed to arbitrate in front of the court; moreover, the appellant and the defendant both named their arbitrators. The appellant's lawyer delegated to the court the selection of the arbitrators after the failure of the original arbitrators to fulfill their roles and duties.

⁹⁵⁰Abu Dhabi Federal Court of First Instance, Shari'a Circuit Case no. 282/2001.

⁹⁵¹Abu Dhabi Federal Court of First Instance, Shari'a Circuit Case no. 482/2001.

⁹⁵²Abu Dhabi Federal Court of Appeal, Shari'a Circuit, Appeal no. 388/2003.

⁹⁵³ Since this case involve minors the Civil Procedures law obliges the Prosecution office to intervene based on Article 61/3 of the civil Procedures Law which state:" 3 - The actions related to the incapacitated, those whose capacity is defective, the absentees and the missing persons.", supra note 5.

The court ultimately agreed to this request, which led to the appointment of arbitrators that decided to divorce the parties. The court also argued that the case focused on a substantive issue, which should not have been brought before it.

The appellant's second ground for appeal was that the arbitrators did not mediate the issue between the parties and based their decision on the defendant's claim without any proof, making both the award and the first instance court's decision null and void.

The Supreme Court also dismissed this argument. According to the Maliki *madhab*, the judge stated that he was bound by the arbitrator's decision and obliged to enforce the arbitral award.⁹⁵⁴

The appellant's third ground of appeal was that the appealed decision failed to answer the requests of the appellant, which rendered the decision null and void.

The court also dismissed this argument, which resulted in the dismissal of the appeal and of the appellant's requests.

v. Appeal No. 349/26 to the Federal Supreme Court of the UAE⁹⁵⁵

The proceedings of this case commenced in front of the First Instance Court of Sharjah,⁹⁵⁶ when the plaintiff (the wife)⁹⁵⁷ filed a suit requesting divorce due to damages sustained, as well as payment of the remainder of the dowry, alimony expenses, and child support. When the first instance court dismissed the claim, the plaintiff appealed to the appellate court,⁹⁵⁸ which nullified the first decision and decided to divorce the plaintiff from her husband, as long as the plaintiff surrendered

⁹⁵⁴ The court based their claim on a couple of Maliki Jurists opinion and cited them in their opinion. See, al-DESOKI' supra note 225 at 228, see al-TSOLI' supra note 225 at 491

⁹⁵⁵ Federal Supreme Court of the UAE appeal no.349/26 issued on 19th of September 2005.

⁹⁵⁶ Federal First Instance Court of Sharjah Case no. 598/2003 issued on 10/7/2003.

⁹⁵⁷ The defendant of the appeal.

⁹⁵⁸ Federal Appeal Court of Sharjah Appeal no. 176/2003 issued on 28/4/2003.

her suit to obtain the remainder of her dowry.⁹⁵⁹

This decision was appealed to the Supreme Court on three grounds, the first of which was that the court failed to submit the dispute to mediation⁹⁶⁰ or the prosecution's office.

The Supreme Court responded by dismissing the claim, since referring the dispute to mediation is an administrative procedure that the Court is not required to perform. Furthermore, the appellate court's decision only concerned divorce and did not refer to child support, which is related to the custody of children, who had not been brought to the court. Regarding the court's failure to submit the dispute to the prosecution office, it was decided that the prosecution was not obliged to interfere in divorce cases. As such, the argument was found to lack a legal basis.⁹⁶¹

The defendant also argued that the court appointed arbitrators to settle the dispute, even though the complaint was not repeated to the court. Since divorce was decided based on the arbitral award, the decision should be rendered null and void.

The Supreme Court responded to this claim by stating that the disputing parties agreed in front of the court to arbitrate their dispute, and that they named their arbitrators. As such, it was determined that they were bound by the arbitrator's decision.

The final argument was that the arbitrators decided to divorce the couple, though the defendant in the appeal was unable to prove any prejudice in front of the court.

The Supreme Court responded by stating that the appellant admitted to injuring the defendant morally by calling her names and accusing her of adultery, which alone

⁹⁵⁹ The appeal court based their decision on an arbitral award, it was stated in the grounds of the appeal to the Supreme Court and not in the case summary.

⁹⁶⁰ This is normally done in front of the family orientation committee. See also Article 117 of the personal status law. However, since this case happened before the enactment of the personal status law, the court chooses a different source as a base for their decision.

⁹⁶¹ Which is governed under Book one, Title four of the civil procedures law Articles 60-69.

are grounds for divorce. Moreover, the court considered itself bound by Shari'a law to enforce the arbitrator's decision, hence its dismissal of the appeal.⁹⁶²

vi. Appeal No. 248/24 to the Federal Supreme Court of the UAE⁹⁶³

The plaintiff commenced proceedings in front of the first instance court⁹⁶⁴ by asking the court to divorce her from her husband (i.e., the appellant) on the grounds of injuries sustained, and she also requested custody of their children, child support, a housing allowance, a maid's salary, and payment for the children's school expenses. The court permitted the parties to arbitrate the dispute; the plaintiff chose her father as an arbitrator, which the appellant seconded. The prosecution office intervened in the case.⁹⁶⁵

The arbitrator decided to divorce the parties, to give custody of the children to the plaintiff, and to fulfill all of the plaintiff's requests, except payment for the children's school expenses. The first instance court recognized and enforced the arbitral award. The decision was appealed.⁹⁶⁶ The prosecution office submitted its opinion to the court, and the appellate court refused the appeal.

The appellant appealed the decision to the Supreme Court on two grounds. He first argued that there was no arbitration agreement to determine the scope of the arbitration or the authority of the arbitrator. He also claimed that, since he had been unfamiliar with arbitration procedure, he had seconded the plaintiff's choice that her father arbitrate the dispute, even though Shari'a law requires multiple arbitrators for this form of arbitration. He noted that based on this fact, the arbitrator's neutrality is important. However, note that Imam al-Qurtubi's interpretation of the Quran

⁹⁶²The court cited al-TSOLI' book in here, see al-TSOLI' supra note 225 at 491.

⁹⁶³ Federal Supreme Court of the UAE Appeal no. 284/24 issued on 5th of June 2004.

⁹⁶⁴ Federal First Instance Court Case no. 95/2001

⁹⁶⁵ The prosecution office is allowed to interfere in the case in certain situation mentioned in the law, See supra note 275.

⁹⁶⁶ Federal Appeal Court Appeal no. 26/2002

highlights Verse 35 of Surat al-Nisa', which states that it is admissible to have a sole arbitrator if the parties agree to that.⁹⁶⁷

The court responded to this claim by dismissing it, explaining that for the appealed decision to breach the law, the arbitrator must have exceeded the powers of the agreement or the scope of his or her power, which in this case had not occurred. Furthermore, the court claimed that, according to Maliki Madhab, the arbitrator's award must be enforced without any reservations, regardless of any bias on the arbitrator's part.⁹⁶⁸

The second grounds for appeal concerned the arbitral award. The appellant disputed the merits of the award decision and claimed that he had already paid AED 70,000 for housing expenses.

The Court dismissed this argument, since courts reserve the right to review and understand the facts of the case. The court also countered that the appellant had no proof to substantiate his claim.

The court also stated that personal status is a matter of public policy and order, as per an Article in the Civil Transactions Code stating about personal status that it: shall be considered of public policy, provisions relating to personal status, such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of trade, circulation of wealth, private ownership and other rules and foundations on which the society is based, provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Shari'a.⁹⁶⁹

Thus according to this Article and to the court's jurisprudence, the court can rule on

⁹⁶⁷ MOHAMMAD al-QURTAUBI, Tafsīr al-Qurṭubī : al-jāmi' li-aḥkām al-Qur'ān [al-qurtubi explanation on the meaning of the Quran], Volume V 116 (1st ed. 2000 DAR al-KATB al-ALAMYAH), al-Qurtaubi is an Islamic Jurists and Imam and his book on the explanation of the Quran meaning is widely recognized within the Islamic society, moreover the court cited his explanation in their decision.

⁹⁶⁸ See al-DESOKI', supra note 225 at 346, also al-Mubarak Supra note 225 at 112,

⁹⁶⁹ see United Arab Emirates Constitution Article 3.

matters concerning public policy such as the Islamic Shari'a without requiring the disputing parties to raise the issue to the court, if the issue is related to the appealed decision and occurred as part of the proceedings of the case.

Lastly, regarding how many times the parties had divorced, which the appellate court did not state, the decision was ordered to be referred back to the appellate court, because it was seemed to be related to public policy. Except in this matter, the appeal was dismissed.

Riba Disputes

1 Appeal no. 146/2008⁹⁷⁰

This case addresses a dispute over inheritance and how it was settled according to Shari'a law. The appellant commenced proceedings in front of the first instance court⁹⁷¹ by asking the court to appoint arbitrators to settle a dispute between the appellant and the respondent regarding an insurance policy effective from 16 March 1981 to 15 March 1982 on the life of the appellant's wife, who was murdered on 2 July 1981.

Since the appellant was the sole beneficiary of the late woman's insurance policy, he filed a request to claim the insurance, which the insurance company declined, stating that he instigated her murder and therefore had no right to the insurance claim. The appellant consequently commenced proceedings in front of the court⁹⁷² by asking the court to force the insurance company to pay the full amount of the policy.

The court dismissed the case, citing the existence of an arbitration clause. When the case was appealed,⁹⁷³ the appellate court confirmed the decision of the first instance court, as the Dubai Court of Cassation also did.⁹⁷⁴

Since the respondent to the appeal did not adhere to the request to arbitrate, the appellant commenced new proceedings by requesting the court to enforce the arbitration clause. The court accepted the appellant's claim and ordered the appointment of an arbitrator, who issued an award stating the amount of the insurance policy in addition to an interest rate of 9% beginning on 2 July 1981 and lasting until the date that payment was completed.

⁹⁷⁰ Dubai Court of Cassation, appeal no. 146/2008.

⁹⁷¹ Dubai Court of First Instance, case no. 424/2005.

⁹⁷² Dubai Court of First Instance, case no. 30/1997.

⁹⁷³ Dubai Court of Appeals, appeal no. 31/1998.

⁹⁷⁴ Dubai Court of Cassation, appeal no. 221/1999.

When the appellant sought to have the award recognized, the respondent counterclaimed on eight grounds, the first of which was that the arbitrator had decided in accordance with the Civil Transactions Code. However, the court decided⁹⁷⁵ that the dispute should be decided in accordance with the Dubai Contract Law of 1971. The second grounds was that the arbitrator awarded an interest rate exceeding the amount of the claim, which violated Chapter 6 of the Dubai Law of 1971, as well as Article 6 of the insurance policy. The third grounds was that the arbitrator violated Shari'a principles of inheritance when he decided to award the entire sum of the insurance claim. Based on these three and five other grounds,⁹⁷⁶ both the first instance and appellate court⁹⁷⁷ decided to refuse to recognize the arbitral award.

The appellant consequently appealed the case to the Dubai Court of Cassation, claiming that the court had nullified the arbitral award by reasoning that the award compromised UAE public policy and conflicted with Shari'a law, since the arbitrator had decided to award the appellant the entire sum of the insurance claim, which was in excess of the amount of his share in the inheritance. However, as aforementioned, the appellant was the sole heir to the inheritance. Moreover, in determining an interest rate, the court based its decision on the Commercial Transaction Law, which contradicted the Court of Cassation's earlier decision that the law applicable to the insurance policy was the Dubai Contracts Law of 1971, which does not contain any provisions addressing interest. Not only was the interest to be awarded in arrears, but the grounds upon which the court had decided to nullify the award do not appear in Article 216 of the Civil Procedures Code.

The Court of Cassation responded to this claim by stating that edits

⁹⁷⁵ Id.

⁹⁷⁶ The rest of the grounds does not relate to *riba*.

⁹⁷⁷ Dubai Court of appeals, appeal no. 305/2007 issued on 30 March 2008.

2 Appeal no. 831/25 and 67/26⁹⁷⁸

The facts of this case date back to 14 October 1983, when a contract between the parties ordered the construction of 50 houses in Wasit and 53 in Dasman in emirate of Sharjah.⁹⁷⁹ The contractors claimed that they fulfilled their part of the contract by finishing the project and were thereby entitled to AED 72,294,000.

Upon the other party's failure to fulfill its contractual obligation, the contractors commenced arbitral proceedings to settle the dispute. The case proceeded with a request from the respondent to the court to appeal case no.831/25 of the first instance court,⁹⁸⁰ as well as for the court to allow the appellant to name the second arbitrator and the Ministry of Justice to name a third, who would also preside over the proceedings.

Once the appellant and the Ministry of Justice both agreed to arbitrate and named their arbitrators, the court referred the dispute to arbitration. The arbitration tribunal rendered an award on 26 March 2003, deciding first to dismiss the plea on the grounds that the courts had no right to hear the case because the litigation had expired⁹⁸¹ due to the passing of time. The tribunal also dismissed the respondent's plea to permit a counter claim in case no. 240/2002, yet it accepted the claimant's plea to dismiss the counter claim submitted to the court on 19 November 2002. Regarding the housing project in Wasit, the tribunal decided to award the claimant AED 17,244,172 as compensation for delayed payment, in addition to 10% interest calculated from the 1st of May 2003 until the payment was made in full, in addition to other payments.

⁹⁷⁸ Federal Supreme Court of the UAE, appeal no. 831/25 and 67/26.

⁹⁷⁹ The purpose of this housing project is to provide housing for the UAE nationals; therefore one of the parties to the contract involves a branch of the government embodied in the Emirate of Sharjah.

⁹⁸⁰ Sharjah's Federal Court of first instance, case no.114/2000.

⁹⁸¹ Which is similar to the concept of statute of limitation in the US.

When the arbitral award was submitted for court recognition, the appellant requested that the court refuse its recognition. The first instance court not only refused to recognize the award but also nullified it. This decision was appealed,⁹⁸² and the appellant appealed that decision.⁹⁸³ The appellate court ruled to dismiss both the first and second appeal, to recognize the arbitral award, to force the payment of the arbitrators' fees except the head arbitrator's fee, which was dismissed, and to forward the documents related to the head arbitrator's claim to certain fees owed to the Federal Judicial Council to determine the fee amount.

This decision was also appealed, in Appeal no. 831/25 to the Supreme Court by the Ministry of Public Works, which contested the arbitral award, as well as in Appeal no. 67/26 regarding the arbitrator's fees.

Appeal no. 831/25 was based on twelve grounds, the first eleven of which argue that the appealed decision misapplied the law and breached public order and policy. The appellant also argued that the contract was an administrative contract and should thus fall under the rule of public laws, that the public interest was considered in the contract, and that judicial supervision was necessary to determine the legality of the arbitral procedures. The arbitral award shows that the arbitrators decided to award the amount of the claim, in addition to 10–12% interest, or in the case of the reserved guarantee, 100% interest. The appellant claimed that the arbitrators awarded an unjustified compensation based on unidentified debt not yet due and that the damages were unidentified; further, the appellant argued that this interest constituted *riba*, which is unlawful, or *haram*, according to Shari'a law. As such, the arbitrator here breached public policy and order by stipulating compound interest in an award. The respondent to this appeal admitted to receiving the payment in installments on time

⁹⁸² Sharjah Federal Court of appeals, appeal no. 480/2003.

⁹⁸³ Sharjah's Federal Court of appeals, appeal no.500/2003.

and without delay. The appellant concluded by stating that the recognition of an award containing *riba* is a matter that breaches public policy and that any such award should therefore be nullified.

The Supreme Court responded by rejecting the claim, referring to the first two paragraphs of Article 212 of the Civil Procedures Code,⁹⁸⁴ which state that the arbitrators have the right to render a decision without being bound by the normal course of action for rendering decisions. This reasoning implies that, in viewing arbitral awards, the Court does not examine the merits of the case, unless the case involves an issue of public policy, but scrutinizes only the procedural aspect of the award, as per Articles 212 and 216 of the Civil Procedures Code.

The Court's jurisprudence regarding interest is that interest, either compound or simple, is considered by Shari'a law to be *haram*. However, the Constitutional panel of the Supreme Court in its explanation for decision no. 14/19 allowed simple interest in banking transactions, although compound interest continued to be considered *haram*. The court also examined interest in arrears as a form of compensation for the delayed payment of debt and argued that interest as a form of compensation on delayed payment is compliant with the rules of the Shari'a. In order for the court to rule on interest, it must fulfill one more requirement related to the debt itself: the debt must be identified and should be due at the time of the claim, unlike compensation, which is subject to the court's estimation.

Article 216 of the Civil Procedures Code lists a limited number of circumstances in which an arbitral award may be annulled:

⁹⁸⁴ Which states the following:” 1 - The arbitrator shall deliver his decision without obligation to the pleading procedures except what has been stipulated in this chapter and the procedures concerning the litigant parties' action and hearing their defense's aspects, and enabling them to submit their documents, however, the litigant parties may agree on certain procedures according to which the arbitrator should proceed. 2 - The arbitrator's decision shall be according to the rules of the law unless if it were authorized with the reconciliation, then it shall not be obliged with such rules except with those related to the public order.”

1 - The litigant parties may request the nullity of the arbitrators' decision when the court examines its authentication and that shall be in the following circumstances:

- a- If it has been delivered without an arbitration report or delivered according to a void document or a document that has been extinguished by the failure to observe the date or if the arbitrator has gone beyond the document's limits. b- If the decision has been delivered by arbitrators who were not assigned according to the law or it has been delivered by some of them who were not allowed to give the decision in the absence of others, or delivered according to an arbitration document in which the litigation facts have not been determined, or delivered by a person who had not the capacity of the arbitration agreement, or by an arbitrator who did not fulfill the judicial condition. c- If a nullity in the decision or a nullity in the procedures which has affected the decision has occurred. 2- The acceptance of the nullity shall not be restrained by the litigant party's relinquishment of his right therein before the delivery of the arbitrators' decision.⁹⁸⁵

The court went on to explain that in contrast to what the appellant argued in front of the first instance court (that the dispute does not relate to a banking transaction and thus there was no room for issuing interest), the case fell outside the scope of Article 216, which is the Article that contains the conditions of annulment. Regarding the argument that the court's decision about the award constituted a breach of public policy, the court said this argument had no merit because the dispute fell under the provisions of the commercial law,⁹⁸⁶ and according to that law, creditors have the right to ask for interest and are not required to prove damages in order to ask for it.⁹⁸⁷ Thus, the arbitral award did not breach public policy by involving simple interest.⁹⁸⁸

⁹⁸⁵ supra note 5, Article 216.

⁹⁸⁶ This is identified in the Federal law no. 18 on Commercial Transaction issued on 7/9/1993, hereinafter commercial law, in Articles 4-10.

⁹⁸⁷ Id, Article 90 state that: "Interests on arrears for delay of payment of commercial debts are due upon maturity, unless otherwise provided in the law or in an agreement." Moreover, Article 88 of the same law states the following: "Unless otherwise agreed, where the commercial obligation is a sum of money, the amount of which was known when the obligation arose, and the debtor delays payment thereof, he shall be held liable to pay to the creditors, as compensation for the delay, the interest fixed in Articles (76) and (77)."

⁹⁸⁸ The other ground of appeals does not relate to the issue at hand, they relate to the appointment of the arbitrator and the arbitrators fee, which would be discussed later on.

Lease Disputes

- **Dubai Court of Cassation**

1. Appeal no.193/2002 ⁹⁸⁹

This dispute was initiated by the appellant⁹⁹⁰, asking the court to render an interim order to stop the enforcement of the rent dispute committee's decision to recognize the arbitral award, until the conclusion of this litigation. Furthermore, they argue that the committee lacks the jurisdiction to recognize arbitral awards; they also claim that the arbitral award is void in regard to awarding the defendant the sum of 150 thousand dhs. in addition to the legal interest, claiming that on the 1/1/1998 the defendant have rented a car racing circuit for one year. However, they stopped paying the rent and vacated the property before the end of the lease, the appellant requested the payment of the reminder of the rent to which the defendant answered to upholding the arbitral clause and submitting the dispute to arbitration.

An arbitrator was appointed from the chamber of commerce and rendered an award against the appellant in the amount of 150 thousand dhs and 10 thousand dhs in lawyer fees in addition to 10% legal interest until the fulfillment of the payment, which the rent committee decided to recognize.

The appellant argues that the rent committee was established by a special decree. Thus, its jurisdiction is limited and should not be unrestricted, as such it should not be able to recognize arbitral award, which falls under the jurisdiction of the court based on article 215 and article 217/2, which allows appeals on the decisions

⁹⁸⁹ Dubai Court of Cassation Appeal no.193/2002, issued on the 23rd of June 2002.

⁹⁹⁰ Dubai court of first instance case no. 213/2001 (civil), the appellant is Dubai Formula 1 Company.

recognizing arbitral award, on the other hand the committee decisions to recognize the award nullifies the power of this article. Furthermore the arbitrator has exceeded the scope of the agreement, which is another ground of vacating the award; the first instance court decided to dismiss this claim, stating that the court lacks the jurisdiction to rule on the dispute⁹⁹¹. The decision was appealed to the appeal court⁹⁹², which decided to uphold the appealed decision.

The appellant appealed that decision to the cassation court⁹⁹³, basing his appeal on two grounds, the appellant argues that the court decided that rent disputes fall under the jurisdiction of the rent committee, which includes the decisions to recognize arbitral awards, basing their reasoning on decree no. 2/1993⁹⁹⁴. However, this decree only establishes a committee in the Dubai municipality with the purpose of resolving lease disputes, therefore the parties doesn't have the right to agree to opt-out from the jurisdiction of the committee through contract and seek to arbitrate such disputes, nor does the committee have the right to refuse their jurisdiction over the dispute. In addition, the court has the sole jurisdiction to recognize arbitral awards according to articles 215 and 217/2. Moreover, the appellant referred to the appeal courts⁹⁹⁵ decision between the parties, which established the courts sole jurisdiction over recognizing arbitral awards.

The court dismissed this argument, stating that even though the committee is an administrative body. However, articles 1 and 4 of the decree⁹⁹⁶ that established this

⁹⁹¹ The first instance court rendered their decision on the 26/5/2001.

⁹⁹² Dubai court of appeals, appeal no. 873/2001 issued on 14/4/2002.

⁹⁹³ He appealed that decision on the 4/5/2002.

⁹⁹⁴ The Emirate of Dubai Emir Decree no. 2/1993, in regard to forming a special tribunal to determine disputes between landlords and tenants. There are two other laws regulating the relationship between landlords and tenants in Dubai, which are law no.26/2007, and law no.15/2009 concerning hearing rent disputes in the free zone.

⁹⁹⁵ Dubai Court of Appeals, appeal no. 532/2001.

⁹⁹⁶ Supra notes 377 and 389 and 390.

committee gives it the power and the right to resolve leasing disputes and that their decisions are final and binding, moreover it is not subject to appeal. This fact is not affected by article 213, which established the jurisdiction of recognizing arbitral awards to the court; since the dispute between the parties concern a leasing agreement, which is regulated under the rules of the civil transaction law⁹⁹⁷ and the decree⁹⁹⁸, both of which gives the committee the jurisdiction to rule on all lease disputes, even those that concerning the recognition of arbitral awards, this fact is not overruled nor changed by the appeal courts decision, which establishes the jurisdiction to the court.

Thus, the court decides to dismiss the appeal.

2. Appeal no. 47/2007⁹⁹⁹

This defendant of the appeal started the dispute against the appellant company¹⁰⁰⁰, asking the court to force the defendant to pay the amount of the claim as a compensation for his loss, due to the fact that the defendant have rented a pavilion¹⁰⁰¹ in the Global Village¹⁰⁰² and agreed to be the legal representative of this pavilion in exchange of 66000 dhs¹⁰⁰³. The defendant have finished the pavilion construction in compliance to the agreed terms between the parties, after five days from the opening of the Global Village the electricity was shut by the appellant company for three days, and returned it after three days only to shut down for half the pavilion, resulting in the

⁹⁹⁷ Which is regulated in articles 742-848 of the civil transaction law.

⁹⁹⁸ Supra notes 377 and 389 and 390.

⁹⁹⁹ Dubai Court of Cassation appeal no.47/2007, issued on the 29th of April 2007.

¹⁰⁰⁰ Dubai First Instance Court, case no. 285/2006, issued on 18/10/2006.

¹⁰⁰¹ The disputed pavilion represent the State of Greece.

¹⁰⁰² Is a shopping/park located in Dubai, that has pavilions representing the countries of the world, each pavilion is developed through a separate contract.

¹⁰⁰³ Which is the amount of the lands rent.

tenants to refuse to pay their rent, which is a direct result from the appellants action. The appellant company counter claimed in front of the first instance court to dismiss the suit, due to the fact that the court lacks jurisdiction to hear the dispute since it falls under the rent committee's jurisdiction, in addition to the existence of an arbitration clause in the agreement between the parties. The first instance court decided to dismiss the case based on the existence of the arbitration clause.

The defendant appealed¹⁰⁰⁴ this decision arguing that the agreement between the parties didn't contain any arbitration clause, the appellant upheld their argument that the court lacks the jurisdiction hear the dispute since it fall under the jurisdiction of the lease committee, the appeal court decided to vacate the decision stating that the rent agreement did not contain an arbitration clause, and ordered the dispute to be sent back to the first instance court.

The appellant company appealed that decision to the cassation court,¹⁰⁰⁵ arguing that the court refused to uphold the arbitration clause, in addition to dismissing the argument that the court didn't have jurisdiction to hear the case given the fact that the dispute relates to a lease agreement, which falls under the jurisdiction of the rent committee that was established by an Emir decree¹⁰⁰⁶, and based on the above discussion any dispute of this sort should have been brought in front of the rent committee and not in front of the court given the fact that the rent committee have the sole jurisdiction on this matter, in addition to having an arbitration clause in this dispute.

The court responded to this by stating that article of the civil procedure law allows the emirate that have opted-out into establishing their local courts system the right to

¹⁰⁰⁴ Dubai court of appeals, appeal no. 742/2006 issued on 28/1/2007.

¹⁰⁰⁵ On the 6th of March 2007.

¹⁰⁰⁶ Supra notes 377 and 389 and 390.

establish specialized legal committees¹⁰⁰⁷, and given the fact that the ruler of Dubai established in a decree¹⁰⁰⁸ a specialized legal committee, which states that the establishment of a specialized judicial committee that have jurisdiction over dispute raising between the tenants and their landlords whatever the nature of this dispute be¹⁰⁰⁹, and that the ruling of this committee is final and binding and un-appealable¹⁰¹⁰. In addition, to the explanatory note published by the office of the ruler, which defines the term “any dispute” to mean any dispute rising from renting the non-transferable goods only¹⁰¹¹. Thus, excluding it from the general principles of the court jurisdiction, emphasizing the fact that the court has no jurisdiction over lease disputes, and the parties has no right to opt-out by submitting their dispute to the court, or to agree to submit their dispute to arbitration. Furthermore, articles 742¹⁰¹², 745¹⁰¹³ and 770¹⁰¹⁴ of the civil transaction law, implies that the dispute in this instance rises from a lease agreement, which gives the jurisdiction to settle this dispute to the rent committee, even if the parties of the contract agreed to submit their dispute to arbitration. Furthermore, article 85 of the civil procedures¹⁰¹⁵ allow jurisdictional pleas to be heard at any stage in front of the court, in addition the court can decide on its own without a request of one of the parties, and since pleas on the existence of an arbitration clause fall under this category, and the appeal court dismissal of the appellant argument to dismiss the claim based on the existence of an arbitration clause is an indication that the court has the jurisdiction to hear the dispute. This decision is

¹⁰⁰⁷ Article 1 of the civil procedures.

¹⁰⁰⁸ Supra notes 377 and 389 and 390.

¹⁰⁰⁹ id Article 1.

¹⁰¹⁰ Id Article 4.

¹⁰¹¹ The Explanatory decree no. 1/1999 in regard to the jurisdiction of the rent committee, article 1.

¹⁰¹² The civil transaction law article 742 of states: “A lease is granting ownership of the use of a specific thing to the lessee for a certain time in return for a fixed rent.”

¹⁰¹³ Id article 745 states: “The object of the contract of lease is the enjoyment of the right to use the leased premises which takes effect by delivery thereof.”

¹⁰¹⁴ Which explains the warranty over the leased property.

¹⁰¹⁵ Article 85 of the civil procedures.

subject to appeal on its own before rendering the final decision in the dispute¹⁰¹⁶.

Furthermore, based on the facts of this dispute, which have arisen from a lease agreement between the parties and as such the jurisdiction to hear this dispute falls to the rent committee, and since the appeal court failed to uphold this fact.

Therefore, the court decided to nullify the decision in regard to dismiss the dispute based on the existence of an arbitration clause, and to rule again that the Dubai courts lack the proper jurisdiction to hear the dispute.

3. Appeal no.133/2007¹⁰¹⁷

The defendant started the litigation¹⁰¹⁸ against the three appellants asking the court to appoint an arbitrator to resolve the dispute between the parties through arbitration based on the arbitral clause in the companies contract between the parties, the defendant request that the arbitrator should order the termination of the contract between the parties and return the property¹⁰¹⁹ back to the defendant. However, a dispute arose between the parties in regards to the execution of the contract, the defendant claims that he was deceived by the appellants upon the signing of the agreement to lease the land and the properties on it, and since the parties agreed in the tenth clause of the contract to settle any dispute that rises between the parties through arbitration, the defendant in compliance with this clause notified the appellants on the 18-6-2006 the need to appoint an arbitrator, the appellants refused to appoint an arbitrator forcing the defendant to seek the assistance of the court.

¹⁰¹⁶ Civil procedures article 151.

¹⁰¹⁷ Dubai Court of cassation (civil circuit), appeal no. 133/2007, issued on the 23rd of September 2007.

¹⁰¹⁸ Dubai Court of First instance (civil circuit), case no. 611/2003, issued on 28/1/2007.

¹⁰¹⁹ The defendant claim that based on a contract between the parties dated 1-1-2003; they agreed to invest in property number 1013, which is owned by the defendant.

The first instance court decided on the 28th of January 2007, to dismiss the plea that the court has no jurisdiction to hear the case, and to appoint an accounting expert as an arbitrator to settle the dispute between the parties and to render an award within six month of the start of the arbitral proceedings.

The decision was appealed¹⁰²⁰, the appeal court decided to dismiss the appeal. The appellants appealed this decision to the cassation court on the 10/6/2007. In addition, the defendant's attorney submitted a request to dismiss the appeal to the cassation court, arguing that a decision to appoint an arbitrator is not subject to appeal according to article 204.

The cassation court dismissed this plea stating that the parties have the right to appeal a decision made by the appeal court according to articles 173¹⁰²¹, and that the requirement of article 204 is limited to the decision to appoint the arbitrator, and since the appeal court decided to dismiss the appeal by stating that the first instance decision to appoint an arbitrator is not subject to appeal, which in turn doesn't fall under the exception of article 204.

The appellants based their appeal on two grounds; the first ground argues that the court decision to incumbent the dispute under the jurisdiction of the court, by stating that the relationship between the litigants is not a lease agreement, as such doesn't fall under the jurisdiction of the lease committee. The appellant's claim that based on the documents presented in this case the relationship between the parties is in fact a lease agreement, since the appellants have lease land no.1013 from the defendant, as such it is in fact a lease agreement and not a companies contract, which falls under the jurisdiction of the lease committee and not the court.

¹⁰²⁰ Dubai court of appeals civil circuit, appeal no. 115/2007, issued on 11/4/2007.

¹⁰²¹ This article shows the general conditions of accepting appeals in front of the cassation court.

The court dismissed this argument, stating that lease committee¹⁰²² that regulates the leasing of un-transferable goods¹⁰²³ is limited to the disputes that rise from the lease of those goods. Furthermore, the Court has the right to interpret the will of the parties and define the clauses of the contract, which the court has the right to deduce from the documents presented to it, as such the parties intent in this dispute were to have the appellants invest in the defendant property for ten years. Therefore, the dispute between the parties doesn't rise from a relationship between a tenant and a landlord, but a dispute rising from an investment contract, which makes the appeal courts decision to dismiss the appellants plea that the court lacks jurisdiction justifiable.

The appellants second ground of appeal argues that the appeal court by deciding that the first instance decision to appoint an arbitrator is not subject to appeal, have failed to apply the law, they argue that arbitration clause state that the arbitrator have the right to hear all dispute that arise from this contract, which implies that the arbitrator jurisdiction is limited to those disputes, and since the defendant claimed that the appellants have misguided and deceived the defendant, thereby removing this dispute from the arbitrators jurisdiction by falling outside the scope of the arbitration clause, moreover the defendant should have requested to nullify the contract instead of asking the court to appoint an arbitrator.

The court agreed with the appellants argument, stating that according to articles 203 and 204 supports their claim, both articles implies that in order accept a request to appoint an arbitrator by the court, the parties are required to agree in writing to their intent to submit the dispute into arbitration, and if they identified the scope of the arbitration, then the arbitrators power is limited to what the parties have

¹⁰²² Which is established by the Emir decree no. 2/1993.

¹⁰²³ According to the explanatory decree No.1/1999.

agreed upon in the contract without extending to other disputes, and according to the jurisprudence of this court, arbitration is an exceptional means of resolving dispute in which the individual waives his right to submit his dispute to their natural judge, which requires the court to limit their interpretation of the arbitration clause to what has been explicitly agreed upon by the parties.

Therefore, the court in this dispute is unable to appoint an arbitrator except to a dispute that falls under the scope of the arbitration clause in question. Therefore, the court in this dispute has no right to appoint an arbitrator in a dispute that is not governed under the arbitration clause, which is evident by the defendant's purpose of requesting the appointment of the arbitrator, which is to nullify the contract based on fraudulent activities by the appellants a fact that is outside the confines of the arbitration clause and subsequently falls outside the arbitrator's authority.

Thus, the cassation court decided to vacate the appealed decision and refer the dispute back to the court.

b. Abu Dhabi Cassation Court

4. Appeal no. 58/2007¹⁰²⁴

The appellant started the litigation¹⁰²⁵ against the construction company (the first defendant) and the guardian of the second party (the second defendant) asking the court to nullify the lease agreement dated 17/1/1999, which stated that the first defendant going to invest in the land owned by the appellant. The appellant argues

¹⁰²⁴ Abu Dhabi court of cassation civil circuit appeal no. 58/2007, issued on the 30th of October 2007, Arbitration according to the jurisprudence of the cassation court at 17-22 (2007). Which is a collection of arbitration cases published the Emirate of Abu Dhabi judicial department from 2007-2010.

