

**Critical Study of the Concept of International Arbitration in the UAE:  
Identifying Problems Affecting the Recognition and Enforcement of  
Foreign Arbitral Awards**

**Hassan Mohammed Arab Darwish**

**A thesis submitted for the degree of Doctor of Philosophy In Law**

**School of Law**

**University of Essex**

**6 October 2016**

## Acknowledgements

My first and foremost thanks go to Almighty ALLAH for giving me strength and ability to accomplish this thesis.

I would like to express my sincere gratitude my supervisor, **Dr Youseph Farah**, for the useful comments, remarks and engagement through the learning process of this thesis. I am highly indebted for his support, patience, guidance and motivation since the commencement of my thesis. The valuable discussion with him enabled me to gain great knowledge and skills in both the academic and practical levels.

I would also like to acknowledge **the Staff of the University of Essex**, School of law for cooperating with me throughout the entire process of my thesis.

My deep appreciation to all those who supported me in any respect during the completion of this thesis and particularly to the following:

- **HR Department** of my firm, Al Tamimi & Company Advocates and Legal Consultants, for offering to sponsor my studies which lead me to work on such a diverse and exciting opportunity.
- **Mr. Essam Al Tamimi**, Senior Partner of Al Tamimi & Co and **Mr. Husam Hourani**, Managing Partner of Al Tamimi & Company for providing me with unfailing support and continuous encouragement to me.
- My Partners in the Litigation Department **Mr. Hussain Eisa Al Shiri** and **Mr. Ahmed Allouz** for their efforts to handle and manage the department during the course of my thesis.
- I would like to thank **Mrs. Arlene Abe Pulido** of my firm's HR Department for coordinating with the University throughout my thesis for the registration and payment of the fees.
- To all my dear **colleagues** in the Litigation Department who supported and encouraged me during the completion of this thesis.

A special thanks to my colleague **Mrs. Jyothi Venugopal** for her continuous support, encouragement and efforts in handling my clients and matters throughout the process of my research.

Finally, I must express my very profound gratitude to my family, brothers and sisters, my wife and close friend Laila, and to my children, Mohammed, Fatma, Mahra and Maryam who are my most valuable treasures.

## Abstract

Arbitration commentators have underlined the significance of recognition and enforcement of arbitral awards and it has been widely acknowledged that the effectiveness of international arbitration ultimately depends on successful implementation of an arbitral award. This thesis intends to critically explore the legal obstacles currently undermining the recognition and enforcement process of foreign and international arbitral awards in the UAE arising out of the lack of the concept of international arbitration. UAE legislation and the jurisprudence of the courts fail to set forth relevant criteria for determining whether an award should be interpreted as domestic or international, as such, the UAE national courts lack appreciation for the international character of arbitral awards while considering recognition and enforcement of awards, and consequently, fail to bestow the pro-enforcement attitude that an international award usually enjoy under international practice. Equally, it defeats, as this research will show, the UAE's commitment to the enforcement regime of the New York Convention. The emphasis of this thesis is therefore to identify how critical is the concept of international arbitration and the extent to which it affects the recognition and enforcement of foreign and international awards in the UAE.

This thesis focus also on the practical implications caused by the lack of separate arbitration legislation and various legal aspects of the concept of international arbitration, on the enforcement of international and foreign arbitral awards in the UAE. International best practice jurisdictions such as France and Switzerland apply various parameters for determining the international character of arbitral award which is lacked in the UAE. The current court procedures on enforcement of international and foreign arbitral awards in the UAE are also not conforming to international best practice, as will be seen in this thesis, which cause major obstacle on the enforcement regime.

## Table of Contents

Acknowledgments	I
Abstract	III
Table of Contents	IV
Table of Cases	VII
Table of Laws & Regulations	X
Table of Abbreviations	XI
<b>Chapter One</b>	
<b>Introduction</b>	
1.1 Background of the Study	1
1.2 Scope and Structure of this Chapter	3
<b>Part One</b>	
1.3 Thesis Outline	4
1.4 Structure of the Thesis	9
1.5 Research Methodology	11
1.6 Significance and Scope of the Thesis	12
<b>Part Two</b>	
1.7 The UAE Legal System	13
1.7.1 Sources of Law	13
1.7.2 Court Structure	15
1.7.3 Historical Background of Arbitration in the UAE	17
1.7.4 Arbitration Centers in the UAE	18
<b>Chapter Two</b>	
<b>Lack of the Concept of "International Arbitration"</b>	
<b>and its Impacts on The Current Arbitration Legislation In The UAE</b>	
2.1 Arbitration in the UAE	20
2.2 Scope and Structure of this Chapter	22
<b>Part One</b>	
2.3 Arbitration Legislation in the UAE	24
2.3.1 Why UAE Needs a Separate Arbitration Law?	25
2.3.2 Brief about the Draft Federal Arbitration Law	26
2.4 Summary of the Current UAE Arbitral Provisions	27
2.4.1 Arbitration Agreements	28
2.4.2 Arbitral Tribunal	29
2.4.3 Conduct of the Arbitration Proceedings	30
2.4.4 Court's Assistance in Conducting Arbitration	31
2.4.5 Arbitral Award	32
2.5 Recognition and Enforcement of Arbitral Awards in the UAE	33
2.5.1 Ratification and Enforcement of Domestic Arbitral Awards	33
2.5.2 Recognition and Enforcement of Foreign Arbitral Awards	36
<b>Part Two</b>	
2.6 Introduction	39
2.6.1 The Concept of International Arbitration	41
2.6.2 Why to distinguish between National and International Arbitration?	42
2.6.3 How to determine if Arbitration is International?	45
2.6.3.1 Legal Factors	45