¹⁰²⁵ Abu Dhabi Court of First instance, civil circuit case no. 123/2005, issued on 29/5/2005.

that since the contract was not brought to the land department in AD for ratification, which renders it void under the law.¹⁰²⁶

The first defendant asked the court to dismiss the suit, based on the existence of an arbitration clause in the contract. The first instance court decided to dismiss the case based on the existence of an arbitration clause.¹⁰²⁷ This decision was appealed and the appeal court decided to uphold the appealed decision.¹⁰²⁸

This decision was appealed to the cassation court of AD on the 14/2/2006, the defendant pleaded that the appeal should be dismissed since it is not a decision on the subject of the dispute and according to article 173 it is not subject to appeal, secondly the court decision was to refer the dispute into arbitration, which according to article 150¹⁰²⁹ is not a ground of appeal. Furthermore, the court should dismiss this claim since the appellant has no benefit from this appeal. The court dismissed those pleas and decided to hear the appeal.

The appellant argues that the appeal court by upholding the arbitral clause has misapplied the law according to article 203, since the appellant upheld the argument that the clause is void since the main contract that contained the clause is void, subsequently the arbitrator has no jurisdiction over the dispute according to article 209/2. Moreover, the appealed decision by stating that the arbitral clause still is valid even if the agreement in which it was contained were to be void and that the arbitrator is the one that has to determine the validity of the arbitral clause. However, the determination of whether or not the agreement is valid is a preliminary issue that falls outside the scope of the arbitrators power, since the nullification of the main contract

¹⁰²⁶ According to article 6 of law no. 11/79 in regard to registration lands in Abu Dhabi, and the Abu Dhabi Emir decree no.33/1996.

¹⁰²⁷ Article 203.

¹⁰²⁸ The appeal case number is missing. However, the date of the decision is mentioned in the decision, which is 27/12/2005.

¹⁰²⁹ Which regulates the general requirements of appeals.

would subsequently nullify the arbitral clause, as such the court should take back its jurisdiction.

The cassation court accepted this argument, stating that the nullification of the main contract entails the nullification of the clause and the determination of the validity of the arbitral clause falls to the court according to article 209/2. In addition, the documents presented by the appellant shows that they have upheld this argument in front of the court and that the contract in question¹⁰³⁰ is null and that the appealed decision did not answer this by deciding to refer the dispute to arbitration, which renders the decision unlawful for it gave the power to the arbitrators to determine their own jurisdiction.

Thus, the court decided to vacate the decision and refer it back to the court.

5. Appeal no. 72/2007¹⁰³¹

The second defendant started the litigation¹⁰³² on behalf of himself and the inheritors against the Abu Dhabi Islamic Bank and.....(The respondent) asking the court to nullify the mortgage agreement dated 2/4/2005 on the second defendants property, which came to their possession through their inheritance, the second defendant argues that the inheritor have given the appellants father authorization to act as his agent based on an agency contract dated 14/8/1996, and that the appellant have abused their power by entering into a mortgage agreement on the land in question after the passing of the inheritor. The appellant initiated a counter

¹⁰³⁰ Which was concluded on the 17/1/1999 and contained the arbitration clause.

¹⁰³¹ Abu Dhabi Court of Cassation civil circuit, appeal no. 72/2007, issued on the 11th of December 2007.

¹⁰³² Abu Dhabi court of First instance, civil circuit case no.194/2005.

proceeding¹⁰³³ against the second defendant as a representative of the rest of the inheritors. The second defendant counter claimed in that case to recognize the selling of the property in question, and to dismiss the dispute based on the existence of an arbitration clause. The court dismissed the request to refer the dispute into arbitration, stating that the court has jurisdiction over the dispute.

The court decided to combine the two cases and on the 29th of November 2005 issued a decision, first in regards to case no.194/2005 to nullify the mortgage agreement and in case no.281/2005 to recognize the selling of the land.

The first defendant appealed this decision¹⁰³⁴ and the second defendant also appealed this decision in a separate appeal¹⁰³⁵, the court decided to combine both appeals and to vacate the appealed decision and to refer the dispute into arbitration based on the existence of an arbitration clause.

The appellant appealed this decision to the cassation court, arguing that the arbitration clause is void since the defendants failed to uphold this argument in the first hearing, which according to article 203/5 constitute a waiver of their right to uphold this clause. The cassation court agreed with this argument, stating that article 203 requires the party seeking to uphold the arbitration clause to take a positive action in the first hearing and that the failure to do so would result in a waiver of this clause, and based on the facts of the case the defendant request to refer the dispute into arbitration were done in the second hearing and not the first, implying that they have waived their right to arbitrate, subsequently nullifies this clause. Thus, the court decided to vacate the appeal decision and refer the dispute back to the court.

¹⁰³³ Abu Dhabi court of First instance, civil circuit case no.281/2005.

¹⁰³⁴ Abu Dhabi court of appeals Shari'a circuit appeal no.489/2005.

¹⁰³⁵ Abu Dhabi court of Appeals Shari'a circuit appeal no.493/2005.

6. Appeal no.66 and 71/ 2007¹⁰³⁶

The defendant started the litigation¹⁰³⁷ requesting the nullification of the sales contract¹⁰³⁸ between them and the second defendant and the first appellant¹⁰³⁹, and to erase all the records on the selling of the land in question and to recognize the sales contract, moreover to transfer the ownership of the land to them and to recognize the agency agreement dated 8/8/1996 that was concluded in Dubai. The defendant claim that according to the sales contract of 24/8/1996, they bought the land from the second defendant and built a villa on it and the defendant have failed to register the land under their name, which they became aware of through the notification of the lawsuit¹⁰⁴⁰ that the second defendant started in which they claim that the sales contract was in fact an investment contract and requested to appoint an accounting expert in order to settle the account between the parties. The defendant was also unaware of the existence of another sales contract dated 14/8/2005, in which the defendant's attorney sold half of the land to the appellant sister, which is the same property that was sold to the defendant according to the sales contract of 24/8/1996.

Which, resulted in the initiation of this proceedings, the second defendants attorney argued that the case should be dismissed based on the existence of an arbitration clause in article 11 of the sales contract and that the contract in question is an investment one and not a sales contract, they argue that the ownership of the land have transferred to the second defendant. Moreover, the land in question is registered under their name and not under the first defendant.

¹⁰³⁶ Abu Dhabi court of cassation civil circuit, appeal no. 66 and 71/2007, issued on 15th January 2008.

¹⁰³⁷ Abu Dhabi court of first instance civil circuit case no. 251/2005.

¹⁰³⁸ Which was concluded on the 24/8/1996.

¹⁰³⁹ The appellant in appeal no. 66/2007.

¹⁰⁴⁰ Abu Dhabi court of first instance civil circuit, case no.162/2005.

The first instance court decided to dismiss those pleas and ruled that the sales contract of 24/8/1996 is valid and enforceable and nullified the sales contract of 14/8/2005. This decision was appealed by the first appellant against the first defendant and by the second defendant against the first defendant, in two separate appeals¹⁰⁴¹. The appeal court decided on the 22nd of April 2006 to dismiss both appeals.

This decision was appealed to the cassation court in two separate appeals, appeal 66/2007¹⁰⁴² and appeal 71/2007.

First: Appeal no.66/2007

This appeal was based on four grounds, all of which revolves around the sales contract and the selling and the ownership of the land, which were dismissed by the court. Resulting in the dismissal of this appeal.

Second: Appeal no.71/2007

This appeal was based on five grounds. Only the first ground of appeal argues on the existence of the arbitration clause, the appellant argues that they have upheld their request to dismiss the dispute based on the existence of the arbitration clause. However, the court dismissed their request, basing their refusal on article 159 of the civil transactions law.¹⁰⁴³ Which, implies that the minor has the right to allow certain acts once he become of age, and the defendant after coming of age didn't agree to be bound by the arbitration clause. However, this article is limited to the acts in which

¹⁰⁴¹ The first appellant appealed this decision to the appeal court of Abu Dhabi in appeal no. 494/2005, and the second defendant appealed this decision in appeal no. 497/2005.

¹⁰⁴² The first appellant appealed that decision against the first and second defendants.

¹⁰⁴³ Which state: "1-Pecuniary dispositions of the discerning minor are valid, if totally beneficial to him, and void if entirely detrimental. 2 - All acts of disposition that may vary between being profitable or detrimental depend of the ratification of the tutor, within the limits he initially is allowed to dispose of, or of the minor after attaining legal age. 3 - The age of discernment is seven full Hegira years."

the minor have entered on his own and not agreements that were concluded through his agent, in this case through his guardian.

The court dismissed this argument stating that the appealed decision dismissed the claim to uphold the arbitration clause based upon the fact that dispute doesn't fall within the scope of the arbitration clause. Moreover, article 159/2 of the civil transaction law state that the acts that fall between profitable or detrimental requires the consent of the minors guardian or the minors own consent after he become of age, this fact doesn't change whether he concluded the contract on his own or through his guardian, making the appellants argument in this regard void and without basis.

The remainders of the grounds of appeal argue on the ownership of the land, which were ultimately dismissed by the court.

Thus, the cassation court decided to dismiss the appeal.

7. Appeal no. 186/2008¹⁰⁴⁴

The appellant started the litigation in front of the first instance court of Abu Dhabi¹⁰⁴⁵, against the defendant asking the court to terminate the companies contract¹⁰⁴⁶. They later amended their request by asking the court to refer the dispute into arbitration and appoint an arbitrator. The first instance court decided to dismiss the case based on the existence of an arbitration clause. The appellant on the 21/4/2003 appealed the decision to the appeal court¹⁰⁴⁷, which decided to nullify the appealed decision and refer the decision back to the first instance court to settle the dispute.

¹⁰⁴⁴ Abu Dhabi Court of cassation, civil circuit appeal no.186/2008, issued on 8th of June 2008.

¹⁰⁴⁵ Abu Dhabi Court of first instance, case no.295/2002.

¹⁰⁴⁶ The nature of the company in question is Particular Partnership Company or a joint venture, which is addressed in Federal law no.8/1984 concerning commercial companies, amended by Federal law no. 1/2009, title four of that law addresses this form of companies in articles 56-63.

¹⁰⁴⁷ Abu Dhabi Court of appeals, appeal no. 24/2003.

The appellant appealed this decision to the Supreme Court of the UAE¹⁰⁴⁸, the court decided to dismiss the appeal¹⁰⁴⁹.

The first instance court after referring the dispute to them decided to appoint two arbitrators to settle the dispute; the arbitrators rendered an award that was recognized on the 12/11/2006. The defendant appealed this decision on the 25/2/2007 asking the appeal court to nullify the decision to refer the dispute into arbitration and the appointment of the arbitrators and to set-aside the arbitral award, the appeal court decided to dismiss the appeal, for failing to appeal within the allowed time period.

The defendant decided to appeal that decision to the cassation court¹⁰⁵⁰, the court decided to refer the dispute back to the appeal court to rule on the subject matter of the dispute, stating that the first instance decision to recognize the award is appealable, given the fact that the defendant wasn't notified to the recognition hearing, subsequently the time for appeal is still open. The appeal court¹⁰⁵¹ decided on the 2/2/2008 to vacate the appealed decision and the arbitral award.

This decision was appealed to the cassation court; the appellant argues that the court decided to nullify the award based on article 206/2. However, the appointment of the arbitrators was done according to clause 22 of the contract, which was done according to the law since it allows the parties the freedom to opt-out into arbitration. Moreover, article 216 states specific conditions for setting-aside arbitral awards, which don't apply to this dispute. Furthermore, article 217 states that the arbitral award is not subject to appeal. In addition, the defendant waived their right to appeal since they have agreed to arbitrate according to the arbitration agreement of 5/6/2006, which was drafted according to the requirements of article 203 and 204.

¹⁰⁴⁸ This was before the emirate of Abu Dhabi withdrew from the federal court system and establish its own cassation court.

¹⁰⁴⁹ Federal Supreme Court of the UAE, appeal no. 25/308, issued on 21/3/2005.

¹⁰⁵⁰ Abu Dhabi Court of cassation, appeal no.15/2007, dated 13/12/2007.

¹⁰⁵¹ There is no mention to the appeal number in the decision.

The cassation court dismissed this argument, stating that article 206/2 explicitly requires that the number of arbitrators should be an odd one, which is a rule that concerns public policy, as such the parties has no right to waiver this rule. Moreover, the waiver of this requirement in the contract doesn't entitle that the act itself is lawful in the eyes of the court. Thus, arguing in front of the court that the parties have agreed to waiver their right to appeal or their right to contest the arbitration agreement, has no merit according to article 216. In addition, article 166¹⁰⁵² state that if the appeal court vacated the first instance decision it is required to render a decision in the dispute, the appeal court failed to do so and as such the dispute is referred back to the appeal court to render a decision in the dispute.

8. Appeal no.136/2009¹⁰⁵³

The defendant started the litigation¹⁰⁵⁴ against the appellant company asking the court to vacate the company from the property no. 19/t west of Abu Dhabi, claiming that based on an investment agreement between the parties dated 15/11/2007 the appellant has the right to invest in the property for one year starting from the 19/11/2007 and ends on the 18/11/2008 in exchange for an amount of 1605000 dhs. on the 16th of June 2008 the defendant sent a written notification to the appellant stating that they don't wish to extend the contract and the appellant should vacate the property once the lease is over. The defendant sent an additional notification on the

¹⁰⁵² Article 166 of the civil procedures, states: "If the court of first instance decided in the matter and the appellate court found that there has been a nullity in the decision or a nullity in the procedures affecting the decision, it shall decide its cancellation and judge in the action. But if the court of first instance has judged the lack of jurisdiction or the acceptance of a subsidiary plea that has had as a consequent the hindrance of the action progression, and the appellate court has decided the cancellation of the decision and the jurisdiction of the court or the rejection of the subsidiary plea and decided to examine the action, it should return the case to the court of first instance to decide in its matter."

¹⁰⁵³ Abu Dhabi Court of Cassation, civil circuit appeal no.136/2009, issued 31/3/2009.

¹⁰⁵⁴ Abu Dhabi Court of First Instance case no.112/2008.

14th of October of 2008 to ensure that they don't wish to extend the contract, the appellant responded by stating that they don't wish to vacate the property nor to end the contract.

On the 21/12/2008, the first instance court decided to dismiss the appellants plea to refer the dispute into arbitration based on an arbitration clause. Furthermore, the court decided to dismiss the case since it has no jurisdiction.

The defendant appealed this decision¹⁰⁵⁵ and on the 10th of Feb 2009 the court decided to nullify the decision and decided that the appellant company should vacate the property, based on the fact that the lease agreement between the parties have ended. The appellant company appealed this decision to the cassation court.

The appeal was based on two grounds, the appellant argues in the second ground of the appeal that the courts decision to dismiss their request of referring the dispute to arbitration, was based on the fact that the clause is a general one and didn't specify interim measures to fall under the scope of the arbitration clause, as such interim measures would fall under the court jurisdiction. The appellant argues that this interpretation of the clause is flawed, for it is limiting the application of the arbitral clause, given that the parties have agreed to refer all disputes to arbitration, which include interim measures.

The court dismissed this argument stating that interim measures need to be mentioned explicitly in the clause, in order for it fall under the arbitrators power, implying that such measures falls outside the scope of arbitral clause, and subsequently outside of the scope of the arbitrators power. Moreover, it doesn't prohibit the parties from referring such disputes to the court.

¹⁰⁵⁵ Abu Dhabi court of appeals appeal no. 1161/2008.

The appellant argues in the first ground of appeal that the court has no jurisdiction over the dispute, which should fall under the jurisdiction of the lease committee according to law no.20/2006. Moreover, this dispute doesn't fall under the provisions of the civil transaction law that addresses the lease contract in general, rather it falls under the provisions of the lease law no.20/2006.

The court agreed with this ground stating that article 2, 24 and 25 of that law no. 20/2006 in regard to regulating the lease transaction between the tenants and the landlords in the emirate of Abu Dhabi, delegates all lease disputes in Abu Dhabi to this committee, including interim measures, which falls under article 31 of that law, and since the request in this situation is an interim one, in the form of a request to vacate the property, which falls under the lease committee jurisdiction, this idea is further supported by article 25 of that law. A general arbitration clause doesn't deter the appellant from presenting his request to the lease committee and consequently doesn't deter the committee from hearing the case. Therefore, the jurisdiction in this dispute doesn't fall to the court nor to arbitration, rather to the lease committee based on article 25 of law no.20/2006.

Thus, the cassation court decided to nullify the appealed decision and to refer the dispute to the lease committee.

c. Federal Supreme Court of the UAE

9.Appeal no.32/23¹⁰⁵⁶

The defendant started the litigation¹⁰⁵⁷ against the appellants, asking the court to appoint arbitrators between them according to clause 18 of the naval vessel leasing

¹⁰⁵⁶ Federal Supreme Court of the UAE appeal no.32/23, issued on the 6th of August 2003.

agreement and to award the defendant the amount of the lease in addition to the legal interest. According to the defendant, the appellants leased the naval vessel “Shahd” for one month starting from the 5/7/1995 in exchange for 3000 U.S. dollars per day, which can be extended for one more month in exchange for the same amount per day, the appellants are obliged to deliver the vessel in one of the UAE ports in good condition after the end of the leasing period. The defendant claim that they didn’t deliver the vessel at the end of the term, which resulted in extending the lease term, the appellant also subleased the vessel to two other parties, making those two additional parties liable in front of the defendant. On the 30/6/1996 the vessel was returned to the defendant making the lease lasting for 270 days, which amounts to 71000 dollars minus 5000 dollars, which brings the total amount of the claim to 66000 dollars. The appellants refused to pay this amount in addition to the damages that occurred on the vessel, which resulted in these proceedings.

The first instance court decided on the 15/11/1997 to appoint a maritime expert as an arbitrator in the dispute and to refuse to include the sublease parties in the dispute. The arbitrator issued an award on the 6/10/1999 granting the claimant what they asked for which are the ships rent amount in addition to the damages suffered on the ship, in addition to the interest rate of 9%. The court recognized this award on the 28/3/2000.

The appellant appealed this decision¹⁰⁵⁷, the appeal court before issuing a decision in the dispute issued an interim measure on the 19/8/2000, to refer the appellants questions and appeal to the arbitrator to answer those concerns, the court was notified of the passing of the arbitrator. Thus, the court decided on the 27/11/2000 to uphold the first instance decision and recognize the arbitral award.

¹⁰⁵⁷ Sharjah’s Court of First instance civil circuit, case no. 94/1996.

¹⁰⁵⁸ Sharjah’s Court of appeal, appeal no.65/2000, issued on 19/8/2000.

The appellant appealed this decision to the Supreme Court on three grounds. The appellant first ground of appeal, argues that the decision failed to uphold the provisions of the law and more specifically the requirements of article 212/2, which requires that the arbitrator to uphold the law when deciding on the dispute, which implies that the arbitrator is required to follow the requirements of article 245 of the commercial maritime law¹⁰⁵⁹, thus the arbitrator is forced to apply the rules of force majeure that exclude the appellants from their obligation to pay the lease amount. The appellant continued their argument by stating that the appeal court at first agreed with this argument and referred the award back to the arbitrator to answer the appellants concerns in this regard. However, they retracted their decision after being informed that the arbitrator passed away, stating that they have the right to retract their decision since it is a matter relating to the law of evidence and according to article 5/1¹⁰⁶⁰, the court has the right to retract their decision. The appellant argues that interim measure doesn't fall under this article and the court issued the interim measure according to article 214 of the civil procedures, which the court has no right to retract and the passing of the arbitrator doesn't affect this matter, the court should have appointed a new arbitrator or answered the dispute on their own. The appellant continued their argument stating that the interim measure renders the arbitral award null, in addition to the fact that the award has been issued in contrast to articles 245¹⁰⁶¹ and 249¹⁰⁶² of

¹⁰⁵⁹ Federal Law no.26/1981, Concerning Commercial Maritime law, (hereinafter maritime law), article 245 state:” The freighter must place the specified vessel, in seaworthy condition and properly equipped to carry out the operations specified in the charter party, at the disposal of the charterer at the agreed time and place. Furthermore he must keep the vessel in such condition throughout the period of the contract.”

¹⁰⁶⁰ Federal Law no.10/1992 On Evidence In Civil and Commercial Transactions, article 5/1 state:” 1- The Court may, by virtue of a decision recorded in the minutes of the session, go back on what it has ordered to be taken as evidence procedures, provided it mentions in the minutes the reasons for changing its mind, unless such change was decided by the court without a request from the parties to the litigation.”

¹⁰⁶¹ Supra note 478.

¹⁰⁶² Article 249 of the commercial maritime law states:” 1-The rent shall begin to run from the day on which the vessel is placed at the disposal of the charterer but nevertheless the rent is not due if the

the maritime law, moreover the arbitrator have failed to taken into account the ships captains statement that confirms that the failure of the ships engines was due to force majeure.

The court dismissed this claim stating that article 214, implies that the court has the right to clarify some of the provisions within the award that the arbitrator failed to explain in the award, this clarification is considered to be an interim measure that doesn't bind the court when deciding the subject of the dispute, unless the clarification by the arbitrator have managed to decide or change part of the award, only then would the court be bound. Moreover, according to the jurisprudence of this court the appellant need to specify the grounds of appeal, for example if the appeal was based on the fact that the arbitrator have failed to rule on one of the subjects of the dispute that the parties have agreed to include in the arbitration agreement, then the appellant need to identify those issues in his appeal.

Furthermore, according to the jurisprudence of this court article 212 sections 1 and 2 of the civil procedures shows the requirements needed in an arbitral award, and that the award is not required to meet the same requirements of a courts decision. Therefore, the court when deciding whether to recognize an award or not they are not required to examine the subject of the dispute only to ensure that public policy hasn't been breached.

However, the court is required to examine the procedures within the arbitration process, to ensure that the arbitrators have met the requirements of articles 212 and 216. The courts supervision over the arbitral award is limited and the purpose of having such a supervision is to ensure that the award is enforceable within the UAE, the courts supervision should not extend to revising the subject of the award,

vessel is lost or if it is stopped by force majeure or act of the freighter. It is not allowed to agree that the same shall be paid under all circumstances. 2 - If news about the vessel cease and it is then established that it is lost, the rent shall be payable in full up to the date of the last news about the vessel.”

for an award that have met the procedural requirements is considered to be a binding and enforceable award that receives res judicata status. Consequently, the appeal court decided to implement article 214, which grants the court the right to seek explanation from the arbitrator and since the arbitrator have passed away the court is unable to get such clarification from the arbitrator.

Therefore, the request to set-aside the award by the appellant should be limited to the award as being a legal act and should be on the procedural aspects of the award according to article 216 and not on what the arbitrator decided to grant in the award. Since the appealed decision came to the conclusion that the arbitrator upheld due process and rendered an award within the scope of the arbitration agreement and issued an enforceable award, in addition the appellant didn't identify the aspects that the arbitrator have failed to rule upon in the arbitration, which renders their plea ungrounded.

Thus, the court decided to dismiss the appeal.

10. Appeal no.732/24¹⁰⁶³

The defendant started the litigation¹⁰⁶⁴ against the appellant asking the court to order the payment of 652,511 U.S. dollars or its equivalent in UAE dirhams in addition to 12% interest until the fulfillment of the payment, in addition to order the provisional seizure on the appellants property, they based their claim on the fact that they agreed to rent an airplane from the appellant for one year, in order to transport mail between AD and Ishq Abaad airports, the defendant opened three bank accounts for the purpose of this agreement in the AD branch of Citi bank, the appellant confirmed the fact that they failed to pay the amount that the defendant. However,

¹⁰⁶³ Federal Supreme Court of the UAE civil circuit, appeal no. 732/24, issued on 26th of February 2005.

¹⁰⁶⁴ Abu Dhabi court of first instance, case no. 656/2001.

upon refusing to pay this amount the defendant sought the court to settle their dispute. The appellant counter claimed that the court that lack the proper jurisdiction to hear the dispute, based on the existence of an arbitration clause in the contract between the parties, upon which the defendant amended their request to submit the dispute to arbitration and that each party should appoint their own arbitrator and the court would appoint the third arbitrator, in addition to the validity of the provisional seizure no. 82/2001. The first instance court decided to refer the dispute to arbitration.

The appellant appealed this decision¹⁰⁶⁵, in which the appeal court decided to amend the appealed decision by changing the defendants arbitrator and the third arbitrator, the court also ordered the arbitrators to confirm their appointment and to draft the term of reference. This decision was appealed to the Supreme Court on three grounds.

The appellant argues in the first part of the first ground and on the second ground that the appealed decision failed to apply the law; for the appeal court upheld the first instance decision to refer the dispute into arbitration, which is an amendment of the original request to order the payment of the amount of the claim. Thus, the court should not accept this request and given the fact that the parties have agreed before the start of the dispute to arbitrate, as such the defendant doesn't have the right to request the court to refer the dispute into arbitration and appoint arbitrators. Moreover, the court should have accepted the appellant request to dismiss the dispute due to the existence of an arbitration clause.

The cassation court dismissed this plea, stating that according to article 98 of the civil procedure¹⁰⁶⁶, which addresses the counter claims and request and the

¹⁰⁶⁵ Abu Dhabi Court of Appeals, appeal no. 178/2002.

¹⁰⁶⁶ Civil procedures, article 98 state: "The claimant may submit any of the interlocutory requests: 1- Which include the amendment of the original request or the amendment of its facts in order to cope with the circumstances which have emerged or have been observed after the claim has been submitted.

amendment of the original claim, which allows for such action to be made in front of the first instance court. Therefore, the defendant has the right to amend their original request anytime before the closing argument.

The appellant argues in the second, third and fourth part of the second ground of the appeal that the appointment of the arbitrators occurred contrary to the requirement of the arbitration clause.

The court dismissed this argument stating that article 204 of the civil procedures, allows the court to appointment the arbitrators based on a request by the parties in the event of a dispute on the appointment or in the event that the arbitration clause didn't state a process of an appointment or if one of the parties refused to appointment an arbitrator. Thus, the court intervention in the appointment of the arbitrator is regulated by the conditions stated in this article, in addition to having the jurisdiction to hear the subject matter of the dispute. Since the contract shows that the parties have chosen arbitration as a method of resolving their dispute and by failing to appoint an arbitrator at the start of the proceeding, which implies that the appellant waived his right to appoint an arbitrator and consequently cannot dispute the courts decision to appoint an arbitrator in their place.

The appellant argues that the original request couldn't be amended since it was based on an arbitration agreement, the court responded by stating that there is nothing in the law that restrict the defendant from amending their claim, if the amendment occurred before the closing argument. Furthermore, the appellant fourth part of this argument state that the defendant didn't request the start of the arbitral proceedings before the start of the litigation, which makes their argument that the appellant failed

2-Which are complementary to the original request, consequent, or indivisibly connected thereto. 3- Which includes addition or change to the reason of the action provided that the request's facts shall remain as they are. 4-Requesting an order with a precautionary procedure .5 - Which the court shall allow to be submitted and connected to the original request.”

to appoint an arbitrator null, the court dismissed this argument as well stating that the appellant failed to appoint an arbitrator after they have agreed to submit the dispute to arbitration according to article 204, which grants the court the right to appoint an arbitrator in this instance.

The appellant argues in the third ground that the court has no jurisdiction to hear the case according to article 31/3¹⁰⁶⁷, since the agreement was concluded in Turkmenistan and the appellant resides in that country, which is supported by the fact that the appellant is an entity of the Turkmenistan government.

The court dismissed this argument stating that according to articles 20¹⁰⁶⁸ and 21¹⁰⁶⁹, which implies that the courts jurisdiction is part of the public policy of the court that the parties have no right to agree to disregard it. Furthermore, the appellant have taken residence in one of the apartments in the Emirate of Abu Dhabi and made it into a headquarters for their operations in the UAE, in addition to the agreement between the parties that shows that part of the agreement would have to be concluded in the UAE according to clause 13/6 of the agreement, moreover the purpose of leasing the plane it to export goods from AD's airport to Ishq Abaad Airport.

¹⁰⁶⁷Article 31/3 of the civil procedures, supra note 5, state:” 3-The jurisdiction should be in the commercial matters of the court in which circuit the prosecuted residence exists or be given to the court in which circuit the agreement has been concluded, totally or partially executed or to the court in which circuit the agreement should be executed.”

¹⁰⁶⁸Id Article 20: “With the exception of the real actions related to a real estate abroad, the courts shall have the jurisdiction to examine the actions prosecuted against the citizen and the actions prosecuted against the foreigner who has residence or domicile in the state.”

¹⁰⁶⁹Id Article 21/3 which state: “The courts shall have jurisdiction to examine the actions against the foreigner who has no residence or domicile in the state in the following cases... If the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts”

11. Appeal no. 546/24¹⁰⁷⁰

The defendant started the litigation¹⁰⁷¹ by requesting the court to order the payment of 45,000 dhs. as a compensation to the damages that the defendant suffered due to the appellants negligence that resulted in a fire in a warehouse owned by him. The defendant claim that the appellant rented a warehouse in order to use it as a car repair shop and they certified this contract in front of the municipality of Sharjah on the 1/4/1997, a fire broke out in the shop and the damages were estimated to be in the amount of the claim. The first instance court appointed an expert that determined the amount of 25,440 as a compensation of the damages. The appellant appealed¹⁰⁷² the court decided to uphold the appealed decision.

The appellant appealed this decision on three grounds; the first ground argues that the appellant have pleaded in front of the first instance court that the court lacks the proper jurisdiction, since the dispute falls under the jurisdiction of the Municipality of Sharjah committee of arbitration and settlement¹⁰⁷³. However, the court stated that this dispute doesn't fall under the jurisdiction of that committee since the dispute doesn't rise from the lease agreement between the parties, since the dispute is in regard to identifying the damages that occurred due to the appellant negligence. The appellant argues that on the contrary it is a result of the appellant's obligation to safeguard the leased property, subsequently it makes this dispute rise from the lease contract and as such falls under the jurisdiction of that committee.

¹⁰⁷⁰ Federal Supreme Court of the UAE, civil circuit appeal no. 546/24, issued on the 3rd of July 2005..

¹⁰⁷¹ Sharjah's Court of First Instance, case no. 271/1999.

¹⁰⁷² Sharjah's court of appeal's, appeal no.8/2002, issued on 4/9/2000.

¹⁰⁷³ According to article 1 of law no.4/1988 in regards to regulating the relationship between the tenants and the landlords in the emirate of Sharjah.

The court dismissed this argument, stating that based on the jurisprudence of this court the Municipality of Sharjah's Arbitration committee jurisdiction¹⁰⁷⁴ is limited to disputes that rises from the lease agreement and in regard to the application of this agreement. The defendant in this dispute rented the warehouse to the appellant to use it as a car repair shop, and based his claim on the fact that the appellant was found guilty of negligence in another dispute¹⁰⁷⁵ that led to this warehouse destruction. Therefore, this dispute is governed by the general rule that every act that results in damages needs to be compensated¹⁰⁷⁶, even though that this act occurred as a result of leasing the property between the litigants, however the dispute is not in regards to the application of the contract, it is a dispute regarding the appellants unlawful act, which falls outside the scope of the committee.

The appellant second ground of appeal argues that his usage of the warehouse was lawful, since the fire has occurred not as a result of the appellant's action but due to his normal usage of the warehouse.

The court dismissed this ground, stating that a final criminal decision has an effect over civil courts; it binds the court in a way that the civil court is unable to reexamine what have been decided by the criminal court and is bound by that decision when deciding the civil rights of the parties that relate to this criminal decision. The defendant based his claim on the criminal decision¹⁰⁷⁷, which decided that the fire occurred due to the appellants negligence, thus the court is bound to what have been decided in that decision.

The third ground of appeal argues that the court failed to answer his plea that the owner of the warehouse (the defendant) action have helped in the occurring of the

¹⁰⁷⁴ Which were created by the Emirate of Sharjah Law no. 92/1977 and its amendments laws no.7/1986 and no.4/1988.

¹⁰⁷⁵ Sharjah Federal court of First instance, criminal circuit, case no.3301/1998.

¹⁰⁷⁶ Article 282 of the civil transaction law.

¹⁰⁷⁷ Supra note 1075.

accident, since the warehouse lacks the fire safety equipment, which were not installed and as a result helped in the spread of the fire and the damages in the warehouse.

The court dismissed this argument, stating that the court have decided to base their decision on the experts report and is not bound by the litigants requests.

12. Appeal no. 851/25¹⁰⁷⁸

The appellant started the litigation¹⁰⁷⁹ in order to resolve a leasing dispute against the defendant, in which he protested the Municipality of Sharjah's Arbitration Committee award dated 21/6/1998, the appellant claims that the defendant started the proceedings in front of the committee asking them to order the appellant to vacate the property that he is leasing from the defendant (a commercial shop), the defendant claim that the appellant failed to pay his rent which is the reason for his request, the committee ordered the appellant to vacate the property and to pay the reminder of the rent. The appellant requested the nullification of this award stating that he fulfilled his obligation by paying the rent, the first instance court decided on the 31/1/2000 to dismiss the claim. The appellant appealed this decision to the appeal court¹⁰⁸⁰ which decided on the 31/10/2000 to nullify the appealed decision and decided that the lease contract is still in affect and that the defendant has no right to the rent before 7/1/1998, the defendant appealed this decision to the supreme court¹⁰⁸¹, which decided to nullify the appealed decision and refer it back to the appeal court, which decided to appoint an expert and after submitting his report the court decided on the

¹⁰⁷⁸ Federal Supreme Court of the UAE civil circuit, appeal no. 851/25 issued on the 30th of May 2004.

¹⁰⁷⁹ Sharjah's Federal court of First Instant, civil circuit case no. 679/1998.

¹⁰⁸⁰ Abu Dhabi Federal Court of Appeals, civil circuit appeal no. 49/2000.

¹⁰⁸¹ Federal Supreme Court of the UAE appeal no. 719/22, issued on the 25th of June 2002.

27/9/2003 to amend the committees award in regards to the rent amount and raise it from five thousand dhs. to ten thousand dhs.

The appellant appealed this decision to the Supreme Court in this appeal on one ground¹⁰⁸², the appellant argues that the appealed decision ordered the appellant to vacate the property despite the fact that the arbitration committee ordered the increase of the rent from five thousand to ten thousand, which was recognized in front of the municipality of Sharjah's. The appellant managed to pay to the defendant and in doing so he managed to fulfill his obligation according to article 5 of law no. 92/1977 amended by laws no.7/1986 and 4/1988 for the emirate of Sharjah, which identify the conditions in which the owner of the property could request the tent to vacate, in this case it would have been the failure to pay the rent. However, the appellant managed to pay the rent in here and as such this article doesn't apply.

The court dismissed this argument, stating that article 5, implies that the legislator in here added a new requirement to those mentioned in the civil transaction law regarding the lease agreement¹⁰⁸³, which state that the lease agreement ends by the end of the term of the lease, the Sharjah's law state that the owner of the property has no right to request to vacate the property unless three years have passed from the start of the lease or if one of the condition mentioned in the law can be applies¹⁰⁸⁴. Thus, it limits the request to vacate the property to the passing of three years or if one of the conditions in the law has been met. Moreover, based on the arbitral award in case no. 676/1998 dated 31/1/2000 the defendant became the owner of the property on

¹⁰⁸² The defendant argued that the appeal should be dismissed based on the fact that the appeal was signed by the appellant representative that doesn't relate to the appellant. The court dismissed this argument stating that the law allows for the appeal request to be submitted by any individual in place of the appellant, and the only requirement is having the appeal signed by the appellant or his representative.