2.6.3.2	Economic Factor	50
2.6.3.3	Dual Factors	58
2.6.3.4	Standard Adopted Under New York Convention and UNCITRAL Model Law	60
2.7	Lack of the concept of “International Arbitration” and its effectiveness on the UAE	64
2.7.1	Seat of Arbitration	65
2.7.1.1	Hypothetical Case Studies on International Arbitration	66
2.7.2	Mandatory Rules in International Arbitration	72
2.7.2.1	The Ruling of Dubai Court of Cassation in <i>Bechtel</i> case	73
2.7.2.2	<i>Bechtel</i> Case Analysis	74
2.8	Conclusion	78

### Chapter Three

#### Incorrect Application of Domestic Arbitration Provisions to the Enforcement of Foreign Awards Causes Lengthy Court Procedures Before National Courts of the UAE

3.1	Introduction	82
3.2	Scope and Structure of this Chapter	83

#### Part One

3.3	Consequences of the Lack of the Concept of International Arbitration from UAE Perspective	85
3.4	Major Obstacles Facing the Enforcement of Arbitral Awards in the UAE	88
3.4.1	Recognition and Enforcement Procedures before the UAE National Courts	89
3.4.2	Enforcement Procedures in the UAE at a Glance	91
3.4.2.1	Provisions related to the Ratification and Enforcement of Domestic Awards in the UAE	92
3.4.2.2	Case Laws from International Perspectives	94
3.4.2.3	Provisions Related to Recognition and Enforcement of Foreign Arbitral Awards in the UAE	96
3.4.3	Conflicting Interpretations of Higher Courts on the Relevant Provisions of the UAE CPL Applicable to Domestic And Foreign Arbitral Awards	102
3.4.3.1	Federal Supreme Court Decision in Civil Appeal No. 202 of the Judicial Year 25 dated 14/5/2006	102
3.4.3.2	Dubai Court of Cassation Decision in Civil Appeal No. 218/2014 dated 15 May 2005	106

#### Part Two

3.5	Arbitration Proceedings in Other Jurisdictions	110
3.5.1	Arbitration Proceedings in France	110
3.5.1.1	Arbitration Laws in France	110
3.5.1.2	Domestic and International Arbitration - Rules and Mandatory Provisions	111
3.5.1.3	Recognition and Enforcement of Foreign Arbitral Awards	112
3.5.1.4	Approach of French Courts Towards Enforcement	113
3.5.1.5	Jurisdictional Comparison - The UAE and France	115
3.5.2	Arbitration proceedings in Switzerland	116
3.5.2.1	Arbitration Laws in Switzerland	116
3.5.2.2	Domestic Arbitration	117
3.5.2.3	Recognition and Enforcement of Foreign Arbitral Awards	117
3.5.2.4	Jurisdictional Comparison - The UAE and Switzerland	119
3.5.3	Arbitration Proceedings in Egypt	120
3.5.3.1	Arbitration Laws in Egypt	121
3.5.3.2	Recognition and Enforcement of Foreign Arbitral Awards	122
3.5.3.3	Approach of Egyptian Courts Towards Enforcement	124
3.5.3.4	Jurisdictional Comparison - The UAE and Egypt	126
3.6	Obstacles for Enforcement and Possible Remedies	127
3.7	Conclusion	128

**Chapter Four**  
**The Impact of The New York Convention on The UAE Courts’**  
**Approach Towards Recognition And Enforcement of Foreign Awards**

4.1 Introduction	131
4.2 Scope and Structure of this Chapter	132

**Part One**

4.3 Overview of the New York Convention	134
4.3.1 New York Convention - A Comprehensive Observational Study	137
4.3.1.1 Scope of Application of the New York Convention	138