¹⁰⁸³ Which is regulated in the civil transaction law, articles 742-848.

¹⁰⁸⁴ The emirate of Sharjah's lease has been amended in 2007, by Sharjah's law no.2/2007 n regards to regulating the relationship between the tenants and the landlords, which confirms those same requirements in article 13.

the 23/1/1995 and the lease have continued for more than three years. Thus, the defendant request to vacate the property on the 21/6/1998 is lawful.

The appellants second and third part of appeal, argues that the appealed decision have confirmed the experts report, which increased the rent amount from five thousand to ten thousand dhs. even though the report lacked any evidence to support this increased amount.

The court dismissed this argument as well, stating that article 6 of law no. 92/1977, implies that in the event of a dispute between the tenant and the landlord can be submitted either to the arbitration committee or to the court.

Thus, the court decided to dismiss the appeal.

Civil Circuit Disputes

a. Dubai Court of Cassation

1. Appeal no. 167/2002¹⁰⁸⁵

The appellant company started the proceedings¹⁰⁸⁶, against the two defendants asking the court to award the company the amount of 850738.45 dhs., in addition to the interest rate of 12% from the start of the proceedings and until the fulfillment of the payment, the appellant also asked the court to appoint an arbitrator to settle the dispute. The appellant explains that the basis for starting the litigation is an agreement between the parties dated 18/6/1998 in which they agreed with the first defendant based on a sub-construction contract to supply and install the electrical and mechanical equipment in the construction site based on the plans that were supplied by the first defendant since they are the main contractors to the project, which is being constructed for the second defendant (the owner of the property), resulting in the amount of the. Moreover, the appellant claim that when the defendants failed to pay their expenses, they requested that the defendant should appoint an arbitrator in order to start the arbitration proceeding, which they failed to do so. The first defendant counter claimed in front of the court to dismiss the litigation based on the existence of an arbitration clause. The court decided on the 8/10/2001, to dismiss the case based on the existence of an arbitration clause, and to appoint the engineering expert as an arbitrator and should submit an award within six months from the first hearing.

The appellant company appealed this decision¹⁰⁸⁷, requesting to nullify the decision in regards to referring the dispute into arbitration, instead refereeing the dispute back to the first instance court; their reserve request was that the court

¹⁰⁸⁵ Dubai Court of Cassation appeal no. 167/2002, issued on the 2nd of June 2002.

¹⁰⁸⁶ First Instance court of Dubai, commercial circuit case no. 162/2001, issued on 8/10/2001.

¹⁰⁸⁷ Dubai Court of appeals, appeal no. 1447/2001, issued on 19/3/2002.

supervises over the arbitration proceedings according to article 213/1. The appeal court decided to uphold the appealed decision.

The appellant appealed this decision to the cassation court on the 22/4/2002 on seven grounds.

The second and third ground of appeal argue that the appealed decision upheld the first instance decision, to dismiss the appellants claim in regard to the payment of his expenses, basing their decision on the arbitration clause in the contract. The appellant argue that the scope of the arbitration clause doesn't involve this request, for the arbitration clause scope involves disputes that concern the fulfillment of the construction contract, on the other hand the appellant is seeking to get paid in exchange for the work the he have done in the project. Furthermore, the arbitration clause has no affect since the construction contract have ended according to article 892 of the civil transaction.¹⁰⁸⁸

The court dismissed this argument stating that paragraph five of article 203 of the civil procedures implies that if the parties have agreed to arbitrate then they have waived their right to litigate in front of the court, in the event that one of the parties disregarded the existence of the arbitration clause and started the proceedings in front of the court and no one argued to the existence of the arbitration clause in the first hearing, then the parties right to argue on the existence of the arbitration clause would be waived. According to the jurisprudence of the court the party seeking to uphold the arbitration agreement or clause need to take a positive action in the first hearing by objecting to the proceedings and requesting the dismissal of the litigation and referring the dispute into arbitration. Which requires a dispute to have in fact risen between the parties, the court explained what is considered a dispute, according to the

¹⁰⁸⁸ Article 892 of the civil transaction law state: "The contract for work shall come to an end by completing or by rescission of the contract by mutual agreement or by order of the court."

court it is a dispute that the purpose of which is the protection of a legal right or the legal status of the parties, moreover the scope of the arbitration need to be identified clearly in the arbitration agreement, otherwise it would be considered a ground of setting-aside the award according to article 203/3 of the civil procedures, which is the legal relationship that the dispute have risen about and identifying this relationship on its own is sufficient to consider the arbitration agreement valid, even if the agreement didn't identify what disputes falls under the scope of the arbitration. Even though that arbitration is limited to what the parties have agreed to they still have the right to identify what is considered fall under the scope of the arbitration, moreover the determination if that dispute falls under the scope of arbitration is the responsibility of the first instance court.

The first ground of appeal argues that the appeal court dismissed their claim in regard to appointing the arbitrator, stating that according to article 204/2 the decision to appoint the arbitrator is not subject to appeal, the appellant claims that the court didn't appoint an arbitrator, moreover the decision to appoint the arbitrator is not subject to appeal only if the parties have agreed to the appointment, which is not the case in this instance.

The court dismissed this claim, stating that the court intervention in the appointment process is limited to the conditions stated in article 204, one of those conditions is if the parties have failed to come to an agreement in regard to the arbitrators, and one of the parties sought the intervention of the court to resolve this issue, moreover the parties doesn't have the right to appeal once the court have answered their request. Based on the facts of the dispute and the sub-construction contract that the parties to the dispute have agreed to arbitrate any dispute that rises from this contract, the appellant company have stated that the first defendant didn't

comply when a request was made to them to appoint an arbitrator to start the arbitration proceedings, which is why the first instance court have appointed an arbitrator upon the appellants request. Therefore, the appellant has no right to appeal in this respect since the court has granted their request.

The fourth ground of appeal argues that the appeal court upheld the first instance decision to dismiss the dispute in regards to the second appellant, the court justified this decision by stating that the second defendant is not part of the sub-construction contract, moreover the arbitration clause has no affect against the second defendant. The appellant argues that the second defendant is indeed a part of the sub-contract and the arbitration clause affects him; moreover the court by deciding to dismiss the second defendant from the arbitration clause, should have ordered him to pay the amount of the claim that the appellant is asking for in their claim.

The court dismissed this claim stating that article 252 of the civil transaction law state that” The contract does not impose any obligation on third parties, but may establish a right in their favor.” implying that the arbitration agreement has no effect against third parties and its effect is limited to the parties to the agreement, which are the ones that helped in creating the contract and they have the will to be bound by it. However, the arbitration clause can extend its effect to third parties in certain circumstances, if for instance the contract have transferred to a third party in this condition the arbitration clause would have effect to this party. Moreover, according to article 891 of the civil transaction¹⁰⁸⁹, which implies that the determination of all of this factor is part of the subject matter court, and based on the facts of this dispute the first instance court have come to the decision on sound reasoning that is supported by evidence, thus the court decided to dismiss this argument.

¹⁰⁸⁹ Article 891 state: “.” The subcontractor may not have a claim against the master, as regards the dues of the first contractor, unless the latter refers him to the master.”

The fifth and seventh ground of appeal, argues that the court decision to refer the dispute into arbitration and to stop the litigation until the arbitrator render an award and submits it to the court for recognition is flawed. Since there is nothing in the law that state that the court should pause the litigation until the arbitrator renders an award, moreover by referring the dispute to arbitration the court essentially have given up their jurisdiction over the dispute and they have given their right to recognized the award.

The court dismissed this argument stating that article 213 of the civil procedures shows that the courts authority over court-annexed arbitration, doesn't stop by referring the dispute into arbitration but continues until the arbitrator renders an award and is being recognized by the court.

The appellants sixth ground of appeal argues on the expenses of the case, which was also dismissed by the court based on articles 132¹⁰⁹⁰ and 135¹⁰⁹¹ of the civil procedures.

2. Appeal no. 261/2002¹⁰⁹²

The defendant started litigation in this dispute¹⁰⁹³ requesting the payment of 420211 dhs. Plus the interest, the defendant claims that based on a construction

¹⁰⁹⁰ Article 132 state: "1 - The decision's copy according to which the execution is to proceed shall be sealed with the court's seal and the clerk shall sign it after subjoining it with the executive wording, and it shall not be delivered except to the opposing party who has an interest in the decision execution, provided that the decision should be executable. 2 - It shall not permissible to deliver another executive copy to the same litigant party unless the first copy has been lost or it has become impossible to use, and that shall be by the order of the judge or the circuit manager. 3 - It is possible to give an official simple copy of the decision's original copy to whoever of the concerned persons who would request it and it shall not be given to other than them unless with a permission from the judge or the circuit manager according to the circumstances."

¹⁰⁹¹ Article 135 state: "If both opposing parties have failed in some requests it shall be possible to judge that each party bears what he has paid of the expenditures or to decide the division of the expenditures between them according to what the court would decide in its judgment, and the court may also impose all the expenditures on one of the."

¹⁰⁹² Dubai Court of Cassation appeal no. 261/2002 issued on the 2nd of November 2002.

contract that was concluded on the 15/2/1999 between the litigants in order to construct a residential villa in exchange of an amount of 1986710 dhs. The defendant claims that the appellant failed to pay this amount and that is the reason behind this litigation, the appellant pleaded to the court to dismiss the case based on the existence of an arbitration clause, the court decided to dismiss the case based on the existence of an arbitration clause. The case was appealed¹⁰⁹⁴ and the appeal court decided to vacate the appealed decision and refer the dispute back to the first instance court.

The appellant appealed this decision to the cassation court on the 4/6/2002 asking the court to nullify the appealed decision and refer the dispute back into arbitration, the appellant based his argument on one ground.

The appellant argues that the appealed decision failed to uphold what the parties have agreed upon in the contract, since articles 5-8 of the construction contract state that the rules of the FIDIC is the reference to any disputes that occur in the time of construction and maintenance, the court came to the conclusion that this dispute is outside the scope of the arbitration clause, which is in contrast to clause 67/3 of the FIDIC which state that any dispute between the parties shall be resolved through the rule international chamber of commerce arbitration, which implies that the rule of arbitration apply to any dispute that rises between the parties, and is not limited to the disputes that concern the construction and maintenance of the property.

The court dismissed this argument stating that the court has the authority to understand and interpret the contract as they see fit, this interpretation doesn't fall under the supervision of the cassation court. Furthermore, the jurisprudence of this

¹⁰⁹³ Dubai Court of first instance, commercial circuit, case no. 881/2001, dated 16/1/2002.

¹⁰⁹⁴ Dubai Court of appeals, appeal no.151/2002, dated 27/4/2002.

court establishes that arbitration is an exception to the individual right to seek their natural judge, thus every interpretation should be limited to what the parties have intended, the appealed decision decided that the arbitration clause scope doesn't cover this dispute based on an examination of the construction contract dated 15/2/1999 that shows in article 5/8 that the parties have agreed to submit the disputes that relates to the construction and the maintenance into arbitration. Thus, it shows that the parties have agreed to limit the scope of the arbitration to those disputes, moreover the defendant have submitted evidence of the completion of the construction of the villa by submitting the certificate of completion issued from the municipality of Dubai on the 14/5/2001, which the appellant didn't dispute and thus his argument to the application of the arbitration clause has no basis.

Therefore, the court decided to not implement the arbitration clause in this dispute, moreover the rules of the FIDIC contract doesn't relate to the public policy, which implies that the parties have the right to amend the rules of this contract in regard to submitting all disputes into arbitration, and since the parties in this dispute have agreed to limit the scope of the arbitration to issues raising in the construction period, as such the arbitration clause doesn't apply to this dispute.

3. Appeal no. 328/2002¹⁰⁹⁵

The appellant company started the litigation¹⁰⁹⁶ against the defendant company, asking the court to recognize an arbitral award. The appellant explained their claim stating that based on arbitration agreement between the parties dated 26/2/2000, the Dubai chamber of commerce and industries appointed a sole arbitrator

¹⁰⁹⁵ Dubai Court of Cassation appeal no.328/2002, issued on the 23rd of November 2002.

¹⁰⁹⁶ Dubai Court of first instance, case no.241/2001

in the dispute, the arbitrator rendered an award against the defendant company ordering them to pay 365000 U.S. dollars or its equivalent in UAE dhs. and the interest rate of 9%, in addition to the expenses of the arbitration, the defendant company presented their defense and asked the court to nullify the award. The court ruled on the 22/10/2001 to dismiss the claim. The appellant appealed this decision¹⁰⁹⁷ the court decided to uphold the appealed decision.

The appellant appealed this decision to the cassation court, arguing that the appeal court upheld the first instance decision to dismiss their request to recognize the award, on the ground that the award lacked a copy of the arbitration agreement, which the court claim is a ground of setting-aside the award. The appellant argues that an arbitration institute within the UAE, an institute that is recognized by the UAE, issued the award and the court should not undermine the authority of this institute.

Moreover, the award was issued according to an arbitration agreement between the parties dated 6/5/2002, which was presented to the arbitration institute in compliance with article 23 of the institute rules, furthermore the chamber have confirmed sending the award to the court containing the arbitration agreement, they also sent a copy to the sent a copy of the arbitration agreement to the chief justice in the second circuit of the Dubai First instance court. Moreover, the Chamber of commerce testimony that the arbitration agreement has been presented at the start of the arbitration proceedings should have been taken into account by the court when deciding to recognize the award, since this is an institutional arbitration. The court decided to refuse to recognize the award despite all of those facts, moreover the legislator aim from having to present an arbitration agreement with the award is to avoid having an arbitration award issued without an agreement or that the arbitrator have exceeded the

¹⁰⁹⁷ Dubai Court of appeals, appeal no.1513/2001, issued on 21/4/2001.

scope of the arbitration. For the following reason the court should nullify the appealed decision and recognize the award.

The court dismissed this claim, stating that according to article 212/5 of the civil procedures and article 45/3 of the rules of the Dubai chamber of commerce and industry arbitration and mediation institute, which state:” the final award of the Tribunal Shall be in writing and must include: (a) the arbitration agreement....”,¹⁰⁹⁸ in addition to the jurisprudence of this court that shows that the award should contain a copy of the arbitration agreement, which is an essential requirement that is required to be presented when recognizing the award, otherwise the award would be set aside, this rule doesn’t change if the arbitration were to be ad hoc or an institutional, and this requirement cannot be fulfilled by presenting a testimony or a certificate from the institute that the agreement have been submitted at the start of the proceedings, a requirement that cannot be completed by a separate paper or by refereeing in the award to the arbitration agreement without presenting it. However, this requirement can be fulfilled by presenting the content of the agreement with the award, the purpose of this requirement is to allow the court to practice its supervisory role over arbitration. Furthermore, the appellant have referred to document no.13 as a copy of the arbitration agreement, without explaining the content of this document in order for the court to recognize the award.

Thus, the award is null and this fact is not affected by presenting a letter from the arbitration institute, which shows that the agreement have been presented at the start of the proceedings.

¹⁰⁹⁸ Dubai International Arbitration Center (DIAC) conciliation and arbitration rules of 1994.

5. Appeal no. 222/2005¹⁰⁹⁹

The defendant started the litigation¹¹⁰⁰ against the appellant by asking the court to recognize an arbitral award issued on the 26/8/2000, claiming that the litigants are partners in the inheritance of the deceased and during his life time they agreed to divide their inheritance through arbitration, this agreement was signed by the first appellants agent and the rest of the inheritors. The appellants counter claimed that the award is null since the first appellant agent didn't have the right to sign the arbitration agreement and that they were not notified of the start of the arbitration, they also argued that the arbitrator have acceded the scope of the arbitration agreement. On the 28/4/2004 the court decided to nullify the arbitral award, this decision was appealed¹¹⁰¹ and the appeal court decided to uphold the appealed decision.

This decision was appealed to the cassation court¹¹⁰², which decided to nullify the appealed decision and to refer the dispute back to the appeal court, the court stated that even though the first appellant agent acceded his agency contract by agreeing to arbitrate, which doesn't affect the other parties to the agreement and they have no right to request the nullification of the award, on the 21/5/2005 the appeal court decided to recognize the award.

The appellant appealed this decision to the cassation court in this appeal on six grounds, the first ground of appeal argues that the cassation court referred the dispute to the appeal court and they rendered a decision instead of referring the dispute to the first instance court, in doing so the court have wasted the appellants opportunity to

¹⁰⁹⁹ Dubai Court of cassation, appeal no. 222/2005, issued on the 22nd of November 2006.

¹¹⁰⁰ Dubai Court of First instance, case no.358/2003, issued on 28/4/2004.

¹¹⁰¹ Dubai Court of Appeals, appeal no.246/2004, issued on 12/6/2004.

¹¹⁰² Dubai Court of Cassation, appeal no.209/2004, issued on the 20th of March 2005.

argue their case in front of the first instance court, which is one of the general principles of litigation to allow the litigants the opportunity to pleaded their case in two stages.

The court dismissed this argument stating that article 166 of the civil procedures implies that if the appeal court decided to nullify the appealed decision its not obliged to refer the dispute back to the first instance, unless it decided to nullify the first instance decision regarding jurisdictional issues, and since the first instance court decisions in this instance is one in regards to the substance of the dispute, ergo the appeal court can render a decision without referring the dispute back to the first instance court and doesn't constitute as infringing the appellants right to appeal.

The appellant second and third ground of appeals, argue that the decision failed to uphold due process, they argue that all of them except for the second appellant asked to nullify the award, on the fact that the award was issued based on an arbitration agreement that was not signed by the appellants, and that the agency agreement between the appellants and the second appellant doesn't allow him to enter into an arbitration agreement on their behalf and be their representative in the arbitration. Moreover, the arbitrator failed to notify them of the start of the arbitration proceedings, a fact that the appeal court failed to answer and stated that they are parts of the arbitration agreement and signed it without proving this fact, and the appealed decision came to the conclusion that the second appellant is a representative of the appellants and have the authority to be present in the arbitration procedure. However, the appellants denied their signature on the arbitration agreement and repudiate the agreement which makes it void, furthermore the documents presented by the court lacks any evidence that the appellants have given the second appellant any

authorization as their agent to enter into an arbitration agreement, and the second appellant was present in the arbitration proceedings as an arbitrator and not as a representative of the parties, in addition to the fifth clause of the arbitration agreement that state that the arbitrator need to notify the parties of the initiation of the arbitration proceedings, which they failed to do.

The court dismissed this argument stating that according to article 11 of the evidence law¹¹⁰³, implies that a customary paper is considered issued from the parties that have signed it, unless the parties have explicitly repudiate what has been stated in it or argues that it was a forgery. Moreover, the arbitration proceedings is considered initiated by conducting any procedures between the parties such as the arbitrator informing the parties of the start of the proceedings or the presence of one of the parties or their representative in the arbitration proceedings, according to the facts of the case and to the arbitration agreement, which the award was based upon that they were signed by all of the appellants, and the arbitration agreement state that the second appellant is a representative of all the parties of that agreement, the arbitrator confirmed the presence of the second appellant as a representative of the rest of the parties on the 18/6/2000.

The appellants argues in the fourth ground of the appeal that all of them except for the second appellant upheld the argument that the defendants right to arbitrate have fallen, they also requested the joining of case no. 202/2003 which is initiated by the appellants in regards to the inheritance and that the defendants did not uphold their

¹¹⁰³ Article 11 state: “1 - An informal document is deemed to emanate from the person who signed it, unless he formally contests the writing, the signature , the seal or the finger print alleged to be his . His heirs or successors in title are not bound to contest, but may only declare on oath that they do not know that the writing, the signature, the seal or the finger print are those of their author .2 - However , the one who discussed the subject - matter of the document may neither contest the writing , signature , seal or finger print attributed to him nor allege his ignorance that such a thing has been issued from the person from whom he received this right.”

right to arbitrate in that dispute and a decision was made by the court in that regards, and according to article 203 of the civil procedures this constitute an annulment of the arbitral award. However, the appealed decision did not answer this argument.

The court dismissed this argument stating that the parties should explicitly waiver their right to arbitrate, and the burden of proof falls to the party that claim such an act have occurred, according to the jurisprudence of this court its obliged to respond to substantial defense by the litigants and not to all of the parties requests and defense. In regards to the dispute in question in case no.202/2003 the defendants attorney have counter claimed to dismiss the dispute based on the fact that an arbitral award has been issued in this dispute in cases no.358/2003 and no.202/2003, the court decided to appoint an expert in those disputes and to nullify the arbitral award in case no.358/2003. Therefore, there is no reason to argue that the defendants right to arbitrate and the award have fallen, since they have upheld this decision and didn't show that they have waived their right.

The appellant fifth ground argues that the three inheritors were not represented in the arbitration procedures and one of them did not agree to arbitrate and he received a courts decision in regard to his share in the inheritance, which makes the arbitration procedure void and subject to annulment since the inheritance cannot be divided between a court decision and arbitral award.

The court dismissed this argument, stating that the appellant have pleaded to the appeal court that the inheritors share in question have been bought by the appellants and as such they have been excluded from the inheritance, which is beyond the scope of the arbitration and given the fact that this plea is considered to be non-substantial the court has the right to either answer it or not.

The sixth ground of appeal argues that the agency agreement between the inheritor and the first defendant only allows the first defendant to agree to arbitrate in regards to the properties that the inheritor owns in partnership with his deceased sister. However, the appealed decision dismissed this argument stating that the courts jurisprudence doesn't extend to the subject matter of the arbitration.

The court dismissed this argument, stating that the arbitration agreement that is being conducted by the agent and extend the agency contract and his powers as a representative is subject to partial annulment regarding the relationship between the agent and his client and not in regard to this parties. Therefore, the appellants have no right to request the nullification of the award by stating that the agent has exceeded his agency contract.

6. Appeal no. 273/2006¹¹⁰⁴

The appellant started the litigation¹¹⁰⁵ against the defendants, requesting that the court should refuse the appointment of the first and third defendants as arbitrators in the dispute, which were appointed based on a decision by the court in case no.232/2004, he claim that on the 9/10/2004 the court decided to appoint the first, second and third defendants as arbitrators in the dispute between the appellant and the fourth defendant, the arbitrators started the proceedings and submitted an award to the court on the 29/9/2005, arguing that the award was based on a prior knowledge by the arbitrators and was issued without any evidence supporting this award, he argues that the first defendant was the guardian over the disputed company based on an order in the preliminary dispute no.13/2005 dated 8/5/2008 and appeal no.51/2005 dated

¹¹⁰⁴ Dubai Court of Cassation appeal no.273/2006, issued on the 4th of November 2007.

¹¹⁰⁵ Dubai Court of First Instance, case no.702/2005, issued on 26/6/2006.

28/6/2005, which made the defendant combine two traits an arbitrator and a guardian in addition to having a prior dispute between the appellant and the first and third defendants, which makes them unfit to rule over the dispute.

The court decided to dismiss the claim. This decision was appealed¹¹⁰⁶ and the appeal court decided to dismiss the appeal. The appellant appealed this decision to the cassation court; the first and fourth defendants attorney submitted a plea to the court requesting the dismissal of the appeal, claiming that article 119 of the civil procedures¹¹⁰⁷, implies that decisions in regard to the dismissal of the arbitrator is not subject to appeal.

The court dismissed this argument stating that article 173 of the civil procedures¹¹⁰⁸, which allow the appeal courts decision to be appealed to the cassation court except were its explicitly stated that certain decisions are unappealable, moreover article 119 of this law that concern the dismissal of judges doesn't apply to arbitrators, which is regulated under article 207. The appellant argues that his request to dismiss the arbitrators, which was submitted to the appeal court cannot be separated from the main dispute in case no. 273/2004 in front of the first instance court, for in that dispute the request was made to appoint arbitrators and the court have granted them their request and in doing so the courts jurisdiction has been waived, and all that remains to them is to recognize the award once the arbitrators submit their award in compliance with article 213/3. Therefore, the request in regard to dismissing the arbitrators doesn't rise from the request to appoint the arbitrators, and as such the appeal court has no right to dismiss the appeal and should hear the dispute.

¹¹⁰⁶ Dubai Court of Appeals, appeal no. 523/2006, issued on 16/11/2006.

¹¹⁰⁷ Which addresses requests made to dismiss judges.

¹¹⁰⁸ Which addresses the decisions that are subject to appeal to the cassation court.

The court dismissed this argument stating that article 213 implies that arbitration can either be court-annexed or ad hoc or institutional, and in regards to court-annexed arbitration it's based on a decision of the court after the parties agreement to arbitrate, and in that instance the court is obliged to follow paragraphs 1 and 2 of this article; on the other hand paragraph 3 concerns arbitration that happens outside the court either ad hoc or institutional, moreover the decisions in regards to appeals is a matter of public policy and the court has the right to answer it on its own, as such article 151¹¹⁰⁹ implies that the legislator set forth general requirement for appeals that doesn't allow appeals on preliminary decisions on its own, unless it fell under the exception stated in this article. The facts of this case shows that the appellant have started the proceedings in this dispute after the arbitrators submitted their, which indicates that the appellant's dispute is directly related to the main dispute, as such it falls under the jurisdiction of the court that hears the request to recognize the arbitral award.

Therefore, the court decided to dismiss the appeal.

7. Appeal no. 222/2006¹¹¹⁰

The defendant started the litigation¹¹¹¹ in order to request the appointment of an arbitrator, the court decided grant him his request by appointing three arbitrators in the dispute one of them is the appellant, the purpose of this appointment is to resolve

¹¹⁰⁹ Civil procedures law, article 151 state:” It is not possible to appeal against the decisions delivered during the progression of the action since the litigation has not been terminated therewith except with the delivery of the decision terminating all the litigation, and that with the exception of the temporary and summary decisions, the decisions issued for staying the action, the decisions liable to the obligatory execution, and the sentences issued deciding the lack of jurisdiction, unless the court had the authority to judge in the action.”

¹¹¹⁰ Dubai Court of Cassation appeal no. 222/2006, issued on the 25th of February 2007.

¹¹¹¹ Dubai Court of First instance case no. 232/2004, issued on 9/10/2004.

the dispute between the parties in a companies contract¹¹¹², which has a clause that refer to arbitration in the event of a dispute, the arbitrators are required to render a decision in the dispute within six months from the start of the first hearing; on the 4/6/2005 the arbitrators requested from the court to extend the arbitration period, the court granted decided to grant them their request and extend the arbitration period, the plaintiff petitioned to the court to nullify this request in petition no. 76/2005, claiming that the extension request was not enforced within 30 days from the courts decision, moreover the arbitrators has no right to request this extension from the court given the fact that they are not part of the dispute and as such lack the right to request an extension from the court, the petitioner also requested the dismissal of the third arbitrator, the petitioner also claim that the extension request should have been brought to the court in a separate litigation and not as preliminary measure, arguing that the chief judge have decided on his own without conferring with the other judges on this matter, furthermore the arbitrator has been appointed as a guardian on the company, as such he combines two contradicting characteristics an arbitrator and an opponent at the same time, lastly the petitioner have requested the dismissal of the third arbitrator.

On the 25/7/2005 the court accepted this petition; this decision was appealed by the third arbitrator in appeal no.68/2005 and the second arbitrator also appealed this decision, the appeal court decided on the 15/11/2005 to uphold the appealed decision, the third arbitrator appealed this decision to the cassation court in appeal no. 311/2005, the petitioner also appealed this decisions to the cassation court in appeal no. 325/2005, the court decided in appeal no. 325/2005 to dismiss it stating that the appellant has no interest in appealing this decision, and to accept appeal no. 311/2005

¹¹¹² Which was concluded on the 12/11/1996.

and to vacate the appealed decision and refer the dispute back to the appeal court. The court explained that the appeal court did not answer the appellant request in regard to the arbitrators right to extend the arbitration, according to article nine of the arbitration clause, which state: “the arbitrators shall render an award within six months of the start of the arbitration, in the event that the arbitrators required extra time to issue their award they would have to agree on a time period and submit it to the court”, on the 26/7/2006 the appeal court decided to dismiss the appeal and uphold the appealed decision, which was appealed to the cassation court by the third arbitrator on the 10/9/2006; the defendant submitted a plea to the court to dismiss this appeal, arguing that the dispute is between the defendant and the arbitration committee, thus the appeal that is submitted to the court by one of the arbitrators is submitted by someone that has no interest in the claim.

The court dismissed this plea, stating that articles 150¹¹¹³ and 170¹¹¹⁴ of the civil procedures implies that the appeal to the cassation court is not accepted unless it is being submitted by the party that has an interest of appealing the decision, therefore the appellant has the right to submit the appeal since he has an interest in submitting the appeal, given the fact that the decision was not in his favor.

The appellant based his appeal on four grounds, the first, third and fourth ground argues that the decision to accept the request of extending the arbitration,

¹¹¹³ Civil procedures law, article 150 state:” 1 - The appeal against the decisions shall not be possible unless brought by the convicted, and it shall not be possible to be brought by that who accepted the sentence expressly or implicitly, or by that whose requests have been judged, unless the law stipulates otherwise. 2 - The appellant shall not be harmed with his appeal.”

¹¹¹⁴ Id Article 170 state:” The time - limit of the petition shall be 30 days and it shall not start in the cases stipulated in the clauses 1,2 and 3 of the preceding article except from the day on which the fraud was disclosed or on which its committer confessed the fraud or on which its verification was sentenced or on which the perjury witness was judged, or on which the paper, which had been withheld , appeared . The time - limit in the circumstance stipulated in clause 6 shall start from the day on which the fraud, collusion or flagrant negligence has come to light and in clause 7 from the day on which the decision has been notified to the convicted or to that who represent him a valid representation.”

which has been granted by the court that heard the dispute in regards to appointing the arbitrators, even if it had been rendered by the head judge and signed by him alone it is still a lawful act, thus the court has no authority to nullify that judges decision. The appellant argues that since the decision is null since the court dismissed the main defendant from the suit, moreover the court dismissed their request that the petition in question is not subject to appeal according to article 204 of the civil procedures, which applies only to appointment decisions and doesn't extend to the arbitration procedure. However, this article state that the court's decision in regards to appointing arbitrators is not subject to appeal, which makes the decision that was rendered by the chief justice in regards to extending the arbitration period in comparison not subject to appeal as well.

The court dismissed this argument, stating that in regards to appeal no. 311/205, in which the court decided to vacate the appeal court decision and submit the dispute, back to the appeal court again to hear the dispute in regard to extending the arbitration period, which implies that the court decided to accept the appeal, as such the appellant has no right to argue in this matter.

The second ground of appeal argues that the ninth clause of the arbitration agreement, grants the arbitrators the right to extend the arbitration on their own without submitting a request to the court and they only have to notify the court about the extension. However, the appealed decision interpreted this clause on the contrary, which resulted in nullifying the extension date.

The court dismissed this argument, stating that the according to article 210 of the civil procedures, if the parties didn't agree on a time period for the arbitration then it shall be for six months from the start of the first hearing and the parties have the

right to extend that period either explicitly or implicitly and they have the right to delegate that right to the arbitrators, the court can also grant the extension based on a request of the arbitrators or one of the parties, furthermore the court has the right to understand and interpret the contracts and to conclude what the parties have intended to do, and since the appealed decision decided to uphold the first instance decision to nullify the petition dated 4/6/2005, by stating that: “ the arbitration clause that the appellant based his argument, is meant to grant the arbitrator the right to seek the court to request the extension in place of the parties, and not as the appellant is stating that it grants them the right to extend the period on their own and notify the court of that extension, and if the appellants claim were true then why did the clause state that the arbitrators are required to notify the court, moreover the court interpreted the clause to grant the arbitrator the right to determine the amount needed for the extension and request the court to confirm that amount. The court came to the conclusion that the arbitrators have upheld this clause by requesting the court to confirm the extension. However, the confirmation was granted from the chief justice on his own which is in contrast to the meaning of the court that is stated in article 210/2 of the civil procedures”. Therefore, court have based their interpretation of the clause on sound reasoning, which makes the appellants argument void.

Thus, the court decided to dismiss the appeal.

8. **Appeal no. 72/2007**¹¹¹⁵

The defendant company started the litigation¹¹¹⁶ against the appellant requesting the recognition of an arbitral award, the defendant claim that the they and

¹¹¹⁵ Dubai Court of Cassation appeal no. 72/2007, issued on the 10th of June 2007.

¹¹¹⁶ Dubai Court of First Instance, case no.468/2005.

the appellant both are commercial companies entered into an agreement to establish a company for the purpose of producing horse nutrition, in order to supply it to horse stables and dividing the revenues of this project between them, which forced the defendant to litigate the dispute in case no. 71/2004¹¹¹⁷ in front of the Dubai First Instance court, which decided on the 19/4/2004 to appoint an accounting expert as an arbitrator to settle the dispute between them, the arbitrator issued an award stating that the defendant shall be awarded the sum of 1055796 dhs. which resulted in their request to recognize the award, on the 21/12/2005 the court decided to recognize the award. The appellant appealed the decision to the appeal court¹¹¹⁸ which decided to dismiss the appeal, resulting in an appeal to the cassation court¹¹¹⁹, which decided to nullify the award and refer the dispute back to the appeal court to rule again, the court justified their decision by claiming that the appeal court decided to dismissed the appeal on the ground that the arbitration clause grant the arbitrator the right to mediate the dispute between the parties. However, the arbitration clause doesn't explicitly state that the parties have authorized the arbitrators to mediate the dispute. The appeal court after referring the dispute back to them decided on the 7/3/2007 to dismiss the appeal and uphold the appealed decision, the appellate company appealed this decision again to the cassation court in this appeal.

The appellant based their appeal on one ground, the first and second and seventh part of the appellant argument claims that the appealed decision decided to uphold the decision to recognize the arbitral award, which was issued by an arbitrator that was appointed by the court. However, the arbitrator was appointed in contrast to the requirement of the law, for the defendant requested in that dispute to appoint an

¹¹¹⁷ Dubai Court of First instance, case no. 71/2004.

¹¹¹⁸ Dubai Court of appeals, appeal no. 42/2006.

¹¹¹⁹ Dubai Court of Cassations, appeal no. 189/2006, issued on the 26th of November 2006.

accounting expert, the appellant on the other hand counter claimed in front of that court to dismiss the claim based on the existence of an arbitration clause the court should have dismissed that dispute, instead the court decided to appoint an arbitrator and refer the dispute to him, the appellant claim that they pleaded to the court to dismiss the arbitral award according to article 216 of the civil procedures , claiming that the appointment of the arbitrator is in contrast to the requirements of article 204, which requires each party to appoint an arbitrator, instead the court dismissed this plea, by claiming that the parties didn't agree on a certain number of arbitrators in the arbitration clause, as such the court would have the right to appoint arbitrators as they see fit.