**Part Two**

4.4 The Position of UAE Courts’ Before and After Acceding to the New York Convention	149
4.4.1 UAE Courts’ Position Prior to Accession to the New York Convention	150
4.4.2 UAE Courts’ Position after Joining the New York Convention	152
4.4.3 Case Study - Enforcement of Foreign Arbitral Awards in the UAE	155
4.4.3.1 The Judgment of the Fujairah Federal Court Of First Instance - Case No 35 of 2010 dated 27 <sup>th</sup> April 2010	155
4.4.3.2 The Ruling of the Abu Dhabi Court of Cassation in <i>Explosivos Alaveses SA (Spain) v United Management Chile Limited</i>	157
4.4.3.3 The Ruling of the Dubai Court of Appeal in <i>Nimbus Sports International Company v Ary Digital Free Zone LLC</i>	159
4.4.3.4 The Ruling of the Dubai Court of Appeal in <i>Al Reyami Group LLC v BTI Befestigungstechnik GmbH &amp; Co. KG</i>	161
4.4.3.5 The Ruling of the Dubai Court of Cassation in <i>Airmec Dubai LLC v. Max International FZE</i>	164

**Part Three**

4.5 Misinterpretation of the Provisions of the New York Convention by Dubai Courts	167
4.6 Comparison of the Judicial Principle Established in the CCI Case with Previous Enforcement Friendly Decisions of the UAE Courts	171
4.7 Divergent Views on the CCI Case	172
4.8 Overall Conclusion	184

**Chapter Five**  
**Conclusion and Recommendations**

5.1 Overview of the Study	187
5.2 Research Objectives and Preliminary Results	188
5.3 Summary of the Main Findings	189
5.4 Recommendation for Future Research	196
5.5 Conclusion	197
Bibliography	199
Appendix I	
UAE Civil Procedure Law (Arbitration Provisions)	212
Appendix II	
United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (New York, 10 June 1958)	220

## Table of Cases

### **Abu Dhabi Court Judgments**

#### **Abu Dhabi Court of First Instance Judgments**

Abu Dhabi Court of First Instance, Case No 410/2008.

#### **Abu Dhabi Court of Cassation Judgments**

Abu Dhabi Court of Cassation, Case No 679/2010 dated 16 June 2011.

### **Dubai Court Judgments**

#### **Dubai Court of First Instance Judgments**

Dubai Court of First Instance, Case No 192/2012 dated 26 March 2013.

Dubai Court of First Instance, Case No 688/2014 dated 17 September 2014.

#### **Dubai Court of Appeal Judgments**

Dubai Court of Appeal, Case No 531/ 2011 dated 6 October 2011.

Dubai Court of Appeal, Case No 1/2013 dated 9 July 2013.

Dubai Court of Appeal, Case No 596/2013 dated 23 October 2013.

Dubai Court of Appeal, Case No 52/2016 dated 30 March 2016.

#### **Dubai Cassation Court Judgments**

Dubai Court of Cassation, Case No 267/1999 dated 27 November 1999.

Dubai Court of Cassation, Case No 258/1999 dated 2 October 1999.

Dubai Court of Cassation, Case No 17/2001 dated 10 March 2001.

Dubai Court of Cassation, Case No 322/2004 dated 11 April 2004.

Dubai Court of Cassation, Case No 503/2003 dated 15 May 2004.

Dubai Court of Cassation, Case No 218/2004 dated 15 May 2005.

Dubai Court of Cassation, Case No 192/2007 dated 27 November 2007.

Dubai Court of Cassation, Case No 233/2007 dated 13 January 2008.

Dubai Court of Cassation, Case No 263/2007 dated 3 February 2008.

Dubai Court of Cassation, Case No 164/2008 dated 10 October 2008.

Dubai Court of Cassation, Case No 270/2008 dated 24 March 2009.

Dubai Court of Cassation, Case No 32/2009 dated 29 March 2009.



Dubai Court of Cassation, Case No 132/2012 dated 18 September 2012.

Dubai Court of Cassation, Case No 282/2012 dated 3 February 2013.

Dubai Court of Cassation, Case No 156/2013 dated 18 August 2013.

Dubai Court of Cassation, Case No 640/2013 dated 8 July 2014.

Dubai Court of Cassation, Case No 434/2013 dated 23 November 2014.

#### **Fujairah Federal Court Judgment**

Fujairah Court of First Instance, Case No 35/2010 dated 27 April 2010.

#### **UAE Federal Supreme Court Judgments**

Federal Supreme Court, Case No 556, Judicial year 24 dated 19 April 2005.

#### **Egyptian Courts Judgments**

##### **Cairo Court of Appeal Judgments**

Court of Appeal Cairo, Case No 10/27 dated 6 September 2010.

##### **Cairo Court of Cassation Judgments**

Court of Cassation Cairo, Case No 2994/1990 dated 16 July 1990.

Court of Cassation Cairo, Case No 966/73 dated 10 January 2005.

#### **French Court Judgments**

##### **Paris Court of Appeal Judgments**

Court of Appeal Paris, April 26, 1985, *Aranella v Italo- Ecuatoriana*, 1985 REV ARB 311.

Court of Appeal Paris, December 8, 1988 *Chantiers Modernes v C M G C*, 1989 REV ARB 111.

Court of Appeal Paris, February 19, 1988, *Firme Peter Beigi v Britannia*, 1990 REV ARB 657.

Court of Appeal Paris, March 14, 1989, *Murgue v Coflexip*, 1991 REV. ARB 355.

Court of Appeal Paris, June 15, 1989, *Granomar v Compagnie Interagra*, 1992 REV ARB 80.

Court of Appeal Paris, March 29, 2001 *SARL Carthago Films v SARL Babel Productions* REV ARB 543.

Court of Appeal Paris, April 4, 1991 *Icart vQuillery* 1991 REV ARB 659.

Court of Appeal Paris, April 19, 1991, *Parfums Stern France v CFFD*, 1991 REV ARB673.

Court of Appeal Paris, November 14, 1991 *Consorts Legrand v European Country Hotels Ltd* 1994 REV ARB 545.

Court of Appeal Paris, Feb 27, 1992 *Sohm v Simex*, 1992 Rev ARB 590.

Court of Appeal Paris, May 26, 1992, *Guyapeche v Abba Import Aktiebolag*, 1993 REV ARB 624.

Court of Appeal Paris, November 25, 1993, *Paco Rabanne Parfums v Les Maisons Paco Rabanne*, 1994 REV ARB 730.

Court of Appeal Paris, December 7, 1994, *V2000 (formerly known as Jaquar France) v Renalut*, 1996 REV ARB 245.

Court of Appeal Paris, April 11, 1996 *OIP v Pyramide*, 1996 REV ARB 467.

Court of Appeal Paris, July 1, 1997 *Agence Transcongolaise des Communications-Chemin de fer Congo (ATC-CFCO) v Compagnie Minière de l'Ogooue-Comilog S.A.*

Court of Appeal Paris, October 8, 1997 *Solna International AB v S A Destouche*, *Dalloz*, 1997 I R 233.

#### **Paris Court of Cassation Judgments**

Court of Cassation Paris, May 17, 1927, *Pelissier du Besset v The Algiers Land and Warehouse Co Ltd.*

#### **Indian Court Judgments**

Supreme Court, Case No 105/2002, *Bhatia International v Bulk Trading SA* (2002)4 SCC 105.

Supreme Court, Civil Appeal No 7019/ 2005, *Bharat Aluminium v Kaiser Aluminium* (2012) 9 SCC 552.

#### **Lebanese Court Judgment**

Beirut Court of Appeal 10<sup>th</sup> Civil Chamber, Decision No 492/2001 dated 21 March 2001.

## Table of Laws, Regulations and Directives

### **Egypt**

Egypt Law No. 27 of 1994 on Arbitration in Civil and Commercial matters dated 18 April 1994.  
Egypt Law No. 9 of 1997 amending some provisions of the Egyptian Arbitration Law No. 27 of 1994.

### **France**

Decree No 80-354 of 14 May 1980.  
Decree No 81-500 of 12 May 1981.

### **Lebanon**

Decree Law 90/83 of the Lebanese Code of Civil Procedure, 16 September 1983.

### **Switzerland**

The Switzerland Federal Code on Private International Law of 18 December 1987.

### **United States of America**

United States Federal Arbitration Act of 12 February 1925.

### **United Arab Emirates (UAE)**

#### **Statutes and Rules:**

The UAE Federal Law No. 5 of 1985 (As amended by the Federal Law No. 1 of 1987), the Civil Transaction Law.

The UAE Federal Law No. 11 of 1992 (As amended by Law No 30 of 2005 and Law No 10 of 2014) the Law of Civil Procedure.

The UAE Federal Law No 10 of 1992 (As mended by Law No 36 of 2006) the law of the Evidence in the Civil and Commercial Transactions.

The UAE Federal Decree No 43 of 2006 enacted pursuant to UAE's ratification of the New York Convention dated 13 June 2006.

Dubai Law No 16 of 2009 (Establishing the Centre for Amicable Settlement of Disputes).

The Rules of the Dubai International Arbitration Centre, 7 May 2007.

## Table of Abbreviations

AAA	American Arbitration Association
ADCCAC	Abu Dhabi Commercial Conciliation and Arbitration Centre
ADGM	Abu Dhabi Global Market
ADR	Alternative Dispute Resolution
ALL ER	All England Law Report
BCDR	Bahrain Chamber of Dispute Resolution
CCI	Construction Company International
CFE	Compagnie Francois d'Entreprises S.A
CIETAC	China International Economic and Trade Arbitration Commission
CRCIAC	Cairo Regional Centre for International Commercial Arbitration
DCA	Department of Civil Aviation (Dubai, UAE)
DCB ACT	Federal Debt Collection and Bankruptcy Act of 1889 (Switzerland)
DIAC	Dubai International Arbitration Centre
DIFC	Dubai International Financial Centre
DIS	The Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
EVIDENCE LAW	The Law of Evidence in Civil and Commercial Matters (UAE)
FAA	Federal Arbitration Act (United States of America)
FRENCH CODE	French Code of Civil Procedure (France)
GAR	Global Arbitration Review
GCC	Gulf Cooperation Council
GENEVA CONVENTION	Convention on the Execution of Foreign Arbitral Awards, 1927
HKIAC	Hong Kong International Arbitration Center
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
INDIAN ARBITRATION ACT	Indian Arbitration and Conciliation Act, 1996
IPBA	Inter-Pacific Bar Association
ITIIC	International Trading and Industrial Company
JCAA	Japan Commercial Arbitration Association
KCAB	Korean Commercial Arbitration Board
LCIA	London Court of International Arbitration
LLC	Limited Liability Company
LMAA	London Maritime Arbitration Association
MENA	Middle East and North Africa region
MOI	Ministry of Irrigation