The court dismissed this argument, stating that according to article 203 of the civil procedures, the parties have the right to agree to submit their dispute to a sole arbitrator or a tribunal, which establishes the individuals right to arbitrate and their right to choose the number of arbitrators they see fit. However, if a dispute rose and the parties did not agree on a number of arbitrators, then the parties have the right to seek the court to appoint an arbitrator¹¹²⁰, this dispute shows that the original contract was concluded between the parties on the 5/8/2002, which contained an arbitration clause that didn't identify the number of arbitrators, in addition a request was made by the defendant to the court to appoint an arbitrator, which the court granted by appointing an accounting expert as an arbitrator in the dispute and both parties confirmed and accepted this appointment.

Furthermore, the appellant argues that the arbitrator claimed in the award the he asked the Horse Club to submit their records of transactions with the company,

¹¹²⁰ According to article 204.

which is an important document required to identify the parties position in this dispute, the arbitrator claim that he didn't receive any reply from the Club; the appellant argues that the arbitrator should have invoked article 209 of the civil procedures and requested the courts assistance in order to receive those documents, moreover the appealed decision refused the request to resubmit the dispute back to the arbitrator in order to clarify this point.

The court dismissed this argument, stating that according to the jurisprudence of this court when recognizing an arbitral award the court shall not revise the subject of the dispute, unless it is in conflict to a public policy rule.

Therefore, the court decided to dismiss the appeal.

9. Appeal no. 32/2009¹¹²¹

The defendants started the dispute¹¹²² against the appellant, asking the court to appoint an expert in order to determine their share in the revenues from renting their property, the defendant stated that they agreed with the appellant and one more party (their sister)¹¹²³ to buy a land in which the property was later on constructed in order to later to lease that property, they agreed that the appellant should manage this project and to register the land under their name. However, the appellant registered the land under his name and after finishing the construction, he took all the revenues from renting the property without dividing the shares with the defendants, the appellant counter claimed by requesting that the court should dismiss the case since it has already been settled through arbitration, in addition he requested that the court

¹¹²¹ Dubai Court of Cassation appeal no. 32/2009, issued on the 29th of March 2009.

¹¹²² Dubai Court of First instance case no.186/2008.

¹¹²³ The litigants in this dispute are siblings.

should recognize the arbitral award that was issued in regard to this dispute, claiming that he and the defendants and their father have bought the land in question, and after the construction of the property, he continued to pay their shares from the revenues and once the dispute have risen between the parties they agreed to submit this dispute into arbitration.

The first instance court decided to dismiss the claim based on the fact that the dispute have already been settled through arbitration and to dismiss the defendants request to set-aside the arbitral award, moreover the court decided to recognize the award. The defendants appealed this decision¹¹²⁴, which decided to nullify the appealed decision and the arbitral award and refer the dispute back to the first instance court. The appellant appealed this decision to the cassation court on the 21/1/2009, the defendants submitted a plea to the court to dismiss the appeal, and the court decided to hear the appeal and dismissed the defendant's plea.

The appellant based his appeal on one ground, arguing that the appeal court should nullify the appeal courts decision, claiming that the court's based their decision on the arbitrator failed to uphold the procedures mentioned in articles 208, 212 and 216 of the civil procedures, which discuss the arbitrator obligation of upholding due process in their hearing. However, the parties have agreed to authorized the arbitrator to conduct the arbitration process as he sees fit, as such the arbitrator is not bound by the requirements of those articles only when it concerns public policy, as such the arbitrator in this dispute have upheld due process. Furthermore, article 208 doesn't require a certain procedure for notifying the parties

¹¹²⁴ Dubai court of Appeals, appeal no. 600/2008, issued on 15/12/2006.

or that the arbitrator need to keep a record of the proceedings. Therefore, none of the grounds for setting-aside the arbitral award¹¹²⁵ applies to this award.

The court agreed with the appellants argument, stating that the conditions for setting aside the award in article 216 have been explicitly mentioned in that article, and they relate to the arbitration agreement or the arbitral process; as such in order to set-aside the award it is required to be issued without an arbitration agreement, or if the arbitrator exceeded the scope of the arbitration or violated a public policy rule. On the other hand, the arbitral process conditions for setting aside the award, relates to issuing an arbitral award by arbitrators that weren't appointed according to the law or were not authorized to issue an award in the absence of the parties, or if they issued an award according to a arbitration agreement that did not specify the scope or the subject of the dispute, or if the agreement was rendered by a person that is not competent to act as an arbitrator or from an arbitrator that has no legal capacity to do so or if due process was not uphold, or if the award was void, or the procedure became void and affected the award.

Therefore, if none of those conditions were to apply then the request to set-aside the award shall be dismissed, moreover articles 13¹¹²⁶, 208, 212, 213 of the civil procedures, shows that the arbitrator isn't subject to the same requirements that a judge is required to uphold. However, the arbitrator is required to uphold the procedural requirements stated in the arbitration chapter and what the parties agreed upon, and if the arbitration is a court-annexed one which is an arbitration that occurs based on a court order or the parties agreement in front of the court, then the arbitrator

¹¹²⁵ Which are stated in article 216.

¹¹²⁶ Article 13 of the civil procedures law, supra note 5, state:" The procedure shall be null if the law has stipulated expressly its nullity or if it has been impaired with a defect or an essential imperfection because of which the procedure purpose has not been fulfilled. In case the procedure purpose has been proved, the nullity shall not be decided in spite of the stipulation thereon."

is required to uphold the requirements of paragraph 1 and 2 of article 213 of the civil procedures, and if the arbitration occurred outside the court either ad-hoc or institutional then the arbitrator need to uphold the provisions of paragraph 3 of article 213. Therefore, it is not required in arbitration that occurs outside the court from the arbitrator to issue a record of the hearing, if the parties or the institute did not require that from him, and what is meant by violating the process of adjudicating is the arbitrator failure to uphold due process and the procedures that the parties agreed upon, even if articles 208 and 212 require the arbitrator to notify the parties of the hearing and to be able to present their defense in order to uphold due process, nevertheless this notification isn't one of the requirements of the civil procedures law, moreover the purpose of having this requirement is to ensure that the parties are able to present their defense in front of the arbitrator, and as such it is not sufficient to set-aside the award to claim that the arbitrator failed to notify the parties to the start of the proceedings, but they are required to establish that this failure is a direct result of their inability to present their defense, as such this failure doesn't relate to the public policy since this requirement has been established for the benefit of the parties, and that the party who claims that his right to present his defense was infringed should present evidence supporting their claim.

Therefore, there is no sufficient evidence supporting the appeal court decision to set-aside the award nor does it provide that the arbitrator failed to uphold those provisions, moreover the arbitration agreement state in clauses two and three that the arbitrator is authorized to “mediate the dispute and is not bound by the provisions of this civil procedures law except in regards to the public policy” as such there is no ground for setting-aside the award based on the arbitrator failure to notify the parties

of the hearing, which is waived given the fact that the award shows the defendant were able to present their defense to the arbitrator.

Thus, the court decided to uphold the first instance decision to recognize the arbitral award.

10. Appeal no. 272/2008¹¹²⁷

The appellant company started the litigation¹¹²⁸ against the defendant company, asking the court to appoint an accounting expert as an arbitrator, claiming that they are sole agent for the defendant according to the agency contract between them dated 8-6-2000. However, the defendant concluded commercial contracts within the appellants jurisdiction in the UAE without giving the appellant his commission from 2001 and to this date, and given that clause 13 of the Agency contract between the parties states that “in the event of a dispute between the parties of this contract it shall be settled through arbitration...” and given the fact that the defendant refused to appoint or name their arbitrator to settle this dispute and refuse to receive the notification by the appellant dated 17-6-2007, it forced the appellant to start this proceeding. The court decided to dismiss this claim; the appellant appealed this decision¹¹²⁹ and on the 25-9-2008 the court decided to uphold the appealed decision, this decision was appealed to the cassation court on the 23-11-2008, the defendant pleaded to the cassation court to dismiss the appeal, the court decided to hear the appeal and to dismiss the defendant plea.

The appeal was based on two grounds, the appellant argues that the court decision to dismiss the appointment request, by claiming that the request should have

¹¹²⁷ Dubai Court of Cassation appeal no. 272/2008, issued on the 25th of January 2009..

¹¹²⁸ Dubai Court of First Instance case no. 782/2007, issued on 18/5/2008.

¹¹²⁹ Dubai Court of Appeals, appeal no. 486/2008 (civil).

been made to the ICC¹¹³⁰ in Paris. However, article 18 of the commercial agencies law gives the jurisdiction to the UAE courts to settle any dispute that rises from the execution of those contracts, which led the appellant to raise the dispute in regards to the appointment to the court. Furthermore, the defendant did not object in the first hearing to dismiss the case based on the existence of an arbitration clause and they did not reply to the appellants notification of the appointment dated 17-6-2007, which constitute a waiver of their right to uphold the arbitration clause and the jurisdiction falls back to the UAE courts.

The court dismissed this argument, stating that based on the courts jurisprudence the arbitration clause cannot be taken in part and should be taken as a whole, and amending the clause regarding the appointment of the arbitrator should not be assumed, and the both parties should consent to this amendment, which falls under the discretion of the court in understanding and interpreting the facts of the case and the contract. Furthermore, article 204/1 implies that disputes in regard appointing the arbitrator should be submitted to the court that has the jurisdiction to hear the dispute, in the event that the arbitration agreement lacks the process of the appointment. However, if the clause or the agreement identified a process of appointment then the court cannot step in, and since the clause in this instance referred to the ICC, which state in articles 8 and 9 that the appointment of the arbitrator shall be concluded through the arbitral tribunal after submitting the dispute to the ICC and they shall appoint the arbitrators if one of the parties refused to appoint their arbitrator.

Therefore, the appellant has no right to submit their dispute to the court after agreeing to arbitrate and the appellants plea that the defendant failed to counter claim in the first hearing to the existence of the arbitration clause and the they did not accept

¹¹³⁰ See general Redfern and Hunter, supra note 59 at 9, were they give a brief overview of the ICC.

the notification to the appointment has no affect, since the appointment process has been stated in the clause to be conducted under the rules of the ICC. Thus, the court decided to dismiss the appeal.

11. Appeal no. 337/1991¹¹³¹

The defendant started the dispute¹¹³² against the two appellants, asking the court to refer the dispute to arbitration under the courts supervision and to appoint an arbitrator and finally to recognize the arbitral award. The defendant claims that based on construction contract between the parties the amount of 75139 dhs. is in the appellants debt, they claim that this amount is in exchange for executing the contract, and given that the construction contract contained an arbitration clause they are requesting to refer the dispute into arbitration and in the event that the parties did not agree to appoint an arbitrator they are requesting that the court appoint one in their place. The defendant amended their request to the court to only include the amount of the, on the 16/7/1991 the court decided to accept the defendants request and order the payment of the amount of the claim. This decision was appealed and the appeal court¹¹³³ decided to uphold the appealed decision, this decision was appealed to the cassation court on three grounds.

The appellant argues in the first ground that the court decision that the parties are not willing to submit their dispute to arbitration is flawed, basing their decision on their representative counter-claim to deny the defendants claim after amending their request to the court. However, this counter-claim did not touch upon the subject

¹¹³¹ Dubai Court of Cassation appeal no.337/1991, issued on the 7th of March 1992.

¹¹³² Dubai Court of first instance, case no.144/1990.

¹¹³³ Dubai Court of appeals, appeal no.155/91.

matter of the dispute in order for the court to consider it as a waiver of the parties right to arbitrate.

The court dismissed this argument, stating that the arbitration is an agreement to grant the arbitrator the right to settle the dispute in place of the court and the natural judge, the nature of this agreement doesn't relate to the public policy thus the parties can waiver this agreement and their right to arbitrate either explicitly or implicitly. Therefore, when the defendant amended their request and the appellant counter claimed by denying the defendant claim, which constitute as an implicit waiver of their right to arbitrate.

The second and third ground of appeal doesn't relate to arbitration and was dismissed by the court¹¹³⁴.

Therefore, the court decided to dismiss the appeal.

12. Appeal no.346/1991¹¹³⁵

The defendant started the dispute¹¹³⁶ by asking the court to appoint an accounting expert to examine the records between the parties, the defendant claim that they agreed with the appellant to form a company; afterwards they decided to end the company and liquidate its assets and since the appellant failed to fulfill his obligation to ease the liquidation process, which forced the defendant to seek the court for relief. On the 20/10/1990 the litigants agreed in front of the court to refer their dispute into arbitration, both parties named their arbitrator and the court appointed the third arbitrator, the arbitrators started their proceedings and issued an award that was recognized by the court. The appellant appealed this decision¹¹³⁷, the court decided to

¹¹³⁴ Which relate to the courts ability to interpret the evidence.

¹¹³⁵ Dubai Court of Cassation, appeal no.346/1991, issued 23rd of May 1992.

¹¹³⁶ Dubai Court of First Instance, case no.1172/1990.

¹¹³⁷ Dubai Court of Appeals, appeal no. 182/1991, issued on 25/11/1991.

dismiss the appeal and uphold the appealed decision, this decision was appealed to the cassation court on two grounds:

The appellant argues that the award should be dismissed based on the fact that it was issued after the agreed upon time, the appellant claim that the court decided to recognize the award by stating that the parties agreed to extend the arbitration time. However, the appellant claim that he did not agree to the extension in addition any extension of the arbitration period requires the courts recognition, neither the parties nor the arbitrators has the right to grant this extension on their own, which is only reserved to the court since it has the authority to supervise over the arbitration procedure, and the fact that the arbitrators have requested the amendment from the court is not sufficient unless the court renders a decision in this request, for the following reasons the award should be set-aside.

The court dismissed this argument; stating that one of the attributes of arbitration is the fact that it is a voluntary process, implying that the parties have the right to agree in the arbitration clause to a certain time for the arbitral award to be issued or to extend it either by providing a process for extension in the arbitration clause or delegating that authority to the arbitrators, this delegation of authority can either be explicit by stating it in the arbitration agreement, or implicit by the parties appearance in the arbitration hearing after the extension and presenting their argument. Furthermore, the appeal court established that the appellant representative have agreed in the arbitral hearing dated 4/6/1991 to authorize the arbitrators to extend the arbitration time, which the arbitrators used to extend the arbitration from 15/6/1991 to 4/8/1991. This procedure is not affected by the arbitrators informing the first instance court of the extension, since as it is proven from the facts of this dispute that the arbitrators has the authority to extend the arbitration on their own.

The second ground of appeal argues that the appellant upheld the argument that the award is void, claiming that the arbitrators didn't uphold due process by dismissing his request to refer the dispute back to the court to examine the evidence, the appeal court answered this request by stating that the arbitral tribunal have given him the opportunity to present his defense and that the purpose of his request is to extend the period of the dispute.

The court dismissed this argument, by confirming that the arbitrators have upheld due process in this dispute.

Thus, the court decided to dismiss the appeal.

13. Appeal no. 91/1992¹¹³⁸

The appellant company started the dispute¹¹³⁹ against the appellant asking the court to order the payment of the amount of the claim; the appellant attorney claims that the appellant constructed a building for the benefit of the defendant and according to the agreement between them, in exchange for 4829340 dhs. which the defendant paid 4727873 dhs. of that amount, the appellant asked the defendant to pay the reminder of the payments, which they refused to do so forcing the appellant to seek the court; the defendant counter claimed to dismiss the dispute based on the existence of an arbitration clause in the contract between the parties. The court decided to dismiss the dispute based on an existence of an arbitration clause, the appellant appealed this decision¹¹⁴⁰ the court decided to uphold the appealed decision, explaining that the amount of the claim is part of the fees that resulted from the construction contract and as such the parties should first uphold their contractual agreement by settling their dispute through arbitration before seeking the courts. The

¹¹³⁸ Dubai Court of Cassation appeal no.91/1992, issued 21st of November 1992.

¹¹³⁹ Dubai court of first instance case no. 3/1991, issued on 17/10/1991

¹¹⁴⁰ Dubai Court of appeals, appeal no. 91/222, issued on 24/2/1992.

appellant decided to appeal that decision to the cassation court on the 25/3/1992, the defendant pleaded to the court to dismiss the appeal on the 15/6/1992. However, the court decided to hear the appeal.

The appeal was based on three grounds, the first and second argues that the appealed decision upon deciding to dismiss the dispute based on the existence of an arbitration clause, even though this dispute doesn't fall under the scope of the arbitration clause since the dispute is in regards to a debt claim, which is not based on the contract in which the arbitration clause was stated in. Furthermore, the arbitration clause is invalid and void since it lacks the sufficient information that makes it a valid clause, such as the determination of the number of the arbitrators or the method of choosing them and the place of the arbitration and the law that governs the arbitration process and the contract and the time of the arbitration.

The court dismissed this argument stating that article 17 of the contract between the parties stated that: "the disputes shall be settled through arbitration", and since the dispute in this litigation involves the reminder of the payment of the construction contract, which rises from the construction contract that contains the arbitration clause, which renders this argument void. Furthermore, according to the jurisprudence of the court all that requires for the validity of the arbitration clause is the parties agreement, thus it doesn't require any agreement on the details of the dispute at the time of drafting the clause.

The third ground of the appeal argues that the appealed decision failed to uphold due process, since the appealed decision did not answer the appellant's defense.

The court dismissed this ground stating that the appeal court based their decision on sound grounds; moreover the court has no obligation to answer all the litigants' claims.

Therefore, the court decided to dismiss the appeal.

14. Appeal no. 171/1992¹¹⁴¹

The defendant company started the dispute¹¹⁴² against the first appellant (an institution) and the inheritors of the appellants, asking the court to order the payment of the amount of 5963816.40 dhs. in addition to the interest from the time of the claim and until the fulfillment of the payment, claiming that the appellants are indebt to the defendant company in exchange for constructing a storage unit for the institution which is owned by the appellants inheritor who signed the contracts in his capacity as a patron, and since he refused to pay the amount of the claim they referred the dispute to the court. The appellants also started a suit¹¹⁴³ against the defendant company asking the court to refer the dispute to arbitration based on an arbitration agreement between the parties, and to order the company to pay a compensation in exchange of the damages that occurred due to their failure to uphold the construction requirements. The court decided to combine both suits and to refer the dispute to arbitration; the litigants sought the court again due to the fact of the passing of one of the litigants and to dispute the appointment of one of the arbitrators, the litigants agreed in front of the court on the 21/2/1989 to appoint a sole arbitrator that has the authority to mediate and arbitrate the dispute and that his decision should be final and binding to the parties, lastly the parties have the right to submit the award to the court to recognize

¹¹⁴¹ Dubai Court of Cassation, appeal no. 171/1992, issued on the 22nd of November 1992.

¹¹⁴² Dubai Court of First Instance, case no.396/1982.

¹¹⁴³ Dubai Court of First Instance, case no. 1149/1982.

and enforce it; they agreed that the minimum amount of the award should not be less than one million Australian pounds in favor of the defendant company and doesn't exceed 4.3 million Australian pounds. The litigants failed to name an arbitrator and on the 24/4/1989 the court appointed an engineering expert as an arbitrator and on the 31/3/1991 the arbitrator issued an award in the amount of 3357467 Australian pounds in favor of the defendant company and to return the bills of exchange to the appellants, the defendants attorney asked the court to recognize the award and on the 29/12/1991 the court decided to recognize and enforce the award.

The appellants appealed this decision¹¹⁴⁴, asking the court to partially nullify the award to what has been decided in excess of one million Australian pounds, on the 21/6/1992 the appeal court decided to uphold the appealed decision, the appellants appealed this decision to the cassation court on the 13/7/1992, asking to partially nullify the decision in regards to what have been decided in excess of two million Australian pounds, the defendants representative pleaded to the court to dismiss the appeal since the appeal didn't contain the defendants address, furthermore this decision is not subject to appeal according to article 217 of the civil procedures, which doesn't allow appeals in arbitral awards in the event that the arbitrators were authorized to mediate the dispute or if the parties have given up their right to appeal, which is the case in this dispute since the parties have agreed to waiver their right to appeal.

The court dismissed the defendants plea, first in regards to dismissing the appeal for the failure to add the litigants address, which was dismissed by the court according to article 177¹¹⁴⁵ of the civil procedures, which implies that such

¹¹⁴⁴ Dubai Court of appeals, appeal no. 23/1992.

¹¹⁴⁵ Article 177 states:” 1- The appeal through cassation shall be prosecuted with a pleading deposited in the clerk's office of the court and signed by a lawyer who is admissible for the prosecution there before, and attached with what certifies the full payment of the fees with the mortgage, and the appeal

information requires to be presented to the cassation court. However, paragraph 2 of article 13¹¹⁴⁶ of the same law state that the court would not decide to nullify a procedure if the purpose of that procedure has been met, and even though the appellant failed to provide this requirement the purpose of article 177 have been met by notifying the parties of the appeal. The court also dismissed the defendant plea that was based on article 217, explaining that this article states that the arbitral award are not subject to appeals if the parties have agreed to authorize the arbitrators to mediate or if they explicitly waived their right to appeal in agreement, which is an exception to the general principle of adjudication mentioned in article 158¹¹⁴⁷, which allows the individuals to appeal the decision of the trial court to the appeal court. However, this doesn't apply to appeals to the cassation court that falls under article 173¹¹⁴⁸, which state that once a decision have been issued by the appeal court and have met the requirements of this article the parties would be able to appeal it to the court of cassation, and since the appeal decision in question was issued on the 21/6/1992, which occurred after the civil procedures law came into power on the 9/6/1992, thus the appeal is granted even if it was in regards to recognizing an arbitral award, which has been agreed upon to authorize the arbitrators to mediate or if the parties agreed in the arbitration agreement that the award is final and not subject to appeal, which is

shall immediately be recorded in the file prepared for that. 2- The appellant should deposit, when he submits the pleading, a number of copies thereof equal to the number of persons against whom the appeal has been prosecuted and a copy to the clerk's office. 3- The appellant should, before retaining the appeal for the decision, deposit a document of the retainer of the lawyer delegated in the appeal....”

¹¹⁴⁶ Article 13 states: “The procedure shall be null if the law has stipulated expressly its nullity or if it has been impaired with a defect or an essential imperfection because of which the procedure purpose has not been fulfilled. In case the procedure purpose has been proved, the nullity shall not be decided in spite of the stipulation thereon.”

¹¹⁴⁷ Article 158 states: “The litigant parties, in other than the circumstances excepted by the law stipulation, may appeal the decisions of the courts of first instances before the authorized court of appeal....”, this article was amended by the federal law no. 30 on the 30/11/2005.

¹¹⁴⁸ Article 173 states:” The opposing parties may appeal with a cassation in the decisions issued from the appellate courts if the action value was more than two hundred thousand Dirham or was not valuated and that in the following circumstances....”, this article was also amended by the federal law no. 30.

limited to appeals from the first instance court to the appeal court. Therefore, the court allows the appeal to the cassation court.

The appellant argues that the court have recognized the arbitral award, which was issued based on an agreement that have been nullified by the parties, and the arbitrators have added interests and compensation to the claim without any basis. Therefore, the appealed decision is contradicting the first instance decision by allowing the first instance decision to be appealed, by stating that the arbitrators has the right to add interests to the amount of the claim, furthermore the decision did not answer the appellants plea in regard to the delay penalties which is in the amount of two million Australian pounds, which should been limited to the amount that the parties have agreed to. Lastly, the appealed decision failed to uphold the parties' freedom of contract after the arbitrators have decided to compensate based on a percentage of the agreed amount.

The court dismissed this argument, stating that once the parties have agreed in the arbitration clause that the arbitral award is final then they should not argue on the subject matter of the dispute in front of the cassation court, even if the dispute occurred before the enactment of the civil procedures law, furthermore there is no contradiction between the first instance and the appeal court decision.

Therefore, the court decided to dismiss the appeal.

15. Appeal no. 165/1992¹¹⁴⁹

The appellant started the dispute¹¹⁵⁰ against the defendant, asking the court to award him the amount of 30000 dhs. in addition to the legal interest, explaining that the defendant have issued a check no. 18262 in the amount of the claim, upon

¹¹⁴⁹ Dubai Court of Cassation, appeal no. 165/1992, issued on the 28th of November 1992.

¹¹⁵⁰ Dubai Court of First Instance, case no.1325/1989.

submitting the check to the bank it turns out that he lacked the sufficient funds, the defendant was found guilty in the criminal case no.1625/89¹¹⁵¹, the court appointed an expert in the case and on the 19/2/1991 both parties agreed to submit the dispute to arbitration by agreeing to appoint a sole arbitrator in the dispute, they also agreed to not dispute the award. The court accepted their request and after the arbitrator submitted his award ¹¹⁵²on the 10/7/1991 for recognition, the court decided on the 25/11/1991 to partially recognize the award in regards to clause 2 and 3 of the award and set-aside the fourth clause; the defendant appealed this decision¹¹⁵³ and the appellant appealed the same decision in a separate appeal¹¹⁵⁴, the appeal court decided on the 2/6/1991 to amend the award in regards to deciding that the check in question is null and to dismiss the appellants appeal.

The appellant appealed the decision on the 2/7/1992, asking the court to nullify the appealed decision and to recognize the arbitrator award in what have been decided in regards to ordering the defendant to pay the amount of 100000 dhs. and the amount of 200000 dhs. that is registered in his account in two different companies, the defendant submitted a plea to dismiss the appeal, which was dismissed by the court.

The appeal was based on four grounds, the appellant argues that the appealed decision failed to uphold the law, claiming that the appealed decision recognized an award, which decided that the check was issued as an insurance to fulfill the obligation of the company towards the appellant. However, this decision was based on speculations and even the arbitrator have admitted that he is not sure in regards to this issue, furthermore the arbitrator have exceeded the scope of the arbitration by investigating the purpose of the check and added the amount of 200000 dhs. from the

¹¹⁵¹ In the UAE it is considered a criminal offence to issue a check without funds, according to article 401, of the Federal Law no. 3/1987, concerning the penal code.

¹¹⁵² The court is labeling the arbitral award in this dispute as a report.

¹¹⁵³ Dubai Court of appeals, appeal no. 736/1991.

¹¹⁵⁴ Dubai Court of appeals, appeal no. 746/1991.

appellants account in the company and in the second pay ordered the defendant to pay the amount of 100000 dhs., which the appealed decision did not recognize.

The court dismissed this argument stating that arbitration is an exception to the individuals right to seek their natural judge, thus it is limited to what the parties have agreed to submit to the arbitration tribunal, and as such it is not sufficient to say that the since its an exception the arbitrators don't have the right to decide over disputes that relate to the main issue that the parties agreed to arbitrate upon, as such arguing that the issues that raises after the submitting of the main dispute should be submitted to the court and not the arbitrator has no basis. Moreover, the court upon recognizing an arbitral award doesn't look at the subject of the award, and since the appellant have started the dispute against the defendant to request the payment of 30000 dhs. which the defendant have submitted a check without sufficient funds, and the defendant claimed that the check was submitted to the appellant as an insurance to fulfilling their obligation, and then the parties agreed to submit the dispute to arbitration and the arbitrator issued an award that came to the conclusion that the check in question was in fact issued as a guarantee and that the check has no affect and is void, and ordered the payment of the amount of 125000 dhs. and the amount of 7500000 dhs. to the appellant from the accounts of the company, and that the defendant should pay the amount of 100000 dhs. to the appellant.

Thus, the appealed decision has a legal basis, as such the court decided to dismiss the appeal.

16. Appeal no. 10/1995¹¹⁵⁵

The defendant company started the dispute¹¹⁵⁶ by asking the court to recognize an arbitral award dated 15/11/1993, which was based on an arbitration agreement in which the parties agreed to settle their dispute through arbitration and appointed a sole arbitrator to settle the dispute, they also agreed that the award shall be final and is not subject to appeal, the arbitrator issued an award, which decided first to order the appellant to register the property number 6 in Jordan in the defendants name; second to order the appellant to pay the amount of 1041114.93 dhs. and 9% interest from the date of the award and until the fulfillment of the payment, the arbitrator submitted a copy of the award to both parties. The appellant counter claimed that the award is null and should be set-aside, the court decided to partially recognize the award by dismissing the first part of the award. The appellant appealed the award¹¹⁵⁷ asking the court to set-aside the award, the court decided to uphold the appealed decision. This decision was appealed to the cassation court on the 17/1/1995, the appellant asked the court to set-aside the award on the following grounds:

The appellant argues in the first part of the first ground that the court decided to recognize the arbitral award even though it is null, claiming that it was based on a null arbitration agreement, since the parties have agreed outside the court to arbitrate their dispute, even though the dispute was being heard by the court at the same time, which makes this a parallel litigation, and since the courts hold the original jurisdiction over the dispute then they should be the one that decide on the dispute, or it would constitute a breach of the public policy and of the principles of adjudication.

The court dismissed this argument, stating that article 210/1 of the civil procedures implies that even if a dispute was brought to the court this doesn't mean

¹¹⁵⁵ Dubai Court of Cassation appeal no. 10/1995, issued on the 8th of October 1995.

¹¹⁵⁶ Dubai Court of First instance, case no. 225/1993, issued on 27/4/1994.

¹¹⁵⁷ Dubai Court of Appeals, appeal no. 527/1994, issued on 22/11/1994.

that the parties are unable to opt-out into arbitration, the only requirement is that the court hasn't decided the dispute. Therefore, opting-out into arbitration at the time of hearing the dispute in front of the court doesn't constitute a ground for setting-aside the award nor is it a parallel proceeding.

The second part of the first ground of appeal, argues that they have upheld the argument that the award is null due to the fact that the arbitrator has no legal capacity to rule on the dispute, the appellant argues that they refused the arbitrator request to pay the arbitrator fee, which is fifteen thousand US dollars in order for him to act as a mediator between the appellant and the banks in order to approve the appellant loans, which was dismissed by the appeal court based on article 207/4. However, this article addresses court-annexed arbitration and cannot be applied to ad hoc arbitration, which is the case in this dispute.

The court dismissed this argument, stating that even though the arbitrator capacity to rule is one of the grounds for setting aside the award under article 216. However, the grounds mentioned in this article have been explicitly identified, and in regards to article 207/4 which determines the conditions under which dismissing the arbitrator is possible, have set a time limit in which this request can be made to the court, the request should be made to the court within five days and this requirement applies to both ad-hoc and court-annexed arbitration. Therefore, in order for the award to be set-aside it needs to meet those requirements that have been explicitly stated in the law.

The third part of the first ground and the first and second part of the second ground of the appeal, argues that the appellant argued in front of the trial court to nullity of taking an oath in the arbitral procedure, claiming that the statement that was given by the defendants companies representative under oath, was given without the

presence of the appellant or their representative, and after it was amended by the arbitrator in a way that contradicts the facts of the disputes and without informing the appellant of this amendment. Furthermore, the arbitrator did not present any reason for conducting that session on the 7/10/1993 without the presence of the appellant or his representative.

The court dismissed this argument, stating that according to article 212 the arbitrator is not bound by the same procedures that bind the court. However, the arbitrator is bound by the procedures that are stated in chapter three of the civil procedures that addresses arbitration and what the parties agreed upon, and is required to uphold due process by allowing both parties the opportunity to present their defense and pleas, and by informing the parties of the hearings in which they have present their evidence and claims. Furthermore, the judge has the authority to amend the format in which the oath needs to be taken either by the parties' request or from his own, the only requirement is that the purpose of this amendment is to clarify the statement given under oath. Thus, the nullity of the award due to the failure to uphold due process and the procedures of adjudication occurs if the arbitrator exceeded and failed to implement those principles and what the parties have decided upon, and since the parties have agreed in the sixth clause of the arbitration agreement that the arbitrator has the right to decided on the procedures that shall be implemented in the arbitration, and that the appealed decision have examined this fact by stating that the appellant have been notified by that hearing on the 7/10/1993 and that the appellant have sent a fact to the arbitrator asking him to delay the hearing for half an hour, the appellant also stated in front of the court that his representative was late to that same hearing, thus the arbitrator have upheld due process in this arbitration. Therefore, the court decided to dismiss this ground of appeal.

The appellant argues on the third part of the second ground, stating that they upheld the argument that the courts decision to dismiss the first part of the award is null, which was based on the fact that the arbitrator exceeded the scope of the arbitration agreement and recognized the rest of the award, is an implication that the entire award is null, since both parts of the award cannot be divided for nullifying one constitute nullifying the entire award and setting it aside.

The court accepted this argument, stating that if part of the award was nullified based on the arbitrator exceeding the scope of the arbitration agreement, which constitute nullifying the other half of the award that relates to the first part, which falls under the consideration of the trial court once they have based their decision on sound reasoning, and since the appealed decision responded to this argument by stating that the appellant has no right nor interest to appeal, which is a void decision since it failed to uphold due process.

Therefore, the court decided to nullify the appealed decision and refer the decision back to the appeal court to decided again on the dispute.

17. Appeal no. 295/1993¹¹⁵⁸

The defendant company started this dispute against the appellant¹¹⁵⁹, by asking the court to order the payment of 25162.5 dhs. which the defendant claim is in exchange to the defendant fulfilling their contractual obligation to construct and maintain a building as per the agreement, moreover they claim that the appellant agreed in writing to complete the payments on the 30/3/1991. However, upon the appellant refusal to pay the reminder of the payments after the passing of the deadline the defendant started these proceedings. The court dismissed the appellant's plea to

¹¹⁵⁸ Dubai Court of Cassation appeal no. 295/1993, issued on the 30th of January 1994.

¹¹⁵⁹ Dubai Court of First Instance, case no. 1190/1992, issued on 12/1/1993.

dismiss the dispute based on the existence of an arbitration clause¹¹⁶⁰, deciding to grant the defendant their request. The appellant appealed that decision; the appeal court decided to uphold the appealed decision.¹¹⁶¹ That decision was appealed to the cassation court on the 24/11/1993, the defendant's attorney submitted a plea to the court to dismiss the appeal, and the court dismissed the defendant's plea and decided to hear the appeal.

The appeal was based on three grounds; the first ground argues that the appealed decision dismissed their request to submit the dispute into arbitration, the courts reasoning was that there is no dispute between the parties in regard to the execution of the contraction contract, which makes this dispute falls outside the scope of the arbitration clause since the construction have already been completed, the court based their argument on the meeting dated 2/5/1991 between the parties and concluded that the construction have been completed between the parties. The appellant argues that this dispute falls under the scope of the arbitration clause, since the parties agreed in the clause to refer all dispute that raises from the execution of this contract into arbitration, which include disputes that occur through the construction period and before the endings of the contract or after the fulfillment of the contract, as such the defendant claim in regards to the payments raises from the contract, which falls under the scope of the arbitration clause. Furthermore, the appellants claim that they agreed on the 7/3/1991 to complete the payments, which is before the defendant's delivery of the property to the appellants that should have been on the 7/4/1991.

The court dismissed this argument, stating that the trial court has the authority to interpret the agreement and the will of the parties without the supervision of the

¹¹⁶⁰ Which was concluded on the 22/12/1992 between the litigants.

¹¹⁶¹ Dubai Court of Appeals, appeal no.76 /1993, issued on 25/10/1993.

cassation court, once they base their interpretation on sound legal basis. The trial court reasoning was that: "... the tenth clause of the construction contract dated 21/12/1989, states that any dispute that rises between the parties in connection to this agreement, regarding the contract or its execution should be referred to a engineering expert in order to settle the dispute..." and this dispute relates to the final payments and the final finishes of the construction making this dispute fall outside the scope of the arbitration clause, which is supported by the litigants meeting on the 2/5/1991 that confirmed the fulfillment of the construction contract.

The appellant second and third grounds argue in regard to the payment that the defendant requested, which was dismissed by the cassation court.

Thus, the court decided to dismiss the appeal.

18. Appeal no.260 and 261/1994¹¹⁶²

The defendant company started the dispute¹¹⁶³ asking the court to recognize and enforce an arbitral award, which was issued based on an arbitration clause between the parties dated 11/5/1991, they claim that based on a construction contract dated 10/4/1988 the appellant asked the defendant company to decorate their villa in exchange for 6500000 dhs. the appellant also requested on the 12/9/1989 to decorate his Majlis¹¹⁶⁴ in the same villa in exchange for 550000 dhs. a dispute rose between the parties and on the 11/5/1991 they agreed to refer the dispute to a sole arbitrator and that his decision is final and binding and is not subject to appeal, the arbitrator issued an award on the 3/7/1993 and delivered a copy of the award to both parties. The court

¹¹⁶² Dubai Court of cassation appeal no.260 and 261/1994, issued on the 16th of October 1994.

¹¹⁶³ Dubai Court of First Instance, case no.158/1993, issued on 11/1/1994.

¹¹⁶⁴ "Majlis" usually refers to the room in which the guests are being greeted and seated at.

decided to recognize the award. The appellant appealed the decision¹¹⁶⁵; the appeal court upheld the decision. The appellant appealed this decision in two appeals that were submitted to the court on the 13/6/1994 and 14/6/1994, the defendant submitted a plea to dismiss the appeals.

Appeal 260/1994 was based on two grounds, the first part of the first ground argues that the UAE legislator decided to treat arbitration in the same level as a courts decision, which implies that the arbitral award is subject to the same provisions as a court decision, since article 10 of the Dubai law no. 3/1992¹¹⁶⁶ requires that the court decision be issued under the Ruler of Dubai's name, which is a requirement that the arbitral award is required to uphold as well, since the award in question failed to contain this requirement it should be set-aside.

The court dismissed this argument, stating that this is not a requirement that the arbitrators are required to present in their awards, even if the arbitral award has the same affects as a judicial decision. However, it still has its own unique nature that the legislator has regulated in the civil procedures law, as such it is not bound to the same requirements as a courts decision.

The second and third part of the first ground of appeal, argues that the appellant continued to uphold the argument that the arbitrator have exceeded the scope of the arbitration agreement, claiming that the clause was general and didn't define the scope of the arbitration, since there exist two construction contracts between the parties, the arbitrator have decided to include both of the contracts under his jurisdiction. Moreover, the arbitration clause did not contain which of the dispute

¹¹⁶⁵ Dubai Court of Appeals, appeal no.133/1994, issued on 15/5/1994.

¹¹⁶⁶ This law concerns the organizing of the courts in Dubai, Dubai Law no. 3/1992.

falls under the scope of the arbitration, implying that the arbitrator exceeded the scope of the arbitration, which is a ground for setting-aside the award.

The court dismissed this argument, stating that the trial court has the right to interpret and explain the contract, the only requirement is that the interpretation is done according to the law, since the appealed decision came to the conclusion that the scope of the arbitration agreement contain both of the contracts, which implies that the arbitrator did not exceed the scope of the arbitration agreement.

The second ground of the appeal, argue that the appellant argued in front of the court that the arbitrator decision is null, due to the fact that the arbitrator didn't uphold the fifth clause of the arbitration agreement, which requires the arbitrator to hear both parties of the dispute, thus he failed to uphold due process, by not giving the appellant the opportunity to present his case and to question the defendant. Furthermore, the arbitrator based their decision on the letters between the parties, the appeal court decided to dismiss this argument thus making their decision subject to nullification.

The court dismissed this argument based on article 212/1, which implies that the arbitrator is not bound by the normal procedures that binds the court, even though the arbitrator is required to follow the procedures mentioned in the chapter regarding arbitration and to uphold due process and the parties right to fair trial. However, in this dispute it is clear that the arbitrator gave the appellant the opportunity to present his defense, which is what the court used to base their decision that the arbitrator upheld due process.

Therefore, based on the previous discussion the court decided to dismiss appeal no. 260/1994, and since the second appeal (261/1994) is based on the same grounds it shall be dismissed as well.

19. Appeal no. 167/1994¹¹⁶⁷

The appellant started the dispute against the defendant¹¹⁶⁸, asking the court to appoint an arbitrator to resolve the dispute between the parties in regard to a precautionary receivership in case no.1937 and to order the payment of 237248 dhs. In addition, they requested to recognize and enforce the award once it is issued and the defendant should be responsible for the court and lawyer fees in case no. 48/1992¹¹⁶⁹, the appellant claim that they are bound by an arbitration clause in a construction contract to arbitrate, they also claim that they contacted the arbitrator on the 28/2/1993 and the defendant on the 31/3/1993 to start the arbitration proceedings. However, both of them failed to respond within 90 days, implying that they are not willing to comply with this request to arbitrate; the court decided to dismiss this suit. This decision was appealed¹¹⁷⁰, the court decided to uphold the appealed decision. The appellant appealed that decision to the cassation court on the 21/4/1994. The defendant pleaded to the court to dismiss the appeal, claiming that article 204/2 of the civil procedures implies that appointment decisions are not subject to appeal. The court dismissed this plea, stating that the decisions that are not subject to appeal under article 204 are the ones that concerns appointing of an arbitrator by the court, which is an exception to the general rules of appeals and as such should be limited, thus the court decided to hear the appeal.

¹¹⁶⁷ Dubai Court of Cassation, appeal no. 167/1994, issued on the 13th of November 1994.

¹¹⁶⁸ Dubai Court of First Instance, case no. 163/1993, issued on the 2/1/1994.

¹¹⁶⁹ Which is in the amount of 20819 dhs.

¹¹⁷⁰ Dubai court of appeals, appeal no. 123/1994, issued on the 27/3/1994.

The appellant based his argument on seven grounds, which is summed up in the following, the appellant argues that there is no dispute between them in regards to submitting the dispute into arbitration, and that the appellant tried to initiate the arbitration proceedings but the defendant and the arbitrator ignored the appellants notice, the court dismissed this claim stating that there is no evidence supporting this claim since there is no record, which shows the defendant or the arbitrator receiving that notice and that the recorded message, which the appellant presented is not sufficient to be considered a notification. In essence, the court's decision to refuse the appointment implies that the court has waived the appellant right to request an appointment from the court according to article 204.

The court dismissed this argument; stating that in the event that the parties agreed to appointing an arbitrator and to arbitrate their dispute, then the arbitration clause has been invoked and the parties are bound to submit their dispute to the arbitrator that they have chosen. In this instance the parties have waived their right to submit their dispute to the court to appoint a new arbitrator, except if the arbitrator refused to do his job or is dismissed by the parties or the court decided to dismiss him, and that there is no agreement between the parties that regulates this process, in this instance they have the right to seek the court to appoint an arbitrator according to article 204, the obligation to prove that one of those conditions has been fulfilled, falls to the party that is requesting the court to appoint the arbitrator. Furthermore, according to the jurisprudence of this court, the examination of the evidence falls to the determination of the trial court that the claim has been submitted to, without supervision from the cassation court, if they have based their decision on sound legal reasoning, as such the appealed decision was based on both sound evidence and legal reasoning.

Therefore, the court decided to dismiss the appeal.

20. Appeal no. 294/1994¹¹⁷¹

The defendant company started the suit¹¹⁷² against the appellants asking the court to liquidate the company agreements and records between the parties, the appellants counter claimed in a separate suit¹¹⁷³ asking the court to examine the accounting records between the parties, the court decided to combine both suits. The parties agreed in front of the court to refer the dispute into arbitration, the parties chose an arbitrator that managed to issue an award and submit it to the court for recognition, the defendant company asked the court to recognize the award, the appellants pleaded to the court to set-aside the award stating that the arbitrator did not examine the original accounting records, the court decided to recognize the award. The decision was appealed¹¹⁷⁴ the court decided to uphold the appeal decision. The decision was appealed to the cassation court, the defendants pleaded to the court to dismiss the appeal, the court dismissed the defendant plea and decided to hear the appeal.

The appeal was based on two grounds, the appellant argues on the second ground that the appeal court decided to dismiss their appeal on the ground that the arbitrator was authorized to mediate the dispute between the parties, which is mentioned in the arbitration agreement between the parties that state ” that the arbitral award is final and binding- once the parties agree that the arbitrator is authorized to mediate and the dispute didn’t end in front of him through mediation”. However, they

¹¹⁷¹ Dubai court of cassation appeal no. 294/1994, issued on the 26th of November 1994.

¹¹⁷² Dubai court of First Instance, case no. 962/1987, which was later changed to 420/1992, issued on 13/1/1993.

¹¹⁷³ The number of the case is not mentioned.

¹¹⁷⁴ Dubai court of appeals, appeal no. 156/1994, issued on 13/6/1994.

agreed in the arbitration agreement that the arbitrator is bound to uphold due process and hear the parties arguments, which doesn't imply that the arbitrator is authorized to mediate the dispute, moreover their agreement that the award is final and binding doesn't mean that they given their right to appeal the first instance decision to recognize the arbitral award.

The cassation court agreed with this ground, stating that article 217, implies that the exceptions to appealing the decisions to recognize arbitral award is limited to the situation in which the arbitrator is authorized to mediate the dispute, the will of the parties to authorize the arbitrator to mediate is not assumed it need to be explicitly stated in the agreement, thus agreeing in the arbitration agreement that the award is not subject to the rules of the civil procedures and that the award is final and binding, doesn't imply that the parties intended to authorize the arbitrator to mediate the dispute; this is justified given the fact that arbitration that includes a mediation procedure is a dangerous process, since the arbitrators that are authorized to mediate are not bound by the law except to the rules of public policy. What is meant by the waiver of the parties right to appeal in article 217/3, is the parties explicit waiver of the right to appeal the decision to recognize the arbitral award or setting it aside, not the right to appeal the arbitral award, since the award itself is not subject to appeal according to article 217/1.

Even though the court has the right to interpret the parties' agreement this right is limited, since the court is required to interpret the agreement within the confines of the terms of the agreement. Therefore, the fifth clause of the arbitration agreement, which states: "in regards to the mediation between the parties" and the seventh clause, which states " with the exception of the above the arbitrators award

either he was authorized to mediate or not is a final and binding award for both parties and they are obliged to enforce it, except if it was in contrast to a public policy rule or the law”, implies that the parties didn’t authorize the arbitrator to mediate the dispute, this is not change by what have been written in the third clause, which state “the arbitrator is not bound by the normal procedures of the court”.

Therefore, the parties agreement doesn’t imply that they have given the arbitrator the right to mediate the dispute, the phrase “final and binding” in the agreement doesn’t mean that they waived their right to appeal the courts decision of recognition. Thus, the court decided to dismiss the appeal and refer the decision to the appeal court.

21. Appeal no. 307/2002¹¹⁷⁵

The defendant company started the dispute¹¹⁷⁶ asking the court to recognize an arbitral award issued on the 31/10/2001, the defendant claims that they asked the court in a previous case¹¹⁷⁷ to appoint an engineering expert to settle the construction dispute between the parties, regarding the execution of a construction contract, which the court granted. The arbitrator decided on the 7/2/1999 on the following: 1- the respondent (the appellant) should pay to the claimant (the defendant) the amount of 126087 dhs. in exchange for the execution of the construction contract. 2- the responded should pay the legal interest to the claimant starting from 9/8/1995 and until the fulfillment of the payment. 3- the respondents shall pay the arbitration fees. 4- both parties are responsible of the attorney fees. The court decided to recognize the

¹¹⁷⁵ Dubai Court of Cassation appeal no. 307/2002, issued on the 30th of November 2002.

¹¹⁷⁶ Dubai Court of First instance, case no. 857/2001, issued on 27/1/2002.

¹¹⁷⁷ Dubai Court of First instance, case no. 398/98.

arbitral award. The appellant appealed this decision¹¹⁷⁸, the appeal court decided to uphold the appealed decision. The appellant appealed this decision to the cassation court on the 23/6/2002, asking the court to dismiss the appeal, the defendant company's attorney pleaded to the court to dismiss the appeal, the court dismissed the defendants plea and decided to hear the appeal.

The appeal was based on two grounds, the appellant argues that the appealed decision failed to uphold the law by deciding to recognize the arbitral award, arguing that the court recognize the award even though the arbitrator decided to award the defendant more than what they asked for in regards to the interest, which is against articles 173/1 and 216/1 since the arbitrator awarded the defendant more than he requested, given that the arbitrator decided to award the interest from the 8/9/1995 and not from the start of the arbitration proceedings on the 8/9/1999, as per the defendant request. The appellant claim that they upheld this argument, however, the court decided that the arbitrator has the authority to order the interest rate from that date, justifying their decision on the fact that this request can be interpreted in this way, however, the arbitrator doesn't have the right to order that amount. The appellant requested that this decision should be referred back to the arbitrator according to article 214, in order to and amend their decision in regard to this point.

The court accepted this argument, stating that article 216/1 allows the parties to request the arbitral award to be set-aside on this ground, moreover, the court has the authority to supervise over the arbitral award in order to ensure that the arbitrator issued the award within the scope of the parties agreement and within the scope of

¹¹⁷⁸ Dubai Court of Appeals, appeal no. 202/2002, issued on 26/5/2002.

what the parties requested, in order to ensure that the arbitrator didn't decide more than what the parties requested.

Therefore, the court decided to partially nullify the award in regard to the interest rate.

22. Appeal no.140/2007¹¹⁷⁹

The appellant company started the dispute¹¹⁸⁰ by asking the court to order the payment of 9,491,419 dhs. and 9% interest rate from the start of the litigation and until the fulfillment of the payment, stating that this amount is in exchange of construction the project, which the defendant requested on their property in Sheikh Zayed's road in Dubai; the defendant pleaded to the court to dismiss this dispute based on the fact that the contract contains an arbitration clause, the appellant amended their request to the court to appoint an arbitrator and to recognize the arbitral award once its issued, the court dismissed this dispute due to the existence of an arbitration clause. The appellant appealed this decision¹¹⁸¹; the appeal court upheld the appealed decision. The appellant company appealed this decision on the 13/6/2007 to the cassation court and the defendant pleaded to the court to dismiss the appeal.¹¹⁸²

The appellant argued that the court dismissed their request to appoint an arbitrator; on the ground that the appellant didn't follow the appointment procedures, which the parties agreed upon in the contract, which is to mediate the dispute before initiating arbitration procedure. However, the appellant claim that they submitted a

¹¹⁷⁹ Dubai Court of Cassation appeal no.140/2007, issued on the 7th of October 2007.

¹¹⁸⁰ Dubai court of first instance case no. 684/2006, issued on 14/2/2006.

¹¹⁸¹ Dubai Court of appeals, appeal no. 167/2007, issued on 15/4/2007.

¹¹⁸² This decision doesn't contain the cassation court response to the defendant's plea.

letter from an engineering expert (the mediator) in which they asked him to settle the dispute, despite the fact that the obligation of proving those facts falls to the defendant. Furthermore, this expert shouldn't be appointed as an arbitrator in the dispute between the parties, since he cannot act as an arbitrator and be an adversary at the same time, which makes this clause void since it infringers public policy rules.

The court dismissed this argument, stating that based on the general principles of contracting, arbitration is considered a contract or an agreement between the parties, as such the parties have the right to agree on any condition or procedure that doesn't contradict the rules of public policy¹¹⁸³. Thus, agreeing on certain conditions or procedures prior to submitting the dispute to arbitration in the arbitration agreement, which implies that the parties are obliged to fulfill those conditions before referring the dispute into arbitration, since they are bound by contract in this condition. Furthermore, the obligation to prove that these conditions have been met falls to the party that is requesting the submission of the dispute into arbitration, moreover arguing that the clause is void based on the fact that the expert is both an adversary and an arbitrator has no grounds, since the parties have agreed by their own free will to submit the dispute to the mediator (the engineering expert) before submitting it into arbitration, moreover the expert is not considered as an arbitrator in this instance, which is supported by clause 67 of the construction contract between the parties that state: " in the event of a dispute between the parties either during the construction of the project or after the completion of the construction or after the end of the contract or after the termination of the contract, the dispute should be presented to an engineering expert to mediate the dispute within 90 days from the submission of the written request, if the mediator failed to settle the dispute within this period or if

¹¹⁸³ The court is confirming the parties' freedom of contract in this decision.

the parties didn't agree to his conclusion, then the dispute should be referred to an arbitration tribunal to settle the dispute within 90 days...". Furthermore, the fact of this dispute shows that the appellant didn't request the settlement of the dispute through mediation in compliance to this clause. Therefore, his request to appoint an arbitrator should be dismissed since it didn't meet the requirements that the parties agreed upon, moreover submitting a copy of a letter doesn't constitute a fulfillment of this requirement, which the appellant claims that they submitted to the engineering expert in order to explain the dispute to him, for this letter on its own is not sufficient to prove the fact that the mediator have received it.

Therefore, the court decided to dismiss this appeal and upheld the appealed decision.

23. Appeal no. 429/2002¹¹⁸⁴

The defendant started the dispute¹¹⁸⁵ against the appellant by asking the court to order the payment of the amount of 70700 dhs. in addition to 9% interest rate from the start of the litigation and until the fulfillment of the payment. The defendant claim that an agreement was concluded between the parties on the 11-10-1998, in which the defendant asked the appellant to purchase surveillance camera and install them in Al-Quasis police station in exchange for an amount of 404000 dhs. the appellant asked the defendant to amend the surveillance cameras operations software, in exchange for an amount of 8700 dhs. the defendant claims that the appellant paid 342000 dhs. and refused to pay the reminder of the amount resulting in this litigation. The court

¹¹⁸⁴ Dubai Court of Cassation, appeal no.429/2002, issued on the 23rd of February 2003.

¹¹⁸⁵ Dubai Court of First Instance, case no.2092/2001, issued on the 26/3/2002.

decided to order the payment of the amount of the claim in addition to the interest rate. The decision was appealed¹¹⁸⁶; the appellant requested that the dispute should be dismissed due to the existence of an arbitration clause in the contract in clause no. 18/1 of the sub-construction contract. The court decided to uphold the appeal decision. This decision was appealed to the cassation court on the 16-10-2002, the defendant pleaded to the court to dismiss the appeal¹¹⁸⁷.

The appellant based his appeal on two grounds, claiming that the dispute should be dismissed based on the existence of an arbitration clause in the contract between the parties, which state: “the agreement to arbitrate in this contract refer to dispute about the construction contract, and the documents referred to in index two of this agreement, the contract include all aspects of payment and conclusion of the contract and submitting it to the owner, and the second index include the description of the advisors ...” implying that the arbitration clause interpretation includes all the disputes that raises from the construction agreement from the start and until the fulfillment of the contract. The appellant argues that the appealed decision didn’t agree with this interpretation of the clause, which resulted in dismissing the clause by claiming that article no. 18/1 of the agreement, which contains the clause limits the scope of the arbitration between the owner and the contractor in regards to the fulfillment of the specification of index two of the contract and doesn’t include the sub-construction contract.

The court agreed with this argument, stating that according to article 203 and the jurisprudence of this court, which defines arbitration as an exceptional method of dispute resolution that constitutes of excluding the individuals from their right to seek

¹¹⁸⁶ Dubai court of appeals, appeal no.458/2002, issued on 25/9/2002.

¹¹⁸⁷ The decision lacks a response to the defendants plea.

their natural judge and the guarantees that are included from submitting the dispute to them, thus, the court should limit the scope of the arbitration to what the parties agree upon to in the arbitration agreement.

Even if the trial court has the right to interpret and explain the parties contracts and clauses, this interpretation is governed by the parties intent and the court is required to base that interpretation on sound reasoning and doesn't exceed the parties agreement, they are also required to look at the entire contract and the nature of the agreement, not to mention the customs that governs the transaction. In essence, the construction contract between the parties defined the terms of the contract in clause 1 of the contract and the dispute settlement method in clause 18 of the contract, by examining both of them it becomes clear that the sub-construction contract falls under the arbitration clause. Furthermore, since the appellant failed to appear in front of the first instance court, thus the first hearing in which they can argue on the existence of the arbitration clause is considered the one in front of the appeal court according to article 203.

Therefore, the court decided to nullify the appealed decision, based on the existence of an arbitration clause between the parties and refers the dispute to arbitration.

24. Appeal no. 21/2003¹¹⁸⁸

The appellant started the dispute¹¹⁸⁹ by asking the court to recognize and enforce an arbitral award, which was issued on the 24-9-1998, the appellant claims that the defendant requested architectural designs for their property in Dubai,

¹¹⁸⁸ Dubai Court of Cassation, appeal no. 21/2003, issued on the 13th of August 2003.

¹¹⁸⁹ Dubai court of first instance, case no. 151/2000, issued on 13/11/2000.

afterwards a dispute rose between them in regards to the fulfillment of the agreement, they appointed an arbitrator to settle that dispute as per their agreement, the arbitrator started the arbitration and issued an award on the 24-9-1998; the defendant counter-claimed to set-aside the award, claiming that the arbitrator failed to notify him of the start of the proceedings. The court decided to recognize the award in addition to awarding the appellant the legal interest of 12%. The appellant appealed this decision¹¹⁹⁰, the appeal court decided to partially dismiss the decision in regards to the interest rate and to uphold the decision to recognize the award, the defendant appealed that decision to the cassation court by the defendant¹¹⁹¹ and by the appellant¹¹⁹², the court decided to dismiss the appellants appeal and to accept the defendants appeal to set-aside the award and refer the dispute back to the appeal court. The appeal court decided on the 11-11-2002, in the absence of the litigants to set-aside the arbitral award. The appellant appealed that decision to the cassation court on the 14-1-2003, the defendant attorney submitted a plea to the court to dismiss the appeal, the court decided to hear the appeal¹¹⁹³.

The appeal was based on two grounds, the appellant argues in the first ground and the last part of the second ground on the following; the decision of the court in case no. 83/98, which decided that this is a new award (issued on 24-9-1998) and not an explanatory award for the previous arbitration between the parties (which was issued on the 15-6-1997), basing their decision to set-aside the award on the assumption that the arbitrator failed to uphold due process, since the arbitrator failed to notify the parties of the start of the proceedings and the submission of their documents. However, the arbitral award that was issued on the 24-9-1998, which is

¹¹⁹⁰ Dubai court of appeals, appeal no. 2235/2000, issued on 20/10/2001.

¹¹⁹¹ Dubai court of cassation, appeal no.387/2001, issued on 17/2/2002.

¹¹⁹² Dubai court of cassation, appeal no. 414/2001, issued on 17/2/2002.

¹¹⁹³ The decision lacks information on the courts response to the defendant plea.

the one that the appellant is requesting to be recognized, isn't a new award but rather an explanatory award to the one issued on the 15-6-1997, which can be noted from the similar outcome of both awards, since this second award is only an explanatory award, the arbitrator is not obliged to uphold the same procedures such as notifying the parties of the hearing dates

The court dismissed this argument, stating that the court jurisprudence in addition to article 212 both implies that if the parties didn't agree on a certain procedure to be followed in the arbitration, then the arbitrator is bound by the procedures mentioned in the civil procedures law, such as the notification of the parties and hearing their defense, this obligation is required both from an arbitrator that is authorized to mediate or not, notifying the parties of the hearing doesn't mean that they need to be present in order to uphold due process. In essence, the failure to uphold due process is one of the grounds for setting-aside the arbitral award according to article 216, which implies that the party that who's right to due process were infringed have the right to request setting-aside of the award. Moreover, according to article 49 of the evidence law¹¹⁹⁴ this decision is considered a final judgment that received res judicata, as such the parties doesn't have to raise the same arguments that were brought in front of the court and was answered by a final decision and the determination if this is the same dispute would fall to the trial court and their decision is not subject to vacation once they base their decision on sound reasoning, as such

¹¹⁹⁴ Evidence law, article 49 states: "Res Judicata judgments are absolute proof as to the matters finally decided of the litigation, and no proof is admitted against the legal presumption resulting therefrom, provided that such judgments refer to rights between the parties themselves acting in the same capacities and having the same object and the same cause. The court, by its own initiative, shall decide the incontestable character of this proof."

the trial court interpretation that this is a new award is a sound interpretation, since it doesn't relate to the previous award.

The appellant argues in the first part of the second ground, that the award issued by the arbitrator is final and binding and received res judicata status, as such there is no grounds for appealing it.

The court dismissed this claim, stating that even though the arbitral award once its been rendered has a binding affect between the parties of the arbitration, this binding affect is put on hold once the award is being brought to the court, furthermore since the award has been set-aside in appeal no.2235/2000 then this affect has been removed, as such this ground is dismissed.

Thus, the court decided to dismiss the appeal.

25. Appeal no. 161/2003¹¹⁹⁵

The appellant company started the dispute¹¹⁹⁶ against the defendant, asking the court to recognize the arbitral award that was issued in front of the court¹¹⁹⁷, and to order the defendant to pay 440323/50 dhs. in addition to 9% interest until the fulfillment of the payment. The appellant claims that they started the dispute in case no. 98/222 against the defendant by asking the court to appoint an arbitrator to settle the dispute between them regarding a construction contract, on the 20-3-1999 the court appointed an engineering expert as an arbitrator in the dispute, the arbitrator issued an award, which concluded that the defendant is indebted to the appellant, thus, the appellant started this proceeding in order to recognize the award. On the 26-11-

¹¹⁹⁵ Dubai Court of Cassation, appeal no. 161/2003, issued on the 14th June 2003.

¹¹⁹⁶ Dubai Court of First Instance, case no.98/2002 (commercial circuit), issued on 26/2/2001.

¹¹⁹⁷ Dubai Court of First Instance, case no.98/222 (civil circuit).

2001 the defendant counter claimed to set-aside the award, claiming that the arbitrator failed to uphold due process, the court accepted the defendant claim and decided to set-aside the award. This decision was appealed¹¹⁹⁸, the appeal court decided to uphold the appealed decision and dismiss the appeal. The decision was appealed to the cassation court on the 18-3-2003, the defendant pleaded to the court to dismiss the appeal, the court decided to hear the appeal.¹¹⁹⁹

The appeal was based on three grounds; the appellant argues that the arbitrator is not bound by the same procedures that binds the court, except to the procedures mentioned in article 212, which regulates the procedures that govern the hearing and the notification of the parties of the hearing dates and upholding due process, the appellant claims that the arbitrator upheld those requirement, in addition to upholding due process, moreover the defendant claim that the arbitrator failed to uphold due process by not giving him the opportunity to respond to the appellants. However, the defendant had prior knowledge of the appellant request, which can be deducted from his disposition in front of the arbitration in which he acknowledged these facts, moreover that request that was made in front of the arbitrator, furthermore the court should have investigated whether or not the defendant was aware of this request, rather than dismissing it based on comparing it with the experts report. Lastly, the award shows that the defendant was aware of the appellant's request; moreover they confirmed this request, however, the court agreed with the defendant claim without proper proof from the defendant.

¹¹⁹⁸ Dubai Court of Appeals, appeal no. 931/2002, issued on 18/1/2003.

¹¹⁹⁹ There is no explanation of the defendant plea in the decision.

The court dismissed this claim, stating that article 212¹²⁰⁰ even though it states that the arbitrator is not bound by the same procedures of the court, however, the arbitrator is bound by the general principles of adjudication and due process, which includes giving the parties the opportunity to examine the documents presented in the arbitration, the failure to uphold those principles would constitute a ground for setting-aside the award. Furthermore, it is no sufficient to uphold those principles to claim that the arbitrator noted in the award that the documents were presented to the defendant, which cannot be amended later on by referring submitting the award back to the arbitrator or to investigate it by the court by asking the arbitrator or the litigants or any of the witnesses that were present in the arbitral hearing. Moreover, according to the appealed decision and the arbitral award, the arbitrator have noted the submission of the document in question on the 18-10-2001, however, that document wasn't presented to the defendant until the 10-1-2002, which is after the issuing of the arbitral award, thus, the arbitrator failed to uphold due process in this instance and the award shall be set-aside in this instance, moreover, the appealed decision stated that the documents presented doesn't show that the appellant have been present on the 18-10-2001 and that the arbitrator note of the submission of this document is not sufficient on its own to prove that it was submitted on that date.

Therefore, the court came to the right conclusion by deciding to set-aside the award, based on the jurisprudence of this court that the disposition requires to be determined with not doubt, if any doubts were presented then the disposition would be dismissed. Lastly, the appellant's argument that the defendant disposition constitutes an acknowledgement of this fact has no legal basis; as such the entire appeal has no legal basis. Therefore, the court decided to dismiss the appeal.

¹²⁰⁰ Id.

26. Appeal no. 294/2008¹²⁰¹

The defendant company started the dispute against the appellant¹²⁰², asking the court to appoint an arbitration tribunal according to the construction contract between the parties, the defendant claim that the appellant requested the construction of a building on his property no. 9139, in exchange for an amount of 28250000 dhs., which the defendant claims that the appellant deducted the amount of 475267 from the final payment and since the parties agreed in clause 67 of that construction contract to submit the dispute between them into arbitration, they asked the appellant to appoint an arbitrator, which the appellant failed to appoint resulting in this litigation. The court decided to appoint the arbitrators and the arbitrator should submit their award in six months from the start of the first hearing. The appellant appealed this decision¹²⁰³, the court decided to nullify the appointment and to appoint new arbitrators, an engineering expert and to two new arbitrators. The appellant appealed this decision to the cassation court on the 22-12-2008, the defendant company pleaded to the court to dismiss the appeal, the court decided to hear the appeal.

The appeal was based on three grounds, the appellant argues that the court failed to interpret and apply the law, the appellant claim that they upheld in their argument that clause 67 of the contract between the parties state that the defendant should have named a sole arbitrator before submitting the dispute to the court to appoint the arbitration tribunal and notify the appellant of this appointment, which is a requirement that the defendant should have fulfilled and if the appellant did not agree

¹²⁰¹ Dubai Court of cassation, appeal no. 294/2008, issued on the 1st of March 2009.

¹²⁰² Dubai Court of First instance, case no. 132/2008, issued on the 18/6/2008.

¹²⁰³ Dubai Court of Appeals, appeal no. 564/2008, issued on 30/10/2008.

on the sole arbitrator they should move to the second stage, which is appointing an arbitration tribunal, in which case the defendant should appoint their arbitrator and then notify the appellant in order for them to choose their arbitrator and then the two arbitrators would choose the third arbitrator. However, the defendant notified the appellant to submit the dispute to arbitration on the 24-7-2007 and then again in their letter on the 6-9-2007 and started the proceedings before fulfilling this requirement, the appealed decision stated that the letter on the 6-9-2007 contained the name of the defendants arbitrator, however, in that letter it stated that they have chosen a mediator to settle the dispute between the parties and a mediator is not an arbitrator since his decision isn't final and binding, which makes this decision subject to vacation by the court.

The court decided to dismiss this ground, stating that article 204 implies that if the arbitration clause or agreement didn't contain a method of appointing an arbitrator or their number, the court shall appoint the arbitrators upon the request of one of the parties. Furthermore, clause 67 of the contract implies that the parties agreed before submitting their dispute to arbitration to mediate the dispute, if the mediator failed then they shall submit their dispute to the arbitration tribunal and if the parties failed to appoint the arbitrators within 15 days then the parties could request the court to appoint the arbitrators. The court interpreted the sole arbitrator requirement to be a mediator, basing this interpretation on the fact that the clause states that "the arbitrator shall mediate the dispute between the parties" and on article 265/2¹²⁰⁴ and 258¹²⁰⁵ of

¹²⁰⁴ Article 265 of the civil transaction law, supra note 166, states: "1- When the wording of a contract is clear, it cannot be deviated from in order to ascertain by means of interpretation the intention of the contracting parties. 2 - Where the contract has to be construed, it is necessary to ascertain the common intention of the contracting parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that loyalty and confidence which should exist between the parties in accordance with commercial usage."

the civil transactions, which implies that the purpose of the contract should be deducted from the what has been drafted and the intent of the parties, therefore, the court should search for the parties intent upon interpreting the contracts text and they are guided in their interpretation by the nature and customs of that transaction.

Therefore, the defendant company upheld the arbitration clause between the parties, and as such the appeal is dismissed.

27. Appeal no. 142/2009 and 146/2009¹²⁰⁶

The claimant started the litigation against the defendants¹²⁰⁷, asking the court to order the payment of 4669250 dhs. in addition to 12% interest rate from the time of the claim and until the fulfillment of the payment, they claim that on the 15/9/2004 they entered in a contract with the first defendant in order to construct and maintain six warehouses on the defendants property. However, the defendants didn't fulfill their contractual obligation by failing to construct those warehouses on the claimant's requirement, which resulted in the claimant to initiate a plea to the court in the preliminary hearing no. 24/2007 in order to determine the state of the construction, the expert that was appointed in that hearing came to the conclusion that 18% of the construction is still unfinished, which is in the amount of 153000 dhs. Resulting in the claimant to start this suit in order to appoint a new expert, the claimant amended their request asking the court to confirm and recognize the new report submitted by this

¹²⁰⁵ Article 258 states: "1-In contracts, purposes and meanings are decisive, not the wording or construction forms. 2-True meaning is the basis of words. A word shall not bear a metaphor unless it is impossible to construe them according to their true meaning."

¹²⁰⁶ Dubai Court of Cassation, appeals no.142/2009 and 146/2009, issued on the 13th of September 2009.

¹²⁰⁷ Dubai Court of First Instance, case no. 179/2008, issued on the 26/1/2009.

expert, the court decided to order the payment of 550575 in favor of the claimant in addition to 9% legal interest from the time of the claim and until the fulfillment of the payment and to order the payment of 17085 dhs. also in favor of the claimant and to dismiss the rest of his requests. The defendant appealed this decision¹²⁰⁸, asking the court to nullify the appealed decision and to dismiss the dispute based on the existence of an arbitration clause or to appoint an engineering expert; the claimant also appealed the decision¹²⁰⁹, asking the court to accept all of his requests and to dismiss the defendants appeal. The court decided to amend the payment amount that should be paid to the claimant and to uphold the appealed decision. The claimant appealed this decision in appeal no. 142/2009, the defendants attorney pleaded to the court to dismiss the appealed based on article 177, the second defendant attorney also pleaded to the court to uphold the appealed decision The first defendant pleaded to the court that the appeal didn't fulfill the requirements of article 177, as such the appeal should be dismissed, the court dismissed this plea and decided to hear appeal no. 142/2009. The first defendant also appealed the appeal courts decision in appeal no. 84/2009.

a. Appeal no. 142/2009:

The appellant based this appeal on one ground, they argue on the courts acceptance of the new expert report, instead of the report of the expert that was appointed in the preliminary case no.24/2007. The court dismissed this argument stating that the court has the right to understand the facts of the case without the supervision of the cassation court.