New York Convention	The New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards of 1958.
ONGC	Oil and Natural Gas Corporation Ltd (India)
PLC	Practical Law Company
POA	Power of Attorney
QC	Queen's Counsel
SCC	Stockholm Chamber of Commerce
SCAI	Swiss Chambers Arbitration Institution
SIAC	Singapore International Arbitration Centre
SWISS CODE	Switzerland Federal Code on Private International Law, 1987
UAE	United Arab Emirates
UAE CPL	The Civil Procedure Law (UAE)
UK	United Kingdom of Great Britain and Ireland
UNICTRAL	United Nations Commission on International Trade Law
US	United States of America
VIAC	Vienna International Arbitral Centre
WTO	World Trade Organization

## Chapter One INTRODUCTION

*“No point in having arbitration-friendly laws, well-drafted arbitration rules, and competent arbitrators and counsel, if no effective enforcement mechanism is available, whether or not it is actually used.”<sup>1</sup>*

### 1.1 Background of the Study:

Scholars on international arbitration have emphasised the significance of recognition and enforcement of arbitral awards as among the most important factors that contribute to the success of arbitration. Parties choose arbitration as an effective means of dispute resolution with an expectation that the arbitral award will be enforced without undue delay; otherwise, the entire arbitration process shall be meaningless<sup>2</sup>.

The fundamental advantage of international arbitration over litigation arises because the procedure set out for the recognition and enforcement of international awards is more widespread and effective than corresponding provisions of the recognition and enforcement of foreign judgments<sup>3</sup>. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”), which has 156<sup>4</sup> Contracting States as signatories, is described as the “single most important pillar on which the edifice of international arbitration rests”<sup>5</sup>. Conventions and Multi-lateral Treaties of each State form an integral part of their legal framework, which determines the effective enforcement of awards.<sup>6</sup>

The accession by the United Arab Emirates (“UAE”) to the New York Convention has been a remarkable step towards the enforcement of foreign arbitral awards. The New York Convention entered into the legal framework of the UAE on 19<sup>th</sup> November 2006 following the ratification on 13<sup>th</sup> June 2006 under Federal Decree No.43 of 2006. Following the UAE’s accession to the New York Convention, the UAE courts applied the provisions of the Convention in relation to recognition

---

<sup>1</sup> Gabrielle Kaufmann- Kohler, “Enforcement of Awards - A Few Introductory Thoughts” in Albert Jan van den Berg (Gen. Ed), ICCA Congress Series No 12, Beijing, May 2004: New Horizons in International Commercial Arbitration and Beyond (The Hague: Kluwer Law International, 2004) 287.

<sup>2</sup> Micheal Hwang S.C and Yeo Chuan Tat, “Recognition and Enforcement of Arbitral Awards”, published in Asian Leading Arbitrator’s Guide, p 407.

<sup>3</sup> Supra note 2, p 408.

<sup>4</sup> List of the Contracting States of the New York Convention can be obtained on [www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries).

<sup>5</sup> Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” (1990) 1 American Review of International Arbitration p 91.

<sup>6</sup> Supra note 2, pp 407-408.

and enforcement of foreign awards. Nonetheless, there are several major procedural issues that threaten the enforcement of awards and hinder the development of arbitration in the UAE.

This study aims to examine the significant issues underlying the process of recognizing and enforcing foreign arbitral awards in the UAE particularly in the absence of a clear and definitive concept of international arbitration and its application by the UAE national courts. This research demonstrates for the first time in an academic writing that there is no concept of international arbitration and its effect on the recognition and enforcement of foreign and international awards in the UAE. Previously, several arbitration practitioners discussed the problems faced by parties seeking recognition and enforcement of awards in the UAE, but they failed to identify the factual error that underlines the enforcement aspects of foreign and international awards. In contrast, this research will examine the core issue and various other factors that are the key contributors to the current problems with the enforcement of foreign and international awards in the UAE.

At the outset, the most important factor is the lack of a separate and independent legislation in the UAE that defines international arbitration and thereby distinguishes between domestic and international arbitration. This issue and its consequent effects have a huge impact on the recognition and enforcement of awards, which is explored in chapter two of this study. In addition to the lack of a clear definition of international arbitration, the absence of substantive international arbitration experience and its implementation by the UAE national courts has resulted in lengthy and complex proceedings for the recognition and enforcement of foreign and international awards. This is yet another prime factor that affects the enforcement process and is explained in chapter three of this study.