¹²⁰⁸ Dubai Court of Appeals, appeal no.84/2009, issued on the 23/3/2009.

¹²⁰⁹ Dubai Court of Appeals, appeal no.160/2009, issued on the 23/3/2009.

The appellant also argued on the amount of the claim, claiming that since the contract is null then the court should have implemented article 274¹²¹⁰ of the civil transactions instead of the 7th clause of the construction contract. The court accepted this argument, stating that in the event that the contract is void or has been nullified then the court should implement article 274, moreover article 982¹²¹¹ of the civil transaction, which implies that the construction contract ends by the end of the construction work or by a mutual agreement to end the contract or by nullifying it. Thus, the court accepted this argument in regard to the damages.

b. Appeal no. 146/2009.

This appeal was based on three grounds, the appellant argues in the first ground that the appeal court decided to dismiss their request to dismiss the dispute based on the existence of an arbitration clause, claiming that their attorney was present in the first hearing¹²¹² and requested an extension to present his power of attorney, the appellant argues that the first hearing is the one in which they are present in or whom ever they choose to represent them are present, since the attorney presented the agreement on the 2/6/2008 and upheld this clause on that hearing then that should be considered as the first hearing.

¹²¹⁰ article 274, state: "When a contract is or shall be rescinded, the two contracting parties shall be reinstated to their former position, prior to contracting, and in case this is impossible, the Court may award damages."

¹²¹¹ Article 982 of the civil transaction, states: "1 - If two persons have deposited a joint property with another, and one of the depositors has asked the depository to retribute his share, in the absence of the other, he shall have to retribute it, if among fungibles; otherwise he shall turn down the request until acceptance of the other depositor. 2-If the thing deposited is subject of dispute between them, he shall abstain to retribute it to one of them without the consent of the other or a court order."

¹²¹² Which was conducted on 5/5/2008.

The court dismissed this arguments stating that article, 50¹²¹³ and 55¹²¹⁴ of the civil procedures implies that the first hearing is the one that the attorney or the defendant is present in and this fact doesn't change by requesting an extension to present the agreement, furthermore, article 203 of the civil procedures requires from the party trying to uphold the arbitration clause or agreement to take a positive action in the first hearing, otherwise it would be considered as a waiver of their right to uphold arbitrate, since it is viewed as a waiver of the arbitration clause.

The rest of the appellant grounds argued on what the court decided in regard to the damages, which was dismissed by the court.

28. Appeal no. 157/2009¹²¹⁵

The appellant company started the dispute¹²¹⁶ against the defendant in order to recognized the arbitral award dated 25/3/2008. The appellant claims that the parties entered into a construction contract on the 18/5/1998, in order to construct a building for the defendant per his request, in exchange for 18200000 dhs. this contract contained an arbitration clause in the event of a dispute, the appellant claims that the defendants failed to fulfill their obligation, which resulted in the appellant to initiate the arbitration proceeding according to the clause, the arbitral tribunal issued an award on the 25/3/2008, which awarded the appellant the amount of 2484010 dhs. and

¹²¹³ Article 50 of the civil procedures, supra note 5, states: "On the day fixed for examining the action, the opposing parties shall appear (attend) by themselves or whoever they brief (authorize - appoint - delegate)."

¹²¹⁴ Article 55 states: "1 - The court shall accept from the parties whoever they shall appoint as proxy according to the law. 2 - The proxy must establish his appointment as proxy for his client by an official document. 3 - The proxy may be done through a declaration recorded in the session's minutes."

¹²¹⁵ Dubai Court of cassation appeal no.157/2009, issued on the 27th of September 2009.

¹²¹⁶ Dubai Court of First Instance case no.399/2008.

9% interest rate; the appellant started this suit in order to recognize the award. The defendants counter claimed to dismiss the suit, claiming that the award is null due to the fact that it was issued in violation to the parties agreement, since the request to arbitrate should have occurred within 70 days of the end of the construction, furthermore, the award was rendered without an arbitration agreement, they also claim that the arbitrators exceeded the time given to them to issue the award, since the first hearing was at 26/1/2006 and the award was issued on the 25/3/2008 and that the they didn't agree to this extension neither explicitly nor implicitly, lastly they claim that the award was issued without a signature from the arbitral tribunal. The court decided to recognize the award. This decision was appealed by the defendant, the appeal court decided to set-aside the arbitral award¹²¹⁷.

The appellant appealed this decision to the cassation court on the 13/5/2009, the defendants pleaded to the court to dismiss the appeal, the court decided to hear the appeal.

The appellant based their appeal on two grounds, claiming that the appeal court came to the conclusion that the arbitration agreement has ended due to the passing of time, without basing their decision on any legal principle in regards to determining the first hearing of the arbitration, furthermore, the arbitrators have decided that the first hearing was on the 26/9/2007 and not 11/9/2007, in addition the court should have applied article 214 and should have asked the arbitrators to confirm the date of the first hearing. The appellant argue that the first hearing is the hearing in which the parties present their defense and arguments; they claim that they presented their requests on the 22/10/2007 and the tribunals notified the defendants to the

¹²¹⁷ Dubai Court of Appeals, appeal no. 1039/2008.

appellants request and gave them a time limit to present their defense on the 29/11/2007, which confirms the fact that the first hearing wasn't that of 11/9/2007. Furthermore, since the arbitration agreement states that the arbitration falls under the laws of Dubai and the UAE, which includes the civil procedures law, which enables the tribunal to postpone the hearing basing their decision on article 54 of the civil procedures¹²¹⁸, which allows the hearing to be postponed in the event that the defendants was not notified properly to appear in front of the tribunal. In addition, the six-month period starts after the parties' signing of the arbitration agreement and the request to start the arbitration, as such the meetings that happened between the parties and the arbitrators before that time doesn't constitute as a hearing nor as a start of the arbitration period.

The court dismissed this argument, stating that article 208 and 212 of the civil procedures implies that the arbitration hearing and process start by the appearance of the parties in front of the tribunal or by notifying them; moreover, it requires the arbitrators to notify the parties within 30 days of their appointment to the date of the first hearing. Furthermore, it is not required for the parties to be present in the arbitration hearing, the only requirement is that the arbitrators have given the parties the opportunity to present their defense; the court state that since confidentiality is the nature of the arbitration hearing and that it is the norm when it comes to arbitration, unless the parties agree to the contrary all that is required from the arbitrators is to uphold due process and the parties right of defense. Therefore, arbitration doesn't fall under the civil procedures law when it comes to notifying the parties and their

¹²¹⁸Article 54 states: "1- If the court has noticed, upon the absence of the defendant, the nullity of his notification of the initiatory pleading, it should postpone the action to a following session and serve him again a valid notification. 2- Should the court, upon the absence of the plaintiff, notice that he is not legally aware of the session, it should postpone the action to a following session of which the clerk's office of the court shall notify him."

presence in the arbitration hearing. However, the arbitrators are bound by the rules stated in the arbitration chapter; as such and according to the jurisprudence of this court any deficiency in the award cannot be amended by asking the arbitrators to explain or complete any shortcoming in the award, such as asking the arbitrators to prove the first hearing. Therefore, once the arbitrators have agreed and notified the parties of the first hearing date they are unable to change that date, in order for the time period to be properly calculated. Moreover, determining the first hearing falls to the discretion and interpretation of the trial court, according to articles 210 and 216 and the courts jurisprudence, which implies that the one of the grounds for setting-aside the award is that it was issued after the agreed upon time. Therefore, based on the appealed decision, which determined the first hearing dated to be on the 11/9/2007, since postponing the hearing on that date doesn't change the fact that this is the first hearing. As such the court decided to dismiss the appeal for the previous reasons.

29. Appeal no. 317/2009¹²¹⁹

The defendant company started the litigation in case no. . ./2008¹²²⁰ in front of the Dubai First Instance court against the appellants asking the court to appoint an arbitrator, based on an arbitration clause in the insurance contract between the parties and to recognize the arbitral award once its been issued. The defendant claim that based on an insurance policy between them they notified the appellants to pay the insurance claim amount, which they refused to pay and since on an arbitration clause exists in the insurance policy between the parties and due to the fact that this clause requires the insurance company to initiate the arbitration proceedings in the event of

¹²¹⁹ Dubai Court of Cassation appeal no. 317/2009, issued on the 14th of February 2010.

¹²²⁰ The court omitted the number of the decisions in this dispute.

the dispute, which they failed to do so for more than 16 months from the start of the dispute, the appellant sought the court in case no.../2004 and the subsequent appeal no.../2005 both of which decided that the court lack the proper jurisdiction to hear the dispute, due to the existence of an arbitration clause. They claim that they asked the insurance company to appoint an arbitration, which they did on the 16-8-2005, however, the arbitrator couldn't fulfill his duty and resigned from his position, the defendant claim that they waited for the insurance company again to appoint an arbitrator, which they failed to do, thus, forcing them to seek the court to appoint an arbitrator on their behalf. The court decided on the 1-6-2008, to appoint an arbitrator to settle the dispute between the parties in six months from the start of the first hearing, the arbitrator rendered an award on the 1-2-2009, in favor of the defendant company they brought that award to be recognized, the insurance company counter claimed to dismiss the award. The court decided on the 19-5-2009 to recognize the arbitral award. The insurance company appealed this decision in appeal no.../2009 the court decided on the 9-9-2009 to dismiss the appeal and uphold the appealed decision. They appealed this decision to the appeal court on the 3-11-2009.

The appeal was based on five grounds, the appellant claim in the first ground of the appeal that the court has mixed up the start of the arbitration and the extension of the arbitration, by miss interpreting articles 208 and 210 of the civil procedures in regards to the first hearing, they claim that the first hearing was on the 3-7-2008 in which they requested the arbitrator to hold the proceedings until the court renders a decision in appeal no.../2008 which they refused, thus making it the first hearing and not a preliminary hearing as the appealed decision claims that this was a preliminary hearing and that the first hearing was on the 10-7-2008. Thus, the arbitrator should have issued the award on the 2-1-2009 and not 1-2-2009, the appellants upheld this

argument as a ground for setting-aside the award based on article 216 of the civil procedures, the appeal court dismissed this argument based on article 210, claiming that the hearing on the 3-7-2008 is a preliminary hearing. The appellant argues that there is no such thing as a preliminary hearing and that the hearing that comes after the appointment of the arbitrators is the first hearing.

The court accepted the appellant argument, stating that article 208 defines the commencement of the arbitral proceedings to be the hearing in which the parties appear in front of the tribunal or were notified to appear.

Therefore, the court decided to set-aside the arbitral award without the need to address the remaining grounds of the appeal.

30. Appeal no. 73/2010¹²²¹

The appellant institute started the dispute against the defendant in case no.../2009¹²²², asking the court to recognize an arbitral award no.../2007 issued from the Dubai international arbitration institute on the 13-7-2006, they claim that on the 5-3-2006 the parties entered into a construction contract that included an arbitration clause, and after a dispute rose they started the arbitration procedure and an award was issued. The defendant counter claimed to set-aside the award, claiming that the award was issued based on arbitration agreement that didn't identify the scope of the arbitration, and that the arbitration tribunal was appointed by a non authorized person, since the defendant is not authorized from the owner of the project to enter into an arbitration agreement, and that the arbitration agreement is void since the agreement only contained the appellants signature. Furthermore, the appellant decided to

¹²²¹ Dubai court of cassation appeal no.73/2010, issued on the 9th of May 2010.

¹²²² Again the case number was omitted in this decision.

arbitrate on the 22-8-2007, which is after the end of the 70 days time limit in which they are able to submit the dispute into arbitration according to clause 67/1 of the contract, moreover the arbitration was conducted in Dubai and not in Um al-Quwain per the agreement, they also claim that the arbitrators awarded interest rate, which is outside the scope of the arbitration agreement. The first instance court decided on the 18-10-2009 to recognize the award and dismiss the counter claim, both the appellant and the defendant appealed this decision; the appellant requested that the recognition decision need to be expedited in appeal no.../2009 and the defendant requested to set-aside the award in appeal no.../2009, the appeal court decided to dismiss the appellants appeal and accept the defendants, by deciding to set-aside the arbitral award on the 7-2-2010. The appellant appealed that decision to the cassation court, the defendant pleaded to the court to dismiss the appeal, the court decided to hear the appeal.

The appellant argues that the appeal court decided that the letter of acceptance dated 5-03-2006, didn't contain any indication of settling the dispute according to the rules of FIDIC contract or to the arbitration clause, which is emphasized by the fact that the parties didn't sign the arbitration clause in that contract, furthermore, the letter of acceptance of the FIDIC is a general acceptance that doesn't involve an acceptance of the arbitration clause of that contract. The appellant argues that this is a binding contract between the parties, and the letter of acceptance shows that the parties' intended to settle any dispute rising from the construction contract through arbitration.

The court accepted this argument, stating that article 203 and 216 of the civil procedures implies that arbitration is "the disputants choosing an impartial arbitrator

to settle the dispute between them without referring the dispute to the court, this could be in relation to a dispute that occurred or will occur and based upon an arbitration agreement or a clause, the arbitration focuses on the parties intent and agreement, this agreement is the main source that the arbitrator authority is derived from and in which the parties are able to opt-out of the court, which is the reason why the legislator have put extra assurances in place such as the arbitration agreement need to be in writing and that the arbitrator renders an award within the scope of the arbitration agreement, and that the arbitration agreement is not required to be in a single document for the acceptance of the agreement can be in another document, moreover it can be proven in writing or through the parties communication and letters if the documents and letters were signed by the sender, and it can be proven through any form of written communication, arbitration cannot be initiated unless the parties intent to arbitrate is proven, which can be proven if the arbitration clause have been included in the main contract or in a separate arbitration agreement signed by the parties”. Accordingly, a construction bidding is considered as a construction contract agreement, moreover the trial court has the right to deduce the parties intent to arbitrate from the facts of the dispute without the supervision of the cassation court, the only requirement is that it is based on factual reasoning, the court explains that the reasoning is null if the courts deduction is not valid from a subjective perspective or that the records show that the court didn’t understand the facts of the case. Therefore, and based on these facts the arbitration agreement is considered valid, and the court decided to uphold the first instance rule and dismiss the appeals court.

31. Appeal no. 41 and 74/2010¹²²³

The appellant company (insurance company) started the dispute against the defendant (investment company) in front of the Dubai first instance court, asking the court to order the payment of the amount of the claim in addition to 12% interest rate from the date of the claim until the fulfillment of the payment, they claim that a tenant leased two shops from the defendant in the shopping mall that they own and operate, the tenant also insured those shops and the goods in them with the appellants company, they claim that due to a leaking pipe from the mall the tenants store suffered damages that extended to the goods that were covered by the insurance agreement, the appellant paid the insurance amount to the tenant, and started this suit against the defendant in place of the tenant. The defendant counter claimed to dismiss the suit, based on the existence of an arbitration clause in the contract between the parties. The court decided on the 25-2-2009, to dismiss the defendants counter claim and accept the appellants claim. The defendant appealed this decision, the appeal court appointed an expert that issued a report, which changed the amount of the damages, and the appeal court confirmed this report on the 10-1-2010. The defendant appealed this decision to the cassation court in appeal no. 41/2010, the appellant pleaded to dismiss the appeal; they also appealed this decision in appeal no. 74/2010. The court decided to hear both appeals.

Appeal no.41/2010:

The appeal was based on four grounds, the appellant argues in the first and third grounds that they upheld their argument that the court should dismiss the case based on the existence of an arbitration clause in the lease contract between them and

¹²²³ Dubai Court of cassation appeal no. 41 and 74/2010, issued on the 2nd of June 2010.

the tenant (the insurer), claiming that the court dismissed this argument by stating that they don't have the right to arbitrate, claiming that the defendant (the insurance company) have initiated this damage claim not based on the lease contract that contains the arbitration clause, but based on the principle of torts, which makes this dispute falls outside the scope of the arbitration clause.

The appellant claims that the insurance company don't have the right to ask for damages based on tort, since the lease agreement contained a clause that exempt them from any suits based on tort, they claim that this agreement doesn't infringe the public policy or order and as such the court needs to uphold it.

The court dismissed this argument, stating that even though the jurisprudence of this court accepts the parties' agreement to exempt tort claims. However, this exemption is limited to the parties ability to prove that the tort claim accord due to an act that is a direct result to the other party action, which exceeds their contractual obligation and as such they are liable either by the contract or not. Furthermore, the court has the right to identify the basis of the damages on their own without the request of the parties, moreover the agreement between the parties to submit what dispute raises between them from a certain agreement into arbitration doesn't affect third parties that are not bound by that agreement. Furthermore, articles 296 of the civil transaction law states that all clauses that exempt the party from tort liability is void¹²²⁴, the court explained that in this dispute the parties liability is based upon the principles of the tort and not the lease contract, since the leaking of the pipes that resulted in the damages to the goods is not a part of the lease agreement. Therefore,

¹²²⁴ Article 296 of the civil transaction law, states: "Any condition exonerating from tort liability shall be deemed null and void."

the appeal court came to the right conclusion in dismissing the appellant's request to arbitrate.

The rest of the grounds argue on the tort and the parties' liability, appeal no.74/2010 doesn't concern the arbitration clause as well.

32. Appeal no.181/2010¹²²⁵

The defendant started the litigation against the appellant in front of the Dubai first instance court in case no.../2009, asking the court to recognize the arbitral award issued on the 14-11-2009; the defendant claims that they are sellers of construction material and they entered into a contract with the defendant to buy three thousand tons of iron, they claim that they annulled the contract due to the financial crisis that hit the international market, which resulted in a drop in the price of iron, which they claim is a ground of nullifying the contract under the force majeure doctrine, the appellant didn't accept this claim, since an arbitration clause exist in this contract they asked the appellant to appoint an arbitrator upon their refusal the defendant sought the court to appoint an arbitrator, the court issued a decision on the 11-6-2009 to appoint an arbitrator. The arbitrator issued an award, which is being brought to the court for recognition, the appellant counter claimed to set-aside the award based on a procedural failure; the court decided to recognize the award on the 22-2-2010. This decision was appealed to the appeal court (appeal no.../2010), the court decided on the 15-4-2010 to uphold the appealed decision.¹²²⁶

¹²²⁵ Dubai Court of cassation appeal no.181/2010, issued on the 26th of September 2010.

¹²²⁶ The case numbers were omitted in this decision.

This decision was appealed to the cassation court on four grounds, the appellant claims in the third part of the third ground and the second ground, that the award is null since it was issued by a non-authorized party and in contrast to what the parties agreed on in the contract, and that the arbitrator failed to notify the appellant of the introduction of a third-party in the proceedings.

The court dismissed this ground, stating that there is nothing in the papers that suggest that the parties of the arbitration are not the ones that agreed to arbitrate, therefore, the claim that a third party was introduced in the proceeding is null and without a basis.

The appellant first ground argues that the arbitrator didn't uphold the requirements of article 213 of the civil procedures, since the arbitrator didn't submit the award and the rest of the arbitration document within 15 days of the issuing the award, which infringes the requirement of that article.

The court dismissed this argument, stating that article 213 and 204 of the civil procedures, implies that the request for appointing an arbitrator doesn't mean that it is a court-annexed arbitration, for in this instance the court is simply enabling the parties to arbitrate, as such the arbitrator didn't violate article 213 since he is not bound by the procedures in that article.

In regard to the remaining grounds of the appeal, the appellant argues that the court recognized the award without examining their defense in regard to their fulfilling their contractual obligation, in contrast to what the arbitrator decided in his award.

The court dismissed this argument, stating that the court when recognizing an arbitral award doesn't examine the subject of the award; furthermore article 216 of the civil procedures limited the conditions of setting-aside the award.

33. Appeal no.131/2009 (civil/construction)¹²²⁷

The appellate company started the dispute¹²²⁸ by asking the court to appoint an arbitrator in the dispute between them and the defendant company, they claim that based on a construction contract dated 14-5-2005, they agreed that the appellate will construct and maintain warehouses and offices on the defendants property in Jabil-Ali in accordance to the engineering consultant plans, a dispute arose between the parties in regard to the payments, and since article 31 of the contract dictate that any dispute shall be submitted to arbitration, upon the parties failure to appoint an arbitrator the appellant sought the court to resolve this dispute. The defendant counter-claimed by stating that the court has no jurisdiction to hear the dispute, according to the arbitration clause in the contract and article 34/4 of the construction contract. The court decided; first to affirm their jurisdiction on the dispute, second to appoint the engineering expert as an arbitrator between the parties. The defendant appealed this decision, the appeal court decided to vacate the appealed decision and dismiss the case¹²²⁹. The appellant appealed this decision to the cassation court on one ground.

¹²²⁷ Dubai Court of Cassation, appeal no. 131/2009, issued on the 14th of June 2009.

¹²²⁸ Dubai Court of First Instance, case no.393/2008, issued on the 30/10/2008.

¹²²⁹ Dubai Court of appeals, appeal no. 951/2008.

The third part of the first ground argues that the appellant requested the appointment of an arbitrator, which the court accepted making this decision unappealable according to article 204 of the civil procedures.

The court dismissed this this argument, stating that article 204/2 of the civil procedures indicate that the decisions that are not subject to appeal are the ones that concern the appointments of the arbitrator in accordance to the conditions set in paragraph one of the same article, which is an exception to the general principle in regard to appeals, as such the court is limited when interpreting and applying this article, therefore, it should be limited to appeals in regard to the appointment of the arbitrator or replacing them, and doesn't extend to other preliminary decisions that the appointment decision is bound to them, such as interpreting the arbitration clause in order to determine if it contained a process of appointment or not, and since the first instance court decided to appoint an arbitrator, without upholding the procedures that are mentioned in article 31 of the contract, which states that the arbitrator should be named by one of the parties before starting that arbitration procedure, as such the appeal court has the right to accept the appeal and determine if those conditions have been met.

The appellant first and second part of the first ground, argues that the clause no.31 of the contract determines that in the event of a dispute between the owner and the contractor and the consultant, in regard to this contract it shall be referred to a sole arbitrator to settle the dispute, and since the parties didn't agree on an arbitrator and a dispute have risen between them then the appellant request to the court is lawful, for if the parties agreed to the appointment they wouldn't have sought the court, furthermore, the appeal court stated that there reason for nullifying the first instance

decision was that it infringed the parties right and will that a dispute should raise first in regard to appointing an arbitrator before seeking the court.

The court agreed with this argument, stating that article 204/1 of the civil procedures and clause 31 of the contract both implies that the parties agreed to arbitrate and there is no condition in that clause that prohibit the parties from seeking the court to appoint an arbitrator.

Therefore, the court decided to nullify the appealed decision and uphold the first instance decision to appoint an arbitrator and refer the dispute to him.

Federal Supreme Court of the UAE

1- Appeal no. 225/23¹²³⁰

The defendant started the litigation¹²³¹ against the appellant asking the court to appoint an accounting expert to revise the parties accounts and to determine the amount that the defendant is claiming to receive in return to his supervising over the project, he claim that he have agreed with the appellant to supervise over the project based on his expertise as a architectural engineer to supervise over the furnishing and the construction of the appellants house, the defendant argues that he have fulfilled his obligation towards the appellant but the later refused to pay the defendants fees. The first instance court appointed an accounting expert that presented a report to the court, which the court have recognized that orders the appellant to pay 270,867 dhs. to the

¹²³⁰ Federal Supreme Court of the UAE, appeal no. 225/23, issued on the 6th of March 2003.

¹²³¹ Um Al Quwain Court of First instance (civil circuit), case no. 13/98.

defendant. The appellant appealed this decision the court, which decided on the 26/2/2001 to uphold the appealed decision¹²³².

This decision was appealed to the Supreme Court on five grounds; the second ground argues that the first instance court decided to dismiss the appellant's request to dismiss the dispute based on the existence of an arbitration clause, based on the fact that it was not presented in the first hearing, although the appellant representative pleaded in the postponed hearing dated 3/10/1998.

The court dismissed this argument, stating that this plea relates to the public policy and should be presented before arguing on the subject matter of the dispute, otherwise it would be considered a waiver of their right to arbitrate according to article 84 of the civil procedures¹²³³.

The appellant first, fourth and the first part of the fifth grounds argues that the appeal court decided to combine the two appeals 80/2000 and 91/99 and rendered a decision in appeal no. 80/2000 and failed to render a decision in the second appeal.

The court dismissed this claim stating that this is within the courts right to interpret the facts of the case as they see fit.

The following ground of appeal, argues that the court have requested the defendant to give their testimony under oath, given the fact that the court decided to uphold the rules of article 19 of the law of evidence¹²³⁴, by asking the defendant to

¹²³² Ajman Federal Court of Appeals, appeal no.80/2000.

¹²³³ Article 84 of the civil procedures, state: "1-The plea to local jurisdiction and the plea to forward the action to another court for setting the same litigation there before, or for engagement, and the refutation of nullity which is not related to the public order, and all of the pleas related to the discontinuing procedures, should be revealed together before presenting any other procedural plea, request, defense in the action, or disapproval, otherwise the right of what hasn't been revealed thereof shall be extinguished, and also the right of the appellant shall be extinguished in such pleas if he hasn't revealed them in the appeal initiatory pleading. 2-It shall be imperative to exhibit together all the aspects on which the plea, related to the procedures which are not connected to the public order, shall be based, otherwise the right to what hasn't been revealed thereof shall be extinguished."

¹²³⁴ Article 19 of the Evidence law, states:" 1- In case the requestor establishes the veracity of his request or if the opponent admits that the document or paper is in his possession or keeps silent, the court shall order the submission of the document or paper at once or within the shortest delay fixed by

present documents, which contradict his testimony and in contradiction to the expert report that the court have confirmed, as such the court should vacate the decision.

The court dismissed this argument as well, stating that this is within the authority of the subject court to consider these facts when deciding their case without supervision from the Supreme Court; the court has the authority as well to take the entire expert report into consideration or part of it.

2. Appeal no.42/23¹²³⁵

The defendant insurance company started the dispute¹²³⁶ against the appellants, asking the court to order them to submit their account records, since the first appellant is an agent of the insurance company in order to determine the defendants' commissions, they also requested the appointment of an accounting expert. The first instance court decided to accept the appellants' counter claim, to dismiss the case based on the existence of an arbitration agreement and to appoint an accountant as a sole arbitrator in the dispute. The defendant appealed this decision to the appeal court¹²³⁷, the court decided to dismiss the appeal. The defendant appealed that decision to the Supreme Court¹²³⁸, the court decided on the 21/11/1999 to nullify the appealed decision and refer the dispute back to the first instance, they also dismissed

it. 2- Should he fail to submit satisfactory evidence proving the veracity of his request and the opponent denies the existence of such document or paper, the latter must take oath that the document or paper does not exist, that he has no knowledge of its existence or its place and that he did not conceal it or neglect searching for it in order to deprive the requester from using it as evidence. 3- If the opponent fails to produce the document or paper on the date fixed by the court, or refuses to take the abovementioned oath, the copy of the document or paper submitted by the requester shall be considered true and conform to the original. In case he did not submit copy of the document, the court may accept his oral statement as to the form and substance of such document.”

¹²³⁵ Federal Supreme court of the UAE appeal no.42/23, issued on the 13th of April 2004.

¹²³⁶ Sharjah Court of First Instance, case no.146/1996.

¹²³⁷ Sharjah Court of Appeals, appeal no.135/97.

¹²³⁸ Federal Supreme Court of the UAE, appeal no.463/19, issued on the 21st of November 1999.

the appellants counter claim of the existence of an arbitration clause. The appellants appealed that decision again to the Supreme Court on four grounds.

The appellant argues that the court decided to dismiss the arbitration clause, by stating that there is nothing in the papers that indicate that the parties have agreed to extend the arbitration period or to allow the court to extend this period; which resulted in the court decision to dismiss their request to refer the dispute into arbitration. The appellants claims that they submitted a letter to the appeal court from the arbitrator dated 7/5/1995, which indicate that the parties have verbally agreed that the arbitrator is going to decide on a hearing date once the defendant manager returns from his trip abroad, they also claim that the defendants didn't start any action in front of the court until 9/7/1996, which is an implicit indication of his agreement to extend the arbitration period, moreover the defendant requested in that suit from the court to ask the arbitrator why is he taking a lot of time in issuing an award? However, the court decided to dismiss his request.

The court dismissed this claim, stating that based on articles 203 and 210 implies that if the parties have agreed in writing to submit a dispute into arbitration and decided on a time period for the arbitrator to issue a decision, then the arbitrator is bound to issue an award within that time period, and in the event that the parties didn't agree on a period then the period shall be six months from the start of the first hearing, otherwise it is acceptable to submit their dispute to the court after the passing of that period. Furthermore, the parties have the right to explicitly or implicitly to extend the arbitration period or to authorize the arbitrator to extend that period, moreover the court has the right to extend the arbitration period upon the request of the parties. Which, indicates that the law obliges the arbitrator to issue a decision

within the agreed period and didn't authorize the arbitrator to extend that period on his own unless the parties agreed to this extension either explicitly or implicitly or by a court order. Furthermore, the court has the right to interpret the facts of the dispute and to determine whether the parties agreed to extend that period or not. Therefore, it can be deduced from the facts of the case that the arbitrator issued the award after the passing of the time period.

Thus, the court decided to dismiss the appeal.

3. Appeal no. 304/23¹²³⁹

The appellant institute started the dispute¹²⁴⁰, against the defendant company asking the court to register the arbitration clause in the construction contract between the parties, and to appoint an arbitrator to settle the dispute between them under the supervision of the ICC¹²⁴¹ in Paris and to order the parties to identify the scope of the arbitration according to article 203; they claim that they entered into a sub-construction contract with the main contractor (the first defendant), claiming that they have fulfilled their contractual obligation, however, the defendant have deducted from their pay, which resulted in the appellant to start a suit in front of the AD court¹²⁴² in which the defendant counter claimed to dismiss the case based on the existence of an arbitration clause, the court in that suit decided to dismiss the case and the appeal court upheld that decision as well¹²⁴³, which resulted in appealing the dispute to the

¹²³⁹ Federal Supreme Court of the UAE appeal no. 304/23, issued on the 24th of March 2003.

¹²⁴⁰ Abu Dhabi Federal Court of First Instance, commercial circuit case no. 218/2000, issued on the 27/11/2000.

¹²⁴¹ This International Chamber of Commerce.

¹²⁴² Abu Dhabi Federal Court of First instance, case no. 1373/1988.

¹²⁴³ No mention of the appeal courts case number.

Supreme Court, which decided to dismiss the appeal¹²⁴⁴. The appellant argued that the arbitration clause referred to the rules of the ICC in regard to appointing the arbitrators, which disregard the international jurisdiction rules of the courts in the UAE, and since the clause doesn't insinuate that the dispute should be settled in Paris, thus the UAE courts still has jurisdiction in regard to the appointment. The first instance court decided that the court lacks the jurisdiction to settle the dispute and dismissed the case, by referring the dispute into arbitration and asking the judicial council to nominate a sole arbitrator in the dispute. The defendants appealed this decision to the appeal court¹²⁴⁵, the appeal court decided to nullify the appealed decision and to dismiss the appellant request to register the arbitration agreement.

The appellant appeal to the Supreme Court was based on the following grounds; that the parties agreed in the arbitration agreement to settle the dispute according to the ICC rules, which doesn't mean that the parties agreed to submit their dispute to be administered under the ICC institute, it only means that the party agreed to apply the same rules used by the ICC in regards to the appointment of the arbitrators, and that the courts in the UAE should still supervise over the dispute.

The court dismissed this argument, stating that the procedure of registering the arbitration agreement in the court was a procedure that was required under the AD civil procedures law no. 3/1970, which has been abolished by the introduction of the Federal civil procedures law no. 11/1992, as such the jurisdiction in regard to the registration of this dispute and the start of the proceedings should be done through the ICC.

¹²⁴⁴ Federal Supreme Court of the UAE, appeal no.38/12, issued on the 6th of December 1990.

¹²⁴⁵ Abu Dhabi Federal Court of Appeals, appeal no.1018/2000, issued on the 25/2/2001.

Therefore, the court decided to dismiss the appeal.

4. Appeal no. 194/13¹²⁴⁶

The appellant started the dispute¹²⁴⁷ against the public works and service department of AD requesting the registration of the arbitration clause between the parties, they claim that a judge.... was appointed as chief of the arbitration tribunal in place of its former chief on the 29/7/1989 by the judicial authority, which resulted in the appellant to seek the first instance court in case no. 2160/84, requesting the court to dismiss this judge from the arbitration tribunal since the appointment procedure was conducted in contrary to what the law states, for the previous chief didn't request to be dismissed and was not dismissed by the proper authority that appointed him which is the court, furthermore the appellant objected in front of the arbitration tribunal in the hearing dated 31/7/1989 to the appointment of that arbitrator in contrast to the law and the arbitration clause. The first instance court decided to dismiss the appellant's request; the appeal court upheld that decision.¹²⁴⁸

The appellant appealed that decision to the Supreme Court, arguing that the court decided that since this decision doesn't end the dispute and as such it's not subject to appeal. However, the Supreme Court in appeals no. 76/10 and 90/10 decided that disputes in regard to appointing an arbitrators and determining the authority responsible of his appointment are separate disputes from the arbitration, as such those decisions do end the dispute, as a result they are appealable.

¹²⁴⁶ Federal Supreme Court of the UAE appeal no. 194/13, issued on the 28th of April 1992.

¹²⁴⁷ Abu Dhabi Federal Court of First instance, (civil circuit) case no. 2160/984.

¹²⁴⁸ Abu Dhabi Federal Court of Appeals, appeal no. 37/1990.

The Supreme Court agreed with the appellant's argument, stating that the decisions of the appointment do indeed end the dispute and as such subject to appeal. Therefore, the court decided to nullify the appealed decision and refer the dispute back to the appeal court to render a decision.

5. Appeal no. 325/2010¹²⁴⁹

The defendant started the suit¹²⁵⁰ by asking the court to appoint arbitrators to settle the dispute between the parties, they claim that based on an agreement between the parties the appellant rented a land from the defendant, they claim that damages resulted due to the appellant usage of the land, therefore, they requested from the appellant to appoint an arbitrator to resolve the dispute between them as per the agreement between the parties, which the appellant refused to do, forcing them to seek the court to order the appointment of the arbitrator. The first instance court decided to appoint three arbitrators to resolve the dispute, the arbitrators managed to issue an award in favor of the defendant, which was brought in front of the court to be recognized, the appellant counter claimed to dismiss the award and to order the defendant to pay the amount of 200,000. Dhs. The court decided to dismiss the dispute, stating that they lack the proper jurisdiction and referred the dispute to the Abu Dhabi First instance court¹²⁵¹. This decision was appealed by both the defendant and the appellant¹²⁵², the court decided that the first instance court has the jurisdiction to issue a decision in the dispute; the appellant appealed that decision to the Supreme

¹²⁴⁹ Federal Supreme Court of the UAE appeal no. 325/2010, issued on the 28th of December 2010.