In addition to the above factors, although the UAE became a signatory to the New York Convention in 2006, the UAE national courts failed to appreciate the full benefits of being a signatory to the Convention. This is primarily due to the absence of the definitive concept of international arbitration in the UAE law. It is also the result of a lack of knowledge and experience in handling substantive international arbitration by some of the judges who deal with the recognition and enforcement of awards. The consequence of not having a competent court to deal with arbitration has also worsened this situation. This topic will be examined in chapter four of this thesis.

## **1.2 Scope and Structure of this Chapter:**

This chapter is divided into two parts as follows:

- (i) Part one presents the outline, problems, aims and objectives of this thesis. It focuses on the significance and the scope of this study. In addition, it explains the research methodology adopted to carry out this study.
- (ii) Part two examines the legal system and the sources of law in the UAE. It outlines the history of arbitration in the UAE. Further, it examines the court structures, discusses the significant arbitration centers in the UAE, and highlights the latest developments in the field of arbitration in the UAE. A brief background of the UAE legal system is presented in this chapter to assist readers in understanding the judicial system in the UAE, as it serves as a focal point in following the issues highlighted in this thesis.



## PART ONE

### 1.3 Thesis Outline

The main question that underlines this study is how vital the concept of international arbitration and its effectiveness are to the recognition and enforcement of foreign and international awards in the UAE and the extent to which the lack of this concept affects the proper development of arbitration in the UAE. No legal writers to date have attempted to undertake an in depth study of the legal framework concerning the recognition and enforcement of arbitral awards in the UAE. There forth this research is unique as it is the first legal study which underlines the obstacles faced by arbitral creditors when seeking recognition and enforcement of the foreign award in the UAE. It investigates the challenges brought about by lengthy procedures before the UAE courts, parochial applicable laws, and often a judicial culture of UAE national courts which does not fully appreciate the significance of the international character of the arbitral award. Thus, the work unpacks the juridical and practical drawbacks that lead to the current problems with regards to the recognition and enforcement of arbitral awards in the UAE.

As will be seen later in this study, the arbitration provisions contained in Articles 203-218 of chapter three of the UAE Civil Procedure Law <sup>7</sup> ("UAE CPL") are outdated and insufficient to meet the accelerated pace at which international arbitration has evolved over the last two decades. The absence of an express definition of international arbitration in the current UAE law has proven problematic in practice for the effective enforcement of arbitral awards including domestic, international and foreign awards in the UAE. This study conducts an in-depth analysis of these legal issues and examines the prevailing UAE arbitration in the UAE CPL. It aims to highlight how the current arbitral provisions obstruct the process of enforcing arbitral awards in the UAE.

This research examines the factors that are applied internationally in jurisdictions with the best practices to determine if an award is a valid international award and then compares the approach adopted by the UAE legislators. Although international arbitration has spawned its own norms and principles and established a solid international presence, it remains a fresh field of law in the UAE. There is an increasing requirement for a new comprehensive modern law in the UAE, which

---

<sup>7</sup> Federal Law No 11 of 1992 (as amended Law No 30 of 2005 and Law No 10 of 2014).

recognizes and incorporates the international best accepted standards to match the current and growing arbitration needs in the UAE.

The terms “international accepted best practices” or “recommended framework” in arbitration denotes “those efficient and effective standards for conducting arbitral proceedings that arbitrators and counsels should apply to provide users of arbitration with the highest possible level of efficiency and fairness in the resolution of their disputes”<sup>8</sup>. Adopting international best practices brings harmony and the standardization of international commercial arbitration. Best practices also serve as a form of “checklist” for parties of what to expect from efficient proceedings in the arbitration process<sup>9</sup>.

Countries that have adopted best practices in relation to enforcing foreign arbitral awards ensure that their procedural law supports the enforcement process of arbitral awards. For instance, Switzerland has a long-standing tradition of efficient dispute resolution through international arbitration and strives to ensure that its arbitration law reflects international best practices that continue to meet the needs of arbitration users worldwide. Switzerland's courts are known for their arbitration-friendly approach. France is another leading jurisdiction in arbitration and is also well known for its pro-enforcement attitude towards arbitral awards.

The legal approach followed in the UAE is different from the procedures followed in the leading arbitration-friendly jurisdictions, such as France and Switzerland. This study, in general conducts jurisdictional comparison between UAE and some of the international accepted best practices' jurisdictions with a view to determine if the current arbitration practice in the UAE supports the development of international arbitration, if not, what are the prevailing legal issues in the enforcement process of arbitral awards, and how these can be reformed in a way which will make the UAE harmonize its approach with best international practice. This will be assessed against the cultural, and socio-political environment in the UAE that has a bearing on the level of receptivity of best international practice.

---

<sup>8</sup> Irene Welser/Giovanni De Berti, “Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices, pp 79-80 available online (last viewed on July 2016).

<sup>9</sup> Supra note 8.