¹²⁵⁰ Abu Dhabi Federal Court of First Instance, case no. 753/2007.

¹²⁵¹ This dispute occurred in a transition period, when the Emirate of AD decided to rescind from the Federal Courts system and create their own judicial body by establishing their own court system and cassation court.

¹²⁵² Abu Dhabi Federal Court of appeals, appeal no.29 & no.33/2010, issued on the 25/5/2010.

Court. Pleading to the court to hear the case by claiming that the exception mentioned in article 151 is limited to the conditions stated in that article, they also claim that the judicial authority of the emirate of Abu Dhabi became a separate entity after 1/9/2007 when Abu Dhabi decided to rescind from the Federal Judicial system¹²⁵³, as such this decision is subject to appeal. The court accepted this plea and decided to hear the appeal.

The appellant appeal was based on one ground, claiming that the court decided that the Federal courts of Abu Dhabi has the authority to hear the request of recognizing the arbitral award. However, since this is not a court-annexed arbitration as such the parties are not required to present their requests or dispute to the federal court, based on the fact that the jurisdiction in this dispute falls to the judicial authority of the Emirate of Abu Dhabi.

The court responded by stating that since the emirate of AD decided to rescind from the Federal System, then the determination of the jurisdiction between the federal courts and the local authority is a matter that relates to the public policy, based on articles 204 and 213, which imply that the award issued by an arbitrator that was appointed by the court is a court-annexed arbitration, as such it would fall under the conditions mentioned in those articles, in regard to the procedure of recognizing a court-annexed arbitral award, which in this instance would fall under the jurisdiction of the Federal First Instance court of Abu Dhabi.

Therefore, the court decided to dismiss the appeal.

¹²⁵³ Supra note 27.

6. Appeal no. 142/17¹²⁵⁴

The defendant company started the dispute¹²⁵⁵ against the appellant, claiming that they entered in a contract with the appellant to supply and install medical equipment in their facility, after they fulfilled their obligation the appellant refused to pay the reminder of their pay, and since they agreed in the contract to submit any dispute that rises from this contract into arbitration, they asked the court to refer the dispute into arbitration, the court decided to refer the dispute into arbitration. The arbitrators issued an award stating that the appellant should pay the amount of the claim to the defendant, the court decided to recognize the award; the appellant appealed that decision to the appeal court which upheld the appealed decision resulting in an appeal to the Supreme Court.

The appeal was based on two grounds, the first part of the first ground argues that the arbitrators accepted the defendant's claim that the appellant failed to pay the defendant fees in the agreed dates, for even if this claim were to be true it doesn't entitle the defendant to stop the construction and installation from their part.

The court dismissed this claim.

The appellant second part of the first and second grounds of the appeal, argues that the court refused their request to set-aside the award, they argue that the court should set-aside the award since it was based on a foreign document that was not legally translated into Arabic, which constitute a ground for setting-aside the award according to the civil procedures law.

¹²⁵⁴ Federal Supreme Court of the UAE, appeal no. 142/17, issued on the 28th of November 1995.

¹²⁵⁵ Abu Dhabi Federal Court of First Instance, case no. 1661/1988

The court decided to dismiss this claim, stating that in order for this ground to be enforced the court should have based their decision on those documents or on the documents that have been presented without the other parties' knowledge. However, the appealed decision was based on facts that has been accessible to the appellant and were contested by the appellant in the arbitration procedure, and were not based on those papers that were not translated.

Thus, the courts decided to dismiss the appeal.

7. Appeal no.5/2009¹²⁵⁶

The appellant started the dispute¹²⁵⁷ against the defendants, asking the court to nullify the lease committees orders number 858, 859, 1071/2007, which were issued on the 26/6/2007, claiming that based on a lease agreement they leased two shops from the defendant, later on the defendant informed them that if they wished to renew the contract the rent would increase, the appellant refused to renew the lease with an increase in the rent and as a result the defendant cut the power from the appellants shops, resulting in a dispute between the parties that ended up in front of the lease committee. The committee dismissed the appellant request and decided to accept the defendant request, by ordering the appellant to vacate the property for the failure to pay the rent. The first instance court decided to dismiss this suit, and the appeal court decided to uphold that decision¹²⁵⁸. The appellant sought the Supreme Court to nullify that decision; the defendant submitted a plea to the court to dismiss the appeal. The

¹²⁵⁶ Federal Supreme Court of the UAE, appeal no. 5/2009, issued on the 17th of February 2010.

¹²⁵⁷ Ajman Federal Court of First Instance, case no.72/2007.

¹²⁵⁸ Ajman Federal Court of Appeals, appeal no. 74/2008.

defendant claims that the appeal was filed after the passing of the appeal time, the court dismissed this plea and decided to hear the appeal.

The appellant argues in the first and second part of the first ground of the appeal, that they upheld their claim in front of the court of the nullity of the committee's decision, claiming that the decision was issued without an arbitration agreement, they also claim that the head of the committee is a relative of the defendants.

The court decided to dismiss the first part, by stating that according to articles 15/2, 16 and 18 of the Emir decree no. 6/2005 in regard to regulating the lease transaction in the Emirate of Ajman¹²⁵⁹, which implies that in order to set-aside the committee's decision it need to fall under one of the conditions of article 216. Moreover, the legislator have set forth new rules that regulates lease transaction disputes by having them fall under the committee's jurisdiction, which are in exception to the general rules of adjudication, in addition to clauses 6 and 7 of the lease contract, which requires the parties to refer all disputes that raises between them to the lease committee of Ajman. In regard to the second part, in which the appellant is contesting the head of the lease committee's relation to the defendant, the court stated that in order to dismiss him the appellant would have had to follow the rules mentioned in article 207/4, which requires such pleas to be submitted within a time limit, which is within five days of the plaintiff knowledge of one of those conditions. Otherwise, it would be considered as a waiver of their right to dismiss the arbitrator.

¹²⁵⁹ Emirates of Ajman, Emir decree no. 6/2005 in regard to regulating lease transaction in Ajman.

The appellant's third part of the first ground of the appeal argues that the court dismissed their request to nullify the award, claiming that they have been willing to pay the rent and as such there is no grounds for ordering them to vacate the property.

The court dismissed this argument, stating that even though article 16 of the decree state that the committees decisions are not subject to appeal, however, article 18/7 of the same decree allows the parties to set-aside the award on grounds that matches those of article 216, and since the civil procedures law didn't state on a reason that relates to the subject matter of the dispute as a ground for setting-aside the award, as such the courts authority doesn't extend to examine those arguments that relates to the subject matter of the dispute, such as the ones presented by the appellant.

The second ground of the appeal argues that the appeal court have referred to the reasoning of the first instance court, without answering the appellants plea and as such have failed to uphold due process.

The court dismissed this argument, stating that the appeal court has the right to refer to the reasoning of the first instance court, in the event that the appellant didn't present any new pleas in front of the appeal court.

Therefore, the court decides to uphold the appealed decision and dismiss the appeal.

8. Appeal no. 116/17¹²⁶⁰

The defendant started the dispute against the appellant¹²⁶¹, claiming that they and the appellant are partners in the ownership of a group of companies, which includes a construction group that has bought a number of construction equipment, and based on an agreement between them they registered some of those equipment's under the defendants name and the others under the appellant, and based on another agreement between the parties, they decided to divide the assets of the company between them on the 3/1/1990. However, the appellant refused to pay an amount that they both agreed upon in order divide the assets between them, which resulted in this dispute. The first instance court appointed an expert then decided to first dismiss the plea, stating that the court lacks the proper jurisdiction to hear the dispute. The appellant sought the appeal court to nullify this decision; the appeal court accepted his plea and vacated the trial courts decision.¹²⁶²

The appellant appealed this decision to the Supreme Court on ten grounds, the tenth ground of the appeal argues that the appealed decision was issued in contrast to the jurisdiction rules, claiming that the subject of the dispute is the collection of rent, which is governed under the lease law no. 92/1977, which gives the jurisdiction to hear the dispute to the municipality of Sharjah arbitration committee. However, the defendant disregarded this requirement and sought the court.

The court dismissed this argument, stating that this committee's jurisdiction is limited to the disputes that rises from lease agreements between the landlord and the tenant in regard to the execution of that agreement only, and that the parties in this

¹²⁶⁰ Federal Supreme Court of the UAE, appeal no. 116/17, issued on the 31st of October 1995.

¹²⁶¹ Sharjah's Federal Court of First Instance, in case no. 1428/1990.

¹²⁶² Sharjah's Federal Courts of Appeals, appeal no. 104/1993.

dispute don't fall under that category, since in this instance the dispute is between the owners in which case the court has the jurisdiction to hear the dispute.

The appellant other arguments revolve around the expert report, which were accepted by the court, the court decided to vacate the appealed decision and refer the dispute back to the appeal court.

9. Appeal no. 62/17¹²⁶³

The appellant started the dispute against the defendants¹²⁶⁴, by asking the court to nullify the termination order, which ordered the appellant termination from his position as a CEO of the Indian School in Al-Ain, the appellant also requested the implementation of article 295 of the civil transaction law¹²⁶⁵ and to reestablish the previous status quo between the parties and to order the payment of 80,000 dhs. as a compensation for the damages, claiming that by the end of 1988 he became the CEO of that School, later on a dispute rose between the parties, which resulted in his termination by the defendants and slandering his name. The first instance court decided to dismiss the dispute, stating that they lack the jurisdiction to hear the dispute; this decision was appealed and the appeal court decided to uphold the appealed decision¹²⁶⁶. The appellant sought the Supreme Court to nullify this decision, the defendants pleaded in front of the court. The court dismissed this plea and decided to hear the appeal.

¹²⁶³ Federal Supreme Court of the UAE, appeal no. 62/17, issued on the 20th of June 1995.

¹²⁶⁴ Federal Court of First Instance, case no. 166/1994, issued on the 12/10/1994.

¹²⁶⁵ Article 295 of the civil transaction, states that: "Damages will consist of a money payment. Upon request of the victim, however, the judge may, in accordance with the circumstances, order that the damage be made good by restoring the parties to their original status, or by performing, in compensation, a specific matter connected with the prejudicial act."

¹²⁶⁶ Federal Courts of Appeals, appeal no. 294/1994.

The appellant based his appeal on two grounds, the first ground argues that the court dismissed the suit based on the existence of an arbitration clause and as a result this implies that the jurisdiction in this dispute falls under that arbitral clause; the appellant argues that at the time of the dispute the arbitrator (the Indian ambassador) was outside the country. Furthermore, the appellant claims that they have already presented their dispute to the previous ambassador; however, he failed to initiate the arbitration proceedings.

The court dismissed this claim, they state that the appealed decision explained that the reason behind dismissing the claim is “the will of both parties to resolve their disputes through arbitration, this will has been manifested through clause fifteen of the schools constitution, which state that in the event of a dispute between the board members this dispute shall be resolved through arbitration and the arbitrator shall be the schools owner and his decision shall be final and binding to the parties; therefore this clause prohibits the parties from seeking the courts to resolve their disputes, moreover the appellants disregarded this clause and the rules of article 203 of the civil procedures both of which prohibits the parties from seeking the courts to resolve their dispute in the presence of an arbitration agreement. In essence, this interpretation by the appeal court has a basis both in the agreement and the law and as such falls under their power of interpretation, which makes the appellants argument void.

The appellant second ground argues on the amount of the claim; the court decided to dismiss this argument as well.

As a result the court decided to dismiss the appeal.

10. Appeal no. 249/15¹²⁶⁷

The first defendant (The UAE Armed Forces) started the dispute, against the appellant and the third defendant¹²⁶⁸ by asking the court to order them to pay the amount of 224695.04 dhs. claiming that on the 20/11/1987 while the appellants truck that was driven by the third defendant was unloading, its load it hit one of the communication towers, which resulted in damaging that tower, they also claim that the appellant have stated in a written letter to the first defendant that they would cover the entire costs of the incident. The appellant asked the court to include the second defendant (insurance company) in the dispute. The first instance court decided to order the appellant and the third defendant to pay the entire amount of the claim and dismiss the second defendant from the dispute. The first defendant appealed this decision¹²⁶⁹, asking the court to nullify the decision to dismiss the second defendant from the dispute, and the appellant appealed it as well¹²⁷⁰. The second defendant counter claimed, by asking the court to dismiss the dispute, arguing that the court lacks the proper jurisdiction to hear the dispute due to the existence of an arbitration clause in the insurance policy. The court decided to include the insurance company in the dispute and to accept their request. The appellant appealed this decision to the Supreme Court, the second defendant pleaded to the court to dismiss the appeal, the court decided to hear the dispute.

The appellant based his appeal on four grounds, the first part of the first ground argues that the appealed decision decided to implement the eleventh clause of the insurance policy, which is an arbitration clause that refers any dispute that raises

¹²⁶⁷ Federal Supreme Court of the UAE, appeal no. 249/15, issued on the 26th of March 1995.

¹²⁶⁸ Abu Dhabi Federal Court of First Instance, case no. 635/1990, issued on the 13/5/1992.

¹²⁶⁹ Abu Dhabi Federal Court of Appeals, appeal no. 422/1992, issued on the 25/5/1993.

¹²⁷⁰ Abu Dhabi Federal Court of Appeals, appeal no. 446/1992, issued on the 25/5/1993.

from this insurance policy into arbitration. The appellant argues that this clause were present in the general rules of the insurance policy and not in a separate document, which is null since it infringes the requirements of article 1028 of the civil transaction law¹²⁷¹. However, the court justified their decision to not implement this article, by claiming that this transaction falls under the commercial transactions law, which allows an exception in this regard, the appellant claims that this interpretation by the court is flawed and as such their decision should be vacated.

The court accepted this argument, stating that law no. 1/1987¹²⁷² have made an exception when it comes to commercial transaction from being governed under the civil transaction law. However, based on the general rules of adjudication and article 1028-d of the civil transaction law¹²⁷³, which implies that any arbitral clause which is included in an insurance policy is null, unless the parties agreed to arbitrate in a separate document, the court states that this rule was put in place due to the importance of this clause and the need to protect the insurer, furthermore, this is a general rule that applies to both commercial and civil insurance policies, as such this arbitral clause is null since it was included in the insurance policy and not in a separate agreement.

The other grounds of appeal don't concern arbitration.

¹²⁷¹ Article 1028 of the civil transaction states: "The following conditions in a policy of insurance are void: a - The condition providing for the forfeiture of the right to insurance on account of a breach of the laws, unless such breach constitutes a deliberate felony or misdemeanor; b - The condition providing for the forfeiture of the insured's right due to his delay in notifying the authorities that have to be notified, or in producing documents, if it appears that the delay was for an acceptable excuse; c - Any printed condition relating to cases involving nullity of the contract or forfeiture of the insured's right, which is not shown in a clear manner; d - The arbitration condition included in the printed general conditions of the policy and not as a special agreement distinct therefrom; e - Any arbitrary condition, the breach thereof appears that it has no bearing on the occurrence of the event insured against."

¹²⁷² Federal law no. 1/1987 is the law that amended and revised the Federal law no.5/1985 in regard to the civil transaction.

¹²⁷³ id states: "The following conditions in a policy of insurance are void: d- the arbitration condition included in the printed general conditions of the policy and not as a special agreement distinct therefrom."

11. Appeal no. 181/15¹²⁷⁴

The appellant started the suit¹²⁷⁵ in order to set-aside the award issued by the arbitration tribunal of the municipality of Sharjah, arguing that they have leased the property owned by the defendant for one year in exchange of five hundred thousand dhs. they further argue that the lease term have ended, in contrast to what the tribunal have declared that the contract have been verbally extended, and based on that the appellant should pay an additional 225 thousand dhs. to the defendant. The first instance court decided to dismiss the appellant request and to uphold the award. The appeal court came to the same conclusion and upheld the appealed decision. This decision was appealed to the Supreme Court on the following grounds.

The appellant first ground of appeal argues that they pleaded in front of the court to set-aside the award, claiming that the defendant representative didn't present the proper documents that identify him as the defendants attorney, the court dismissed this plea stating that those documents has been presented in front of the courts clerk; the appellant argues that those documents should have been brought in front of the court to examine it and that the clerk doesn't have the right to examine those documents.

The court dismissed this argument, stating that the presence of the defendant's attorney doesn't affect the appellant's right to adjudicate, furthermore, the appellant notified the defendant's attorney of the appeal, implying that the appellant and accepts the appointment of the defendant attorney.

¹²⁷⁴ Federal Supreme Court of the UAE appeal no. 181/15, issued on the 19th of March 1995.

¹²⁷⁵ In front of the Sharjah's Federal Court of First Instance, however, the case number was omitted.

The appellant second ground of appeal argues that the court based their decision on the arbitration tribunal being a judicial tribunal, implying that their awards are equal to a court's decision, in doing so this tribunal has the right to hear witnesses and to use any of the evidence procedures available for the court, which is in contrast to the Emir Decree no. 3/81, which limits the scope of this tribunal and jurisdiction to be limited to the disputes between the owner and the tenants in regard to the execution of lease contracts, moreover, article 96 of that decree shows the difference between the jurisdiction of the arbitration tribunal, which is based on the parties agreement or by a reference from the court or from the complains that are based on the execution of the contract, as such if the dispute was based on an arbitration then it shall follow the rules of arbitration and if it was based on a complaint then it shall follow those rules and its role would be to mediate the dispute between the parties. Moreover, the federal law no. 6/78 in regard to the federal courts and delegating their jurisdiction to local judicial authorities, didn't state on a mechanism or a procedure in regard to judicial tribunals as such the arbitration tribunal of the municipality of Sharjah doesn't fall under this law and doesn't prohibit the parties from presenting their dispute for a second time in front of the court, and their awards doesn't receive res judicata status.

The court response to this argument was that the arbitration tribunal of the municipality of Sharjah, is an administrative tribunal, which can be emphasized from the way it was established and the nature of the members of the tribunal. However, the legislator in the Emirate of Sharjah added to this tribunal the responsibility to settle disputes between the tenants and the owners under the law no. 92/77 and its amendments 7/86, 4/88, furthermore article five of that law has stated on the conditions in which the tenants fail to fulfill his obligation, which is the base of the

complain that the defendant stated in their plea in front of the tribunal. Moreover, based on article nine of that law the tribunal has the jurisdiction to settle the dispute between the parties, it also gives the party that want to object on the tribunals award the right to do so in front of the court, within fifteen days from them being notified by the issuing of the award, otherwise the decision would be binding and enforceable in front of the execution judge, furthermore, the only decisions that are enforceable in front of the execution judge are judicial decisions and as such the tribunal awards has judicial power equal to that of a courts decision. This fact isn't affected by the federal law no.6/78 in regard to establishing the federal courts, which didn't govern those tribunals for the legislators intent in here is to leave the power of governing those tribunals to the local authorities.

The appellant third ground of appeal argues that the emir decree no. 3/81, which granted the arbitrators the authority to mediate the dispute between the parties, however, this doesn't imply that they have the right to hear or question witnesses, since this is part of the courts authority, moreover, the arbitrators are not judges and as such lack the authority to question or hear witnesses as well.

The court response was that based on the emir decree no.92/77, which gave this tribunal the authority to settle lease disputes, which implies that the tribunal decisions are of a judicial nature, this fact doesn't change if the members of those tribunal are part of the judicial authority or not, moreover in order to enforce the award issued from this tribunal it doesn't require a judge to issue this award.

The fourth ground of the appeal argues that the appeal court have re-examined what have already been settled by the trial court, in regard to the fact that the tribunal lacks the ability to hear witnesses, and the fact that a verbal evidence doesn't

outweigh a written document nor it has the capability to overturn what has been established in that document, furthermore, the appellant requested that the witnesses affidavit should be dismissed, since one of the witnesses works as an accountant for the defendant.

The court dismissed this argument, stating that based on the previous the response to the appellants grounds of the appeal, the tribunal has the authority to hear those witnesses, moreover, in regard to the appellant argument that the witnesses affidavit cannot rebut a written document, has no merit in this dispute since the appealed decision was not based on the extension of the contract but to the compensation to the owner for their failure to hand over the leased property back to the owner.

The appellant argue in the fifth ground on the subject matter of the dispute; which was dismissed by the court.

Thus, the court decided to dismiss the appeal.

12. Appeal no. 503/20¹²⁷⁶

The appellant started the dispute¹²⁷⁷ by asking the court to order the defendant to pay the amount of 20,000 dhs. claiming that this amount represent a compensation for the damages that was a result from the defendants action, the appellant claims that based on an arbitration clause that was concluded on the 23/4/1983 the defendant was appointed as the head of the arbitration tribunal in order to settle a dispute between

¹²⁷⁶ Federal Supreme Court of the UAE, appeal no. 503/20, issued on the 15th of October 2000.

¹²⁷⁷ Abu Dhabi Federal Court of First Instance, case no. 854/1993.

the appellant and the department of public work in AD, claiming that they entered into a contract with the AD department of public works in order to construct 100 villas. The arbitral tribunal started its proceedings on the 12/5/1983. However, the defendant excused himself without a proper justification from continuing his work as an arbitrator on the 15/11/1984, which resulted in a delay in settling the dispute for eight years, which the appellant claims resulted in damages due to this delay, moreover, they claim that the defendant issued a check in the amount of 20,000 dhs. and from the arbitration tribunal accounts after he excused himself from the tribunal. The first instance court decided to dismiss the claim. The appeal court decided to dismiss the appeal as well¹²⁷⁸, the appellant appealed the decision to the Supreme Court¹²⁷⁹, the court decided to nullify the appealed decision and refer the decision back to the appeal court. The appeal court decided to uphold the appealed decision¹²⁸⁰, which resulted in this appeal.

The appellant based his appeal on two grounds, the appellant argues that the appealed decision decided that the defendant doesn't have any responsibility for the delay that occurred in the arbitration, the court states that the delay was a result of an external factors that doesn't relate to the defendant, despite the fact that the arbitration was delayed for three months, even though the dispute was ready to be settled. Moreover, the appellant claims that the defendant reason to excuse himself from the arbitration, directly relates to their plea that the arbitration proceedings are null due to the fact that the arbitral tribunals authority has ended and the appellant contesting the defendants authority, which the defendant viewed as an attack on the arbitral tribunal, the arbitrator and the court viewed this as a justifiable reason to excuse the arbitrator

¹²⁷⁸ Abu Dhabi Federal Court of Appeals, appeal no.1266/1994.

¹²⁷⁹ Federal Supreme Court of the UAE, appeal no. 219/18, issued on the 26th of October 1997.

¹²⁸⁰ Which was decided on the 28/6/1998. However, there is no mention to the case number in this instance.

from the proceedings. The appellant argues that their plea was meant to insure that the arbitration proceedings would be conducted according to the law and the parties agreement, in order to insure that the extension of the arbitration meets those conditions, however, those pleas were rejected by the arbitrator, making the arbitrator excuse to step down as a result of the appellants attack ungrounded. Moreover, the appealed decision stated that the arbitrator gave a request to the high judicial council to be dismissed from the arbitration, which the appellant claims that this didn't occur, for the arbitrator confirmed that he have withdrew from the arbitration based on his own will, which occurred on the 15/11/1984, resulting in the appellant to seek the court to appoint a new arbitrator¹²⁸¹, as a result of the minister of justice and the respondent failure to appoint a new arbitrator within a week according to the requirements of law no.3/1970, moreover, this council doesn't have the right to accept such a request by the arbitrator.

The court dismissed this argument, based on article 86/1 of the civil procedures law no. 3/1970¹²⁸², which implies that the legislator gave the arbitrator the right to withdraw from the arbitration if one of the conditions have been met, in essence the arbitrator is required to provide a justifiable reason to withdraw from the arbitration, which complies with what the Federal civil procedures law require in article 207/2. Moreover, the determination of whether this is a justifiable reason or not falls to the trial court discretion.

Therefore, the court decided to dismiss this appeal.

¹²⁸¹ Abu Dhabi Court of First instance, case no. 2160/1984.

¹²⁸² Which is the civil procedures law of the Emirate of Abu Dhabi.

13. Appeal no. 263/18¹²⁸³

The defendant started the dispute¹²⁸⁴ by asking

, claiming that they constructed a car showroom for the appellant based on a construction contract between them, and due to the appellants failure to fulfill his obligation the project wasn't finished and the appellant nullified the contract, which resulted in deducting the defendants fee, the parties agreed to submit this dispute to arbitration, however, the appellant refused to execute this agreement resulting in this litigation. The first instance court decided to refer the dispute into arbitration; the arbitrators submitted their award, which the appellant requested to set-aside, the court decided to recognize the arbitral award. The appellant appealed that decision, the appeal court decided to dismiss the appeal.¹²⁸⁵ Resulting in an appeal to the supreme court by the appellant, the defendant submitted a plea to the supreme court to dismiss the appeal, stating that the parties agreed in front the first instance court that the award is not subject to appeal, according to article 217/3.

The court dismissed this plea, stating that this article implies that the legislator intent was to prohibit appeals on decisions that recognize the arbitral award or in the event that the parties agreed to waiver their right to appeal, which is an exception to article 158. Moreover, the appeal courts decision are subject to appeal according to article 173, even if article 150/1 allows the parties to waiver their right of appeal. However, in order for this waiver to be granted it should be explicitly identified, and since the appeal court decided that the decision is not subject to appeal, even if the parties agreed to waiver their right in front of the court in the hearing dated 13/5/1992.

¹²⁸³ Federal Supreme Court of the UAE appeal no. 263/18, issued on the 8th of December.

¹²⁸⁴ Al-Ain Federal Court of First Instance, case no. 45/1992, issued on the 21/1/1996.

¹²⁸⁵ Al-Ain Federal Court of Appeals, appeal no. 77/1996, issued on the 20/5/1996.

However, the arbitration agreement that has been submitted to the court shows that it was concluded on a later date, and it doesn't include any limitation or a waiver on the parties right to appeal, which implies that the parties have amended that condition and as such the court accepts the appeal.

The appellant argues that the appeal court dismissed their appeal based on the parties agreement in front of the court to waiver their right to appeal. However, this waiver needs to be stated in the arbitration agreement.

The court accepted this argument, stating that the waiver of the parties right to appeal is required to be stated in the arbitration agreement.

Thus, the court decided to nullify the appealed decision.

14. Appeal no. 620/21¹²⁸⁶

The defendant started the dispute¹²⁸⁷ against the first appellant, asking the court to order the payment of 1,198,000 dhs. which they claim that it represent the amount of the defendant employment benefits, in addition to the amount of 468,500 dhs. which represents the amount of the defendant work for the appellant.

Furthermore, the defendant started another suit against the second appellant¹²⁸⁸, asking the court to order the payment of 290,000 US dollars, which they claim that the appellant borrowed from them. Moreover, the second appellant counter claimed by asking the court to order the defendant to pay 4,847,108 dhs. which they claim that

¹²⁸⁶ Federal Supreme Court of the UAE, appeal no. 620/21, issued on the 19th of December 2000..

¹²⁸⁷ Abu Dhabi Federal Court of First Instance, case no. 19/1998.

¹²⁸⁸ Abu Dhabi Federal Court of First Instance, case no. 160/1996.

the defendant borrowed from them, furthermore the appellants started a separate suit against the defendant, in which they asked the court to confirm the existence of an arbitration clause¹²⁸⁹. The first instance court decided to dismiss the appellant request to confirm the arbitration clause, and in case no.160/1996 the court decided in favor of the defendant, in case no.19/1998 the court decided to dismiss the claim based on the existence of an arbitration clause and in case no.20/1998 the court decided that the right to uphold the arbitration clause is waived. The appellants decided to appeal this decision before the court decide to appoint an expert; the appeal court decided in appeal no. 151/1999 to vacate the appealed decision and refer the dispute in case no.19/1998 back to the first instance court, in appeal no.219/1999 to dismiss the appeal and refer the dispute to the first instance court as well, in appeal no.399/1999 to uphold the appealed decision in case no.390/1999. Moreover, before the court rendered a decision in case no.160/1996 the appellants appealed that decision to the cassation court.

The defendant submitted a plea to the Supreme Court to dismiss the appeal, claiming that according to article 151 the court should dismiss the appeal, they argue that since the determination of whether or not to implement the arbitration clause is a decision that doesn't settle the dispute, as such the court should dismiss the appeal.

The court dismissed this plea, stating that the request to dismiss the case based on an existing arbitration clause is in fact a jurisdictional plea, which is allowed under article 151.

The appeal was based on five grounds; the appellants argue that the appealed decision determined that the agreement dated 24/1/1998, is in fact an arbitration

¹²⁸⁹ Abu Dhabi Federal Court of First Instance, case no. 390/1998.

agreement, however, the parties didn't determine the scope of that agreement, which makes the arbitration un-executable and the defendant has the right to seek the court. However, the scope of the arbitration has been identified in regard to determining the parties' obligation in the "seidco construction" company or in regard to any dispute that rises between the parties, which allows the parties to ask the arbitrator to issue term of reference. However, the appealed decision miss interpret the term of reference and the parties obligation to have the arbitration agreement in writing and between the determination of the scope of the dispute, which can be determined in front of the arbitrator, moreover, the appealed decision didn't have any legal basis for their decision to vacate the arbitration agreement, and started to hear the dispute in cases no.20/1998 and no.160/1996, as a result the court lacks the proper jurisdiction to hear the dispute, moreover they didn't answer the appellants plea that the first instance court in case no.160/1996 appointed an expert without a request by one of the litigants, which is an implication that the court dismissed the arbitration clause in that dispute, as a result it makes it lacking the jurisdiction to hear the dispute in case no.390/1998 in regard to confirming the arbitration clause and having a contradictory ruling in that dispute, since the court decided at the start that the arbitration cannot be enforced since the parties didn't agree on a term of reference, then they stated later on that the arbitration time limit has ended which makes the arbitration un-executable.

The court dismissed those grounds of appeal, stating that according to article 203, which implies that the arbitration is an exception to the parties right to seek their natural judge in front of the court, which in turn has the jurisdiction to hear the dispute, thus, the legislator requires the arbitration agreement to properly identify the scope of the arbitration or the parties should determine the scope in front of the arbitrators in the event that the agreement didn't contain a determination of the scope.

However, if the arbitration agreement lacked the scope and the parties failed to agree on the scope in front of the arbitrator then the arbitration shall be null and void.

Moreover, the arbitration agreement between the parties didn't contain a scope of the arbitration, this fact isn't change by delegating that right to the arbitrator since that clause is a general one that includes all disputes between the parties and doesn't specify the scope of the arbitration or the subject of the dispute, which resulted in the parties to draft a term of reference in front of the arbitrator, in order to determine the scope of the arbitration, implying that if the scope was clearly determined in the agreement the parties wouldn't have to resort to this solution. However, the parties didn't agree on the scope in front of the arbitrator, which can be inferred from the fact the passing of arbitral hearing without reaching an agreement on the arbitration scope, which in turn nullifies the arbitration agreement, which is a fact that doesn't change by the appellants request in case no.390/1998 to determine the scope of the arbitration, for the court doesn't have the right to intervene in order to determine the scope in place of the parties given the fact that arbitration is based on the will of the parties.

Thus, the court decided to dismiss the appeal.

15. Appeal no. 95/18¹²⁹⁰

The defendant started the dispute¹²⁹¹ against the appellant asking the court to recognize and enforce an arbitral award that was issued on the 26/4/1995, claiming

¹²⁹⁰ Federal Supreme Court of the UAE, appeal no. 95/18, issued on the 23rd of June 1996.

¹²⁹¹ Abu Dhabi Federal Court of First Instance, case no. 222/95.

that they entered into a contract with the appellant on the 11/12/1991 and after they fulfilled their obligation the appellant denied them their pay, and given that the contract between the parties requires them to resolve their disputes through arbitration under the rules of the AD chamber of industry and commerce they sought that chamber to resolve their dispute, the chamber referred the dispute to their arbitration institute, the arbitration tribunal issued a decision in the dispute in case no. 8/94 in favor of the defendant, since the appellant refused to enforce the award the defendant resorted to the court. The appellant counter claimed in a separate suit¹²⁹², asking the court to set-aside the arbitral award, claiming that the contract between the parties which contained an arbitration clause has ended, subsequently they sought the court in another suit in order to nullify the arbitration clause¹²⁹³. However, the court decided to dismiss their request based on the existence of an arbitration clause and the appeal court upheld that decision¹²⁹⁴, and afterwards the appellant decided to continue with the arbitration proceedings. Resulting in the arbitral award that was issued on the 26/4/1995, which is a void award given that the tribunal didn't decided to dismiss the arbitration based on the fact that the arbitration clause has ended by the end of the contract that contained the clause.

The court decided to combine both of the suits, and dismissed the claim in case no.229/95 and to recognize the award in case 222/95. The appellant appealed this decision and the appeal court decided to uphold the appealed decision¹²⁹⁵.

The appellant appealed that decision to the Supreme Court on two grounds; the first ground argues that they pleaded in front of the first instance court in case

¹²⁹² Abu Dhabi Federal Court of First Instance, case no. 229/95.

¹²⁹³ Abu Dhabi Federal Court of First Instance, case no. 315/94.

¹²⁹⁴ Abu Dhabi Federal Court of Appeals, appeal no. 262/95.

¹²⁹⁵ Abu Dhabi Federal Court of Appeals, appeal no. 576/95.

315/94 that the contract between the parties has ended. However, the court decided to dismiss this plea by stating that this plea concerns the execution of the contract and since the parties agreed in that contract to resolve their dispute through arbitration as such this plea falls under the arbitrators jurisdiction; the appellant claims that they upheld that argument in front of the arbitrators and in front of the first instance and appeal courts, despite that the appeal court stated that the appellant didn't uphold that argument in front of the arbitration tribunal as their right to argue on this jurisdictional issue has been waived.

The court agreed with this argument, stating that the waiver of the right should be proven without any room of a doubt, and that the courts decision to refer the dispute to arbitration doesn't imply that the appellant has waived his right to this argument.

Thus, the court decided to nullify the appealed decision and refer the dispute to the appeal court.

16. Appeal no. 605/21¹²⁹⁶

This is a continuation of appeal no. 95/18, after the Supreme Court vacated the appealed decision they referred the dispute back to the appeal court, which decided to recognize the arbitral award that decision was appealed to the Supreme Court in appeal no. 157/19¹²⁹⁷, which decided to vacate the appealed decision and refer the dispute back to the appeal court, which decided to uphold the appealed decision and

¹²⁹⁶ Federal Supreme Court of the UAE, appeal no. 605/21, issued on the 24th of May 2000.

¹²⁹⁷ Federal Supreme Court of the UAE, appeal no. 157/19.

recognize the award, which meant that it was appealed for a third time to the Supreme Court.

The appellant based their appeal on two grounds, the first argues that the arbitrators didn't define the scope of the arbitration and that one of the parties to the arbitration agreement didn't have the capacity nor the authority to conclude the arbitration agreement, for the agency agreement doesn't allow him to enter into an arbitration agreement.