In this context, the study will examine the concept of international arbitration, arbitration legislation and the enforcement procedures in various arbitration-friendly jurisdictions, such as France, and also a civil law jurisdiction, namely Egypt. As explained above, the lack of the concept of international arbitration in this study focuses on the absence of a clear definition to determine international arbitral awards in the UAE and the application of the principles of international arbitration. Based on the analysis of various arbitration friendly jurisdictions, this study highlights the apparent defects involved in the current enforcement mechanism of foreign arbitral awards in the UAE and offer recommendations, which, though unique to the UAE, can indeed serve as a guiding principle that can lead UAE on the path of the development and evolution of arbitration within the UAE. The UAE legislators give predominance to the place (geographical factor) where the arbitral award was signed and issued to determine the nature of arbitral award. Thus, even if an award is actually a foreign award, if it is signed in the UAE, the UAE courts must consider it to be a domestic award.

The researcher examines various scenarios that highlight this issue where a foreign/international arbitral award is erroneously considered a domestic award by the UAE courts and accordingly applies domestic arbitral provisions instead of the provisions of the New York Convention. By evaluating the approach adopted by the leading arbitration-friendly jurisdictions, this study examines if there are problems underlying the categorization of an award based on merely geographical factors.

Due to the lack of the concept of international arbitration, the prevailing arbitration legislation in the UAE CPL fails to define and set forth relevant criteria for determining whether an award should be categorized as domestic, foreign or international. Sometimes there is a lack of proper understanding of the principles of international arbitration as applied in leading arbitration jurisdictions for instance to distinguish between the seat and venue of arbitration. To clarify in some cases the UAE national courts' gave significance to the seat of arbitration whereas in some other cases the courts gave importance to the venue of arbitration where some part or all of the arbitration hearings were conducted to determine the nature of an arbitral award. Generally, in internationally accepted best practice jurisdictions, the national courts will not review the merit of the award nor will consider any grounds other than those contained in Convention. Therefore in internationally accepted best practice jurisdictions there is no risk of lengthy court proceedings, but in UAE a fresh litigation with

lead to lengthy pleadings between the parties and sometimes courts will examine facts beyond the conditions contained in the Convention and hence refuse recognition and enforcement of award.

To elaborate on how this lack of a proper understanding of the principles of international arbitration can lead to lengthy court proceedings, the researcher conducts a critical review of the procedures to be followed by an award creditor before the UAE national courts. These include initiating a fresh action before the First Instance Court similar to commencing a normal claim, followed by an appeal before the Court of Appeal and finally the Cassation Court to recognize and enforce foreign/international arbitral awards. Such a prolonged and complex course of litigious action to seek recognition and enforcement of an award is against the principles of international arbitration and the procedure followed by the internationally best accepted practice.

This study thus attempts to determine various flaws that are currently prevailing in the UAE from a procedural perspective regarding the recognition and enforcement of awards. Moreover, the researcher investigates the juridical approach of the UAE national courts towards the recognition and enforcement of foreign arbitral awards by considering various judgments and setting forth various interpretations adopted by the UAE national courts on the arbitration provision of the UAE laws.

One main question that is considered in this study is the position of the UAE courts before and after acceding to the New York Convention in 2006. The researcher will explore if the UAE's accession to the New York Convention caused any impact on various elements, such as the conditions for enforcing foreign awards, judicial interpretation of the Convention by UAE national courts and the procedural mechanism for the recognition and enforcement of foreign awards. The UAE courts' approach since becoming a signatory to the New York Convention is progressive; namely, the UAE courts started to apply mainly the conditions set out under Articles IV and V of the New York Convention to the recognition and enforcement of foreign arbitral awards. However, from the perspective of the procedures to be followed for enforcing a foreign arbitral award, various issues still remain as a challenge, such as the application of incorrect law. While considering a foreign arbitral award, the UAE courts tend to misapply the applicable provisions for the domestic awards to foreign arbitral awards. Although it was established that, upon the UAE's accession to the New York Convention, the provisions of the Convention should take precedence over the local laws that were inconsistent with the provisions set out in the New York Convention, the UAE courts in some

cases continued to apply Articles 235 and 236 of the UAE CPL. This study conducts a detailed analysis of this issue and determines whether the issue adversely affects the enforcement of foreign arbitral awards.

This study also aims to highlight major obstacles to the recognition and enforcement of foreign arbitral awards in light of lack of the concept of international arbitration in the UAE and how to overcome these issues to pave way for the development of arbitration in the UAE.