The court dismissed this argument, stating that article 203 implies that the scope of the arbitration can be determined either in the arbitration agreement or in front of the arbitrators, it also requires the arbitration agreement to be concluded by an individual that has the legal capacity to do so. Moreover, the court has the right to interpret the facts of the case and the contracts, which includes determining whether or not a party has the capacity to enter into a contract such as an arbitration agreement, this interpretation is not subject to the supervision of the Supreme Court if the trial court based their interpretation on sound legal basis.

The appellant second ground of appeal argues that the first instance decision no. 315/94, which decided to accept the defendant's request of referring the dispute into arbitration didn't answer the appellant's plea, which argued that the arbitration clause has ended.

The court dismissed this argument stating that based on article 187 of the civil procedures¹²⁹⁸, which gives the Supreme Court decisions res judicata status between

¹²⁹⁸ Article 187, states: "It is not possible to appeal against the cassation decisions through any of the appeal manners, and that with the exception of what has been issued there from in the litigation source where it shall be possible to appeal therein through the petition of reexamining the cases stipulated in clauses 1,2 and 3 of article 169."

the parties, implying that the parties cannot submit the same dispute back to the Supreme Court.

17. Appeals no. 267 & 297/20¹²⁹⁹

The appellant started the dispute¹³⁰⁰ against the defendant, asking the court to recognize the arbitral award no. 11/1990 issued from the high federal judicial council, they claim that they entered into a contract with the defendant to construct the road network system in the emirate of Ras Al-Khaimah, after the execution of the project they asked for their fees the defendant refused to pay and given that an arbitration clause exist in the contract between them, they submitted their dispute to arbitration, the arbitral tribunal issued an award on the 16/5/1994 in favor of the appellant.

The first instance court decided to partially recognize the award by dismissing the 12% interest rate. Both parties appealed that decision, the appeal court decided to dismiss the defendants appeal, and to amend the appealed decision by fully recognizing the award. The defendant appealed that decision to the Supreme Court¹³⁰¹, the court decided to partially vacate the decision in regard to the amount of the damages and the interest rate and refer the decision back to the appeal, which decided on the 22/12/1997 to dismiss the appellant appeal and amended the award yet again. That decision was appealed to the Supreme Court in two appeals.

First appeal no. 267/20:

The court dismissed this appeal based on article 177/1, which require the signature of a certified attorney in order for an appeal to be accepted in front of the

¹²⁹⁹ Federal Supreme Court of the UAE, appeals no.267 & no.297/20, issued on the 14th of May 2000.

¹³⁰⁰ Abu Dhabi Federal Court of First Instance, case no. 238/1994.

¹³⁰¹ Federal Supreme Court of the UAE, appeal no.404/18.

Supreme Court, as such this article prohibits appeals submitted by an attorney that lacks this requirement, this requirement isn't fulfilled by submitting the appeal by a certified law firm, since the signature is an essential requirement that need to be present.

Second Appeal no.297/20:

The appellant based this appeal on three grounds, the first ground argues in regard to the courts amendment of the interest rate that the arbitrator have awarded, the appellant argues that based on the commercial transaction law, which allows those forms of interests the court has no right to amend the interest rate in this instance.

The court dismissed this argument, stating that according to article 203, which allows the individuals to opt-out into arbitration based on their will to arbitrate, as such the arbitrators are limited when settling the dispute to the parties will, which is manifested through their agreement and what they decided to submit into arbitration, and since the arbitration clause didn't contain any indication that the parties will went to authorize the arbitrators to grant interest. Therefore, the arbitrator doesn't have the right to grant interest in this instance; thus, the courts decision to dismiss the interest rate from the award is acceptable deduction, since it was based on the fact that the parties didn't include interest rates in their arbitration agreement.

The appellants second and third ground of appeal argues that the appealed decision dismissed their request to return damages awarded to the defendant based on delay penalty; claiming that the court based their decision on the fact that this request wasn't presented in front of the arbitration tribunal or in their closing statement in front of the court, they argue that they have indeed made this request in front of the

arbitral tribunal, and that the appealed decision dismissed their request without identifying their reason.

The court dismissed this argument, stating that the court has the right to identify the facts of the case, they argue that the appeal court decision was based on the fact that the appellant didn't include this request in front of the first instance court, which meant that the appeal court based their decision on what was presented in front of the trial court; this fact that doesn't change by claiming that the arbitral clause is a general one, since their request in front of the court is still required in order for the court to decide.

18. Federal Supreme Court of the UAE appeal no. 9/20¹³⁰²

The defendant company started the dispute¹³⁰³ against the appellant company, by asking the court to notify them of the start of the arbitration proceeding and to consider this litigation as an arbitration agreement, claiming that they are the main contractor in a project and that they delegated the manufacture of certain materials (manholes) to the appellant, after the appellant submitted those parts it turned out that they contained manufacturing flaws, which resulted in damages to the property as a direct result of this flaw, the defendant claim that they asked the appellant to fix those manholes, which they refused to do resulting in the defendant to seek another company to fix those manholes; given that the seventh clause of the construction agreement state on arbitration as a method of resolving disputes, the defendant asked the appellant to start the arbitration proceeding, which they refused to abide by their

¹³⁰² Federal Supreme Court of the UAE appeal no. 9/20, issued on the 13th of February 2000.

¹³⁰³ Abu Dhabi Federal Court of First Instance, case no. 162/96

contractual obligation resulting in this suit. The first instance court decided to appoint an accounting expert as an arbitrator; this decision was appealed and the court of appeals decided to dismiss the appeal¹³⁰⁴. The arbitrator issued an award in favor of the appellant on the 20/2/1997 and submitted it to the court for recognition, the defendant contested this award and asked the court to correct the mistakes in the award before recognizing the award; the court decided to recognize the award in regard to the appellant liability. This decision was appealed by both litigants; the appeal court decided in both appeals to uphold the appealed decision¹³⁰⁵. The appellant appealed that decision to the Supreme Court.

The first ground of appeal argues that the trial court dismissed their request to set-aside the arbitral award; claiming that the award was based on a null arbitral agreement since the appellant agent refused to sign the arbitration agreement, which was drafted by the arbitrator and asked that the dispute should be referred back to the court, moreover, they requested that the records of the arbitration should show their objection and plea and that the arbitrator refused to respond their request, which constitute a failure to abide by the rules of article 209/2¹³⁰⁶.

The court dismissed this ground, stating that once the courts decision has been based on sound reasoning this ground has no affect, for the Supreme Court has the right to correct any flaws in the decision without the need to vacate it. Furthermore, articles 203 and 204 implies that if the parties agreed either in the main contract or in a later agreement to submit their dispute into arbitration, without choosing the arbitrator, then the court shall appoint an arbitrator upon the request of one of the

¹³⁰⁴ Abu Dhabi Federal Court of Appeals, appeal no. 80/97

¹³⁰⁵ Abu Dhabi Federal Court of appeals, appeals no.458 & no.459/97

¹³⁰⁶ Which regulates the instances in which the arbitrator has the right to seek the courts, in situations that the arbitrator lacks the jurisdiction to order the parties, such as asking the court to penalize witnesses that failed to appear and forcing the individuals to present documents.

parties. In addition, article 212 states that the arbitrator shall issue his decision without being bound by the normal procedures of the court, however, the parties has the right to agree on the procedure they wish to be applied in their dispute in that case the arbitrator would be bound by those procedures, furthermore, the law doesn't oblige the arbitrator to stop the procedures unless one of the conditions of article 209 has been met, as a result the first instance court appointment of an arbitrator was per the request of the defendant and as a result of the appellant refusal to start the arbitration procedure and to sign the arbitration agreement; which has no affect on the start of the arbitration nor does it constitute a ground for pausing the arbitration under article 209.

The appellant second ground argues that the arbitrator exceeded the scope of the arbitration, given that the arbitrator decided to settle the accounts between the parties, which the appealed decision stated that this is a subject error and the court has the right to amend it in according to article 215/1. However, it is a matter that exceeds the arbitration scope and as such the award should be set-aside under the rules of article 216.

The court dismissed this argument, by explaining that article 215 requires the recognition of the court in order for the award to be enforced; as such the court is required to examine the award and ensure that nothing would hinder the enforcement of the award and correct any material errors in the arbitral award upon the request of the parties. Moreover, to set-aside part of the award constitutes setting-aside the entire award, except if the setting-aside of this part wouldn't affect the entire award. Therefore, the first instance decision of partially recognizing the award has a basis in the law and as such the court decided to dismiss the appeal.

19. Appeal no. 357/2009¹³⁰⁷

The appellant started the dispute¹³⁰⁸ against the defendant, by asking the court to order the payment of 840,000 dhs. which they claim that it represent their labor fees, in addition to five million dhs. that represent 10% of the annual revenues of the institute and a clearance letter. The first instance court appointed an expert and after he submitted his report the defendant counter claimed to dismiss the suit based on the existence of an arbitration clause between the parties¹³⁰⁹, the court accepted this plea and decided to dismiss the case. This decision was appealed and the appeal court decided to uphold the appealed decision and dismiss the appeal.¹³¹⁰

The appellant based his appeal on one ground; arguing that the defendant didn't uphold their plea to dismiss the dispute for the existence of an arbitration clause in the first hearing, which infringes the requirement of article 203.

The court accepted this plea, stating that even though article 210/1 allows the parties to agree to arbitrate their dispute, even if the dispute have already been submitted to the court, with one condition that the court have not issued a decision in the dispute, however, it also requires the party upholding that agreement to express their will to arbitrate through a positive action by submitting their request to arbitrate in the first hearing, otherwise it would constitute as a waiver of their right to arbitrate and the vacation of the clause under article 203/5. As such the parties in this dispute agreed in a later date, after the dispute has been submitted to the court, to refer the dispute into arbitration, accordingly they drafted an arbitration agreement on the 21/2/2007; the defendants attorney appeared in front of the court on the 18/6/2007

¹³⁰⁷ Federal Supreme Court of the UAE, appeal no.357/2009, issued on the 18th of November 2009.

¹³⁰⁸ Abu Dhabi Federal Court of First Instance, case no. 68/2005

¹³⁰⁹ Which has been concluded on the 24/2/2009

¹³¹⁰ Abu Dhabi Federal Court of Appeals, appeal no. 9/2009.

after the parties agreed to arbitrate, however, their attorney failed to make the request to refer the dispute into arbitration in that hearing, which is considered to be the first hearing in this instances as such their right to arbitrate has been waived.

Thus, the court decided to vacate the appealed decision and refer the dispute back to the appeal court.

20. Appeal no. 427/2009¹³¹¹

The defendant started the dispute¹³¹² against the appellant by asking the court to enforce the arbitral clause in the sales contract¹³¹³ between the parties, as well as appointing an arbitration to initiate the arbitration proceedings, they claim that they bought a farm from the appellants agent (the appellants wife) and when they wanted to harvest the crop of that farm the appellant denied them their right to gather the farms harvest, and given that the appellant refused to uphold the arbitration clause in the contract, the defendant sought the court to enforce this clause. The court decided to appoint an arbitration tribunal to settle this dispute, the tribunal issued an award on the 1/2/2009 that confirmed the ownership of the farm to the defendant¹³¹⁴, the court decided to recognize the arbitral award. The appellant appealed that decision and the appeal court decided to uphold the appealed decisions.¹³¹⁵

The appellant appealed that decision to the Supreme Court, basing his appeal on three grounds; the first ground argues that the appealed decision dismissed their

¹³¹¹ Federal Supreme Court of the UAE appeal no. 427/2009, issued on the 29th of October 2009.

¹³¹² Al-Ain Federal Court of First Instance, case no. 918/2007.

¹³¹³ Which was concluded on the 23/4/2005

¹³¹⁴ In addition to number of things besides their ownership of the farm.

¹³¹⁵ Al-Ain Federal Court of appeals, appeal no. 38/2009.

argument that the public prosecution office should have been notified, given the presence of a minor in the dispute.

The court dismissed this argument, stating that even if the prosecution office is required to be present in a civil suit that involves a minor. However, this argument shouldn't be presented to the Supreme Court for the first time, it should have been upheld in front of the lower courts in order for the appellant to present that argument in front of this court, moreover, the first instance court notified the public prosecution office of the presence of a minor, which they responded to by a letter notifying the court of their opinion in the dispute as such this plea is ungrounded.

The appellant second ground argues that the arbitral award didn't contain a draft and that the arbitrators didn't sign every page of the award, both of which are grounds for setting-aside the arbitral award.

The court dismissed this argument, stating that based on the jurisprudence of the court and on article 212, which grants the arbitral award the same status as a courts decision. However, the fact remains that it is not a decision issued by the court and since the civil procedures states that the arbitrator is not bound by the courts procedures in issuing the award, except in regard to upholding the rules mentioned in the arbitration chapter and since those rules do not require the arbitrators to sign every page and include a draft this argument is void.

The third ground argues that the appellant didn't sign the sales contract and that his wife wasn't his agent at the time of the sale. Moreover, he argues that the sales contract is void, by claiming that his wife entered into that contract when she was ill and on her deathbed, which can be proven by the doctor reports as such this act

conducted on her deathbed is void, moreover, the selling of this farm contradicts the ruler decree that such farms are not subject to selling.

The court dismissed this ground, by establishing that a plea to set-aside an arbitral award is one that is subject to the requirements of article 216, those grounds addressed the arbitral award as being an act of a law, as such they concern establishing a flaw in the procedures and not a flaw in the determination of the facts of the dispute, moreover, those grounds are explicitly stated in this article and concern the arbitration agreement and the arbitral dispute; the ones that concern the arbitration agreement relate to issuing an award without an arbitral agreement or with a void agreement, or if the arbitrator exceeded the scope of the arbitration ... etc. The ones that concern the arbitral dispute relate to an award that is issued by arbitrators that were not appointed according to the law...etc. Furthermore, the court when addressing the issue of recognizing the arbitral award cannot address the subject of the award, since the arbitral award once it fulfill the previous condition receive res judicata status.

Therefore, since the appellant have upheld arguments that concerns the subject of the dispute, the court decided to dismiss the appeal.

21. Appeal no. 266/2009¹³¹⁶

The defendant started the dispute against the appellant¹³¹⁷, by claiming that they notified the appellant through a letter to initiate the arbitration proceeding in order to settle their dispute, in compliance with article 15 of the contract; they also asked the court to confirm the appointment of their arbitrator and to appoint the

¹³¹⁶ Federal Supreme Court of the UAE, appeal no. 266/2009, issued on the 21st of October 2009.

¹³¹⁷ Ajman Federal Court of First Instance, case no. 64/2006, issued on the 12/11/2008.

appellants arbitrator and the third arbitrator¹³¹⁸, the defendant claim that they were asked by the appellant to decorate the interior of a building owned by the appellant, which they claim that they fulfilled according to the contractual obligation, however, the appellant refused to pay the defendants fees claiming that they failed to execute it in the agreed upon time, which resulted in the appellant to seek the court¹³¹⁹, to send an engineering expert in order to prove the quality of the work done by the defendant, they also notified the defendant to resolve their dispute through arbitration after they appointed their arbitrator. The court decided to appoint the third arbitrator and confirm the appointment of the plaintiffs arbitrators¹³²⁰, on the 3/7/2008 the arbitration tribunal issued an award and submitted it to the court for recognition; the appellant pleaded to the court to set-aside the award, claiming that the arbitration agreement is null since the arbitrators issued their award after the agreed upon time. The court decided to dismiss the appellant claim and recognize the arbitral award. This decision was appealed¹³²¹, the court decided to uphold the appealed decision, which resulted in the appellant to appeal that decision to the Supreme Court.

The appellant first ground of appeal argues that the 6th clause of the arbitration agreement stated that the arbitrators should render an award within six months from the start of the first hearing, and given that the first hearing was conducted on the 16/6/2007, then the six months period would have to have ended on the 16/12/2007, and the arbitral tribunal extension request that has been made on the 22/12/2007 occurred after the passing of the deadline, which renders the award that were issued as a result of this extension null.

¹³¹⁸ The defendant also requested from the court to order the payment of 10168943.28 dhs. in addition to 12% interest rate until the fulfillment of the payment, which they claim is an equivalent of what the appellants own them.

¹³¹⁹ Ajman Federal Court of First Instance, case no. 6/2005.

¹³²⁰ Which was done on the 27/12/2006

¹³²¹ Ajman Federal Court of Appeals, appeal no. 142/2008, issued on the 29/4/2009.

The court dismiss this argument, stating that according to the court jurisprudence that the determination of a date for the end of the arbitration procedures doesn't mean that it cannot be extended either explicitly or implicitly¹³²² or by authorizing the tribunal, as well as the court ability to extend this time based on the parties request or of that of the tribunal, the only requirement is that this extension should be connected and not interpreted. Furthermore, the appeal court responded to this argument by explaining that the arbitration agreement states that the extension should be granted exclusively by the court, and based on the facts of the case the tribunal upheld this requirement by seeking the court to grant them the extension, as such the appellants argument has no basis.

The appellant second ground of appeal, argues that the tribunal dismissed their request to confirm and accept the expert report, which has been confirmed by the court in case no.6/2005 and since the arbitral tribunal ruled contrary to what have been determined in that case, which renders the award null and subject to setting-aside since it contradict a courts decision.

The court dismissed this argument, stating that article 68 of the civil and commercial evidence law¹³²³, implies that the purpose of such claims are to proof a certain legal status, which they are in fear of being changed, as such it doesn't concern the establishment of individuals rights and doesn't mean that the parties are not able to seek the court to settle their dispute. Furthermore, the decisions issued

¹³²² The court explained an implicit extension by the appearance of the parties in front of the tribunal after the end of the arbitration time and arguing on the subject of the dispute.

¹³²³ Article 68, states: “ 1- Whoever apprehends the loss of the features of a fact that may constitute an object of dispute before the courts, may request, in the presence of those concerned and in the usual manner, from the judge of summary matters to proceed with the survey and in this case, the preceding provisions shall be observed. 2 - In the foregoing case, the judge of summary matters may delegate an expert to move, survey and hear witnesses without oath; the judge then shall fix a hearing to take knowledge of the observations made by the parties to the litigation on the expert's report and acts. The rules provided for in the Title concerning Expertise shall be followed.”

based on a summary ruling does not bind the court, it is a temporary ruling in which the judge views it is necessary to establish and confirm the existence of a certain legal status or condition; as such the court has the right to over rule this decision; the appealed decision upheld this rule, which renders this argument void.

Thus, the court decided to dismiss the appeal.

22. Appeal no. 713/27¹³²⁴

The appellant started the dispute against the defendant by asking the court to recognize the arbitral award¹³²⁵, claiming that on the 11/10/1979 they entered into a passenger transport contract that was signed in Russian, article 14 of the contract state that the end of the contract shall be by a written notice and it shall go into force after the passing of 45 days of that notification, moreover, article 17 of the contract states that in the event of a dispute it shall be resolved through arbitration in front of the Foreign Commercial Tribunal of the chamber of commerce in Moscow and that their award is final and binding, the appellant complied with those requirement by notifying the defendant to the end of the contract. However, the defendant disregarded this notification, the appellant also claimed that they tried to mediate their dispute without success, which forced the appellant to enforce article 17 and try to resolve their dispute through arbitration, by seeking the arbitration tribunal in the Moscow chamber of commerce; on the 27/7/2003 the tribunal decided that the previous contract has ended on the 5/7/2002, this decision was recognized by the Russian Foreign Ministry and the UAE embassy in Russia; the appellant claims that the defendant refused to enforce the award, which resulted in the appellant to seek the

¹³²⁴ Federal Supreme Court of the UAE, appeal no. 713/27, issued on the 6th of May 2009.

¹³²⁵ Abu Dhabi Federal Court of First Instance, case no. 235/2005 (commercial circuit), issued on the 31/10/2004.

court in this proceeding. The first instance court decided to dismiss the appellant's request, resulting in the appellant to seek the appeal court, which upheld that decision¹³²⁶, subsequently the appellant sought the Supreme Court in this appeal.

The appeal was based on three grounds, the appellant argues that the court dismissed their request to recognize the award, by claiming that the award cannot be enforced in the UAE, claiming that one of the requirements for enforcing the award isn't met, which is that the UAE court shouldn't have jurisdiction over the dispute. However, there is an arbitration agreement between the parties, which implies that they have agreed to opt-out from the courts jurisdiction, despite this fact the court refused to recognize the award, even after they submitted a copy of a courts decision between the same parties in which the court decided to dismiss the dispute based on the existence of an arbitration agreement¹³²⁷, a fact that was dismissed by the trial court and is not amended by the appeal court upholding that decision, by stating that the trial courts decision to set-aside the award was based on factual reasons. Therefore, the court should vacate that decision.

The court dismiss this argument stating that article 235, which addresses the issue of recognizing and enforcing foreign arbitral awards, allows the enforcement of those foreign award by the court after they examine it and decide whether the courts has jurisdiction over the dispute or not. Moreover, article 6 of the law no. 18/81 in regard to regulating the commercial agencies and its amendment in law no. 14/88¹³²⁸, which implies that the arbitral clause that refer to a foreign arbitral tribunal in those

¹³²⁶ Abu Dhabi Federal Court of Appeals, appeal no. 544/2004.

¹³²⁷ Abu Dhabi Federal Court of First Instance, case no. 891/2001.

¹³²⁸ Article 6 of the Federal law no. 18/81 in regard to regulating the commercial agencies amended by the law no.14/88, states that: "The commercial agency contract shall be deemed for the mutual interest of the contractors, the States courts shall be competent to adjudicate any dispute arises from its execution between the principal and the agent, any agreement to the contrary shall be annulled."

contracts is a void clause, and if one of the parties to that contract sought a foreign arbitral tribunal and requested the courts in the UAE to recognize that award, then the court is obliged to refuse to recognize those awards and dismiss their request, as such their decision is valid given that its based on the law. Thus, the court decided to dismiss the appeal

23. Appeal no. 7/14¹³²⁹

The defendant started the suit in front of the first instance court¹³³⁰, by asking the court to refer the dispute between them and the appellant into arbitration, claiming that the appellant is an insurance company and that they insured their shop with that company, they also claim that the insurance policy in question covers fires, on the 21/7/1989 a fire started in the shop that destroyed all of the goods, the defendant submitted a claim to the insurance company asking them to pay the amount of the claim based on the insurance policy between them, the defendant claim that the insurance company refused to pay the amount of the claim and since the eighteenth clause of the insurance policy requires the parties to submit their dispute into arbitration, the defendant upheld that clause by seeking the court to enforce this clause. The appellant counter claim by claiming that the arbitration clause is null and that the defendant doesn't have the right to request the submission of the dispute into arbitration, moreover, the defendant have waived their right to seek compensation from the appellant. The first instance court decided to dismiss the appellant plea and continue the hearings in regard to the defendant request of submitting the dispute into

¹³²⁹ Federal Supreme Court of the UAE, appeal no. 7/14, issued on the 19th of April 1992.

¹³³⁰ There is no record of the case number in this decision.

arbitration. The appellant submitted an appeal after the court dismissed their counter claim, the appeal court decided¹³³¹ to dismiss the appeal by stating that this decision didn't end the dispute between the parties and as such it is not subject to appeal.

The appellant decided to submit an appeal to the Supreme Court, their appeal was based on two grounds; they claim that the trial court issued a decision on the subject of the dispute by agreeing to refer the dispute into arbitration; which imply that they have ended the dispute as a result of that their decision is subject to appeal, moreover, the reason given by the appeal court to justify dismissing the appellants appeal is in contrast to the requirement of article 1028/d of the civil transition law¹³³², which requires the arbitration clause to be stated in a separate document from the insurance policy and are excluded from the general clauses of that policy.

The Supreme Court accepted this argument, stating that the defendant have made a request to the first instance court to register the arbitration clause according to article 95/2 of the civil procedures law of 1970¹³³³, and the court by accepting this request and dismissing the appellant counter claim in essence have ended the dispute in regard to identifying the competent authority that has the jurisdiction to hear the dispute, as such this dispute is subject to appeal.

Therefore, the court decided to vacate the appealed decision and refer the dispute back to the appeal court to resolve the dispute.

¹³³¹ There is no record in the decision of the case number; the only thing that was mentioned in here is that the appeal was submitted to the Abu Dhabi Federal appeal court.

¹³³² Article 1028/d of the civil transaction law, states: "The following conditions in a policy of insurance are void: ... d- The arbitration condition included in the printed general conditions of the policy and not as a special agreement distinct therefrom...".

¹³³³ There is no record of which civil procedures law this refer to, however, it can be assumed that given the fact that this dispute was submitted to the AD courts that this would refer to the AD civil procedures law.

24. Appeal no. 5/14¹³³⁴

The defendant company started the litigation against the appellant company¹³³⁵, by requesting from the court to order the payment of the amount of 2,919,000 dhs., claiming that based on a sub-construction contract they agreed that the defendant is going to supply aluminum to the appellant, the defendant claims that they have fulfilled their side of the contract and that the appellant failed to fulfill his side of the contract by refusing their pay resulting in this litigation; the appellant company counter claimed that the court lacks the jurisdiction to hear the dispute based on an arbitration agreement between the parties that requires the submission of the dispute into arbitration prior to seeking the court, the appellant company started a separate litigation¹³³⁶ in which they asked the court to order the defendant to pay the amount of 8,924,291 dhs. claiming that the defendant failed to fulfill their contractual obligation. The court appointed an expert on the 21/12/1986, afterwards the expert submitted his report the court and a response to the appellants claim, the court decided based on this report. The appellant disagreed with that ruling and decided to appeal the decision; the appeal court upheld the first instance decision¹³³⁷. The appellant appealed that decision to the Supreme Court.

The appellant based their appeal on three grounds; the first and second argues that the first instance court decided on the 13/2/1986 that they lacked the jurisdiction to hear the dispute, thus, the court cannot revise their ruling in this regard, moreover, the appellant upheld this argument in front of the court, to which the court responded

¹³³⁴ Federal Supreme Court of the UAE, appeal no. 5/14, issued on the 20th of May 1992.

¹³³⁵ Al-Ain Federal Courts of First Instance, case no. 7/1986, issued on the 26/12/1990.

¹³³⁶ There is no record of the case number in this decision.

¹³³⁷ Al-Ain Federal Court of Appeals, appeal no. 11/91, issued on the 23/12/1991.

“that the first instance court didn’t rule to that they lack the jurisdiction to hear the dispute, they just put the phrase dismiss the dispute between brackets”, which the appeal court should have decided to dismiss the dispute rather than upholding the appealed decision. The appellant claims that they have upheld their argument that the parties have agreed to arbitrate, which the first instance dismissed and the appeal court ignored to respond to their argument, which is a ground for vacating the appealed decision.

The court dismissed this argument, stating that the trial court didn’t decided to dismiss the dispute and refer it into arbitration on the 13/2/1986, on the contrary they decided to postpone the hearing to 20/2/1986, a brackets have been placed over the phrase the court decided to dismiss the haring and the judge in that dispute decided to amend that phrase since it was written by mistake in the judgment, the appellant didn’t object to this act at the time and the appealed decision shows that they have indeed respond to the appellant argument in this regard. In addition, the local jurisdiction is not a matter of public policy as such the litigants right to object on the courts jurisdiction is waived once they argue on the subject of the dispute, moreover, the objection on the existence of an arbitration clause is based on the parties agreement to arbitrate, which is also a matter that doesn’t relate to the public policy and can be waived either explicitly or implicitly by arguing on the subject of the dispute, and given the fact that the appellant have argued on the subject of the dispute, and started a separate litigation with their claim, which implies that they have waived their right to arbitrate.

The appellant third argument, argues on the subject of the expert report, which was dismissed by the court.

Thus, the court decided to dismiss the appeal.

25. Appeal no. 121/14¹³³⁸

The facts of this dispute can be summarized as follow; the second defendant¹³³⁹ entered into a contract with the first defendant¹³⁴⁰ to construct a modern irrigation network in some farms¹³⁴¹ this contract includes an arbitration clause; as a result when a dispute rose between the parties they agreed to submit it to an arbitration tribunal, which decided that the respondent (the UAE government) should pay to the claimant the following amount (403070805 dhs.) as a compensation, the claimant requested that the award should be submitted to the court for recognition; the court decided to recognize and enforce the arbitral award, and dismiss the court claim of setting-aside the award.¹³⁴²

The public prosecution office appealed this decision to the Supreme Court on five grounds; the first ground argues that according to the jurisprudence of the court the arbitrators are required to uphold the basic adjudication principles and all of the procedures that relate to the public order, such as the decision should be preceded by deliberation from the tribunal and having a draft signed by all of the arbitrators that participated in that deliberation, if those requirement weren't present in their award¹³⁴³ then it's a null and void, which is the case in this dispute for the draft of the

¹³³⁸ Federal Supreme Court of the UAE, appeal no. 121/14, issued on the 27th of December 1992.

¹³³⁹ Is the Ministry of Agriculture and Fisheries.

¹³⁴⁰ This decision state that the first defendant is a company without indicating the name nor the nature of this company, however, it can be assumed that it's a construction company.

¹³⁴¹ There is no mention of the location of the farms, however, the arbitration was conducted in AD, as a result it can be safely assumed that the farms are located in AD.

¹³⁴² Abu Dhabi Federal Court of First Instance, case no.2283/1990, issued on the 29/1/1991.

¹³⁴³ This decision refers to the award as a report.

award was signed by one arbitrator and was missing two signatures, implying that the deliberation didn't occur before issuing the award, moreover, the reasons and the decision both were written in separate documents, which require a signature in each of those documents as well.

The second ground of appeal argues that one of the arbitrators doesn't speak Arabic, which meant that the arbitration tribunal would have to translate certain documents from Arabic into English. However, there is no evidence stating that the arbitral award and the decision have been translated into English, which proves that no deliberation has been conducted in this arbitration.

The third ground of appeal, argues that the descending opinion, which has been stated by one of the arbitrators and has been included in the case file on the 24/10/1990. However, the arbitral award is dated on the 25/8/1990, which is an indication that the descending opinion wasn't included in the delegation before issuing the award.

The fourth ground of appeal argues that the award stated that the respondent is the government of the UAE, which is an indication that the tribunal is unaware to the parties of the dispute, since the respondent in this dispute was the ministry of agriculture and fisheries, which is a major error on their part and a ground for setting-aside the award.

The fifth ground argues that the tribunal accepted a couple of English documents without including a legal translation of those documents, which is in contrast to the law and despite the objection of the ministry, in addition to the fact that

the chief arbitrator have amended a couple of errors in the translation on his own, which is in violation of the law in regard to ruling based on personal knowledge.

The Supreme Court accepted all of the grounds of appeals; by stating that even though the court accepts the fact that the arbitral tribunal is not bound by the normal procedures of the court in order to ease and accelerate the decision making process, in addition to the fact that in some cases the arbitrators are not lawyers. However, this rule is bound by the principles of justice and by the rules that relates to the public policy and preserving due process, which includes delegating the facts of the case before rendering a decision, which needs to be proven through the documents and the facts of the case. Therefore, based on the established principles in the law and within the courts doctrine the arbitral award is required to have a draft, the purpose of having a draft is to prove that due process and that the tribunal delegated the dispute before issuing the award, moreover a signature from all of the members of the tribunal is required according to law no. 3/1970, this requirement doesn't breach the confidentiality principle in arbitration.

Furthermore, according to article 12 of the law no.8/81 in regard to regulating the translation profession, which dismisses any document that is not translated by a certified legal translator, which is a rule that relates to the public policy and the arbitral tribunal, is not at liberty to breach it. Therefore, the court is required to supervise over the arbitration proceeding, in fulfill their role they are required to ensure that the arbitral award is issued according to the requirement of the law no.3/1970, which can only be achieved if the court ensures that the arbitral award fulfills all of those requirement, by ensuring that the arbitral award is supported by the documents presented in front of them. Subsequently, the arbitral tribunal should have

dismissed any document that has not been legally translated into Arabic, and by basing their decision on those documents; the tribunal is essentially basing their decision on their own knowledge, which is inadmissible to the court nor to the arbitral tribunal, therefore, having the arbitrator correct the translation submitted to them by a legal translator is a breach of this rule.

Thus, the court decided to vacate the appealed decision and set-aside the arbitral award, with referring the dispute back to the arbitral tribunal to settle the dispute.

26. Appeal no. 49/20¹³⁴⁴

The appellant started the litigation¹³⁴⁵ against the defendant, they requested to refer the dispute into arbitration under the courts supervision according to article 14 of the sub-construction contract, they claim that the defendant entered into a contract with the public works department to construct and maintain 24 houses, according to the sub-construction contract the defendant requested from the appellant to supervise over all aspects of electrical and mechanical works in this project in exchange for 17800000 dhs. they also agreed in that contract to refer any dispute that raises from this contract into arbitration, in accordance to the laws of AD and the UAE, and since the arbitral award would ultimately be presented to the court whether it were ad-hoc or court-annexed arbitration, and since the arbitration clause doesn't prohibits the court from hearing the dispute and referring it to the arbitration under their supervision, the appellant made this request to the court. The first instance court

¹³⁴⁴ Federal Supreme Court of the UAE, appeal no. 49/20, issued on the 14th of May 2000.

¹³⁴⁵ Abu Dhabi Federal Court of First Instance, case no. 518/1996, issued on the 25/6/1997.

decided; first to dismiss the case based on the existence of the arbitration clause, second to order the defendant to return the bank guarantee letter no. 3010/1994 to the appellant¹³⁴⁶. The defendant appealed this decision¹³⁴⁷, in regard to the second part of the decision, the court decided to amend the decision in regard to the bank guarantee.

The appellant appealed that decision to the Supreme Court on eight grounds¹³⁴⁸; arguing in the fourth and fifth ground that the court decided to dismiss their request after amending it, in regard to appointing an arbitrator according to article 204, which allows them to request the arbitrators appointment from the court in the event that the parties didn't agree on the arbitrators appointment; the court reasoning for dismissing their request was that they should first seek the chamber of commerce and industry in AD to appoint the arbitrators in the event that the parties didn't agree on an arbitrator before seeking the court, to follow the requirement of the arbitral clause between the parties, the appellant claims that they made this request to the chamber and were denied. Therefore, they are entitled to seek the court to appoint the arbitrators.

The court dismissed this argument, stating that court has the right to interpret the facts of the case and to weigh the evidence presented to them. Furthermore, clause 14 of the sub-construction contract, implies that the process of appointment should start first by an agreement between the parties, if they failed to agree on the arbitrator then the parties have the right to seek the head of the chamber of commerce to appoint an arbitrator on their behalf, and if that failed then they have the right to seek the court, furthermore the appellant claim that they have fulfilled this procedure is a new

¹³⁴⁶ One of the requests that was made to the court is the return of this guarantee.

¹³⁴⁷ Abu Dhabi Federal Court of Appeals, appeal no. 567/1997.

¹³⁴⁸ The reset of the grounds doesn't concern arbitration.

claim, which should be presented in front of the trial court and cannot be presented for the first time in front of the Supreme Court.

Thus, the court decided to dismiss the appeal.