In this context, this study endeavors to answer the following questions;

- (i) What issues currently exist due to the application of the prevailing UAE arbitral provisions contained in the UAE CPL regarding the recognition and enforcement of foreign arbitral awards? To what extent do the UAE courts erroneously apply the provisions of Articles 235 and 236 of the UAE CPL notwithstanding the UAE's accession to the New York Convention while considering applications for recognition and enforcement of foreign arbitral awards? Can the UAE meet the growing demands of the international arbitration community without having specific legislation on arbitration? Are the current UAE arbitral provisions in line with the internally accepted best practices?
- (ii) What are the legal elements that determine the international nature of arbitral awards from the perspective of various legal systems worldwide, and what factors should the UAE national courts consider to establish an arbitral award as domestic or foreign?
- (iii) What are the legal consequences of the lack of having a definitive concept for international arbitration in the UAE? Does this void affect the approach adopted by the UAE courts to the recognition and enforcement of foreign arbitral awards?
- (iv) To what extent does the current procedures followed before the UAE courts which require the initiation of a new claim similar to the procedures for ratifying domestic arbitral awards, followed by the two tier appeal system, to recognize and enforce a foreign arbitral award necessary? Are they in line with the internationally recommended framework for recognizing and enforcing foreign awards?
- (v) How do the legislation, jurisdictional approach and the procedures for recognition and enforcement of the UAE courts compare with internationally leading jurisdictions on

arbitration, such as France and Switzerland, and with some of the civil law jurisdictions, such as Lebanon and Egypt? What do these comparisons reveal about the major issues involved in the enforcement of awards in the UAE and what are the shortcomings of the existing law pertaining to the enforcement process? What measures can be undertaken to overcome the existing weaknesses?

#### **1.4 Structure of the Thesis:**

With a view to analyze this topic critically, the researcher divided the thesis into five main chapters, which commence with this introductory chapter.

The introduction explores the importance, scope and methodology adopted in this study. It discusses the purpose and overview of this thesis. In addition, it examines the historical background of arbitration in the UAE and discusses the UAE legal system, including the court structure and sources of law.

In the second chapter, the study examines the current problems in the UAE arbitration provisions and explores whether the lack of a precise definition of international arbitration is the key shortcoming in the UAE arbitration legislation. The study identifies various factors that are considered by worldwide jurisdictions in determining whether arbitration can be considered international. Moreover, the study compares it with the approach adopted by the UAE national courts and determines whether it is in line with the internationally accepted best practices. It examines the profound practical implications arising from the lack of the concept of international arbitration (in terms of the absence of a clear definition of international arbitration and its application by UAE national courts) and how it affects the enforcement of foreign arbitral awards, such as the unjustifiable *Bechteh*<sup>10</sup> case, in which the UAE court set aside the award on the grounds that the arbitrator did not comply with the mandatory provisions of domestic law.

The third chapter discusses the consequences of not having the concept of international arbitration and how it reflects in the practice followed by the UAE courts. It addresses a very complex subject that has not previously been explored by arbitration practitioners. It imposes stress on the procedures followed by the UAE courts for the enforcement of both domestic and foreign arbitral

---

<sup>10</sup> Dubai Court of Cassation Case No 503/2003 dated 15/5/2004. This case is discussed in part two section 2.7.2.1 of Chapter Two of this study.

awards. The UAE courts follow lengthy court procedures for the recognition and enforcement of foreign arbitral awards similar to the ratification process of domestic arbitral awards. Consequently, it takes several years for an award creditor to obtain a final judgment to recognize and to be able to enforce the award, which is a violation of the principle of international arbitration as followed by the leading international arbitration jurisdictions. The study will examine the incorrect application of domestic arbitration provisions on the enforcement of foreign arbitral awards that causes lengthy court procedures before the national courts of the UAE.

In the fourth chapter, the study reviews the position of the UAE courts in relation to the enforcement of foreign arbitral awards prior to 2006, when the UAE joined the New York Convention. Most significantly, the chapter analyzes for the first time in literature the position of the UAE on the issues of recognizing and enforcing arbitration awards after the UAE ratified the Convention. In light of this analysis, this chapter considers whether the UAE's accession to the New York Convention has positively contributed towards the recognition and enforcement of foreign arbitral awards in the UAE by examining some of the decisions in which UAE courts declined to recognize and enforce. In this way, this study evaluates the grounds on which the enforcement of a foreign award was denied and accordingly examines the provisions relied on by the UAE courts to refuse enforcement of awards. In the last part of this chapter, the researcher examines the decision in *Construction Company International (CCI) v. the Ministry of Irrigation of the Government of Sudan (MOI)*<sup>11</sup> ("CCI Case"), which is one of the major focuses of this study, as it demonstrates the absence of the concept of international arbitration and the subsequent misinterpretation of the provisions of the New York Convention by the UAE national courts. It also points out the lack of substantive international arbitration experience by some of the judges in the UAE national courts, which resulted in the UAE courts refusing to recognize a foreign award on the ground that the UAE courts have no jurisdiction, because the award was rendered in a foreign jurisdiction, and the parties had no place of domicile in the UAE.

Chapter five consists of the conclusion with the researcher's recommendation and suggestions to overcome the problems related to the recognition and enforcement of foreign arbitral awards in light of the lack of the concept of international arbitration in the UAE.

---

<sup>11</sup> Dubai Cassation Court, Case No 156/2013 (Civil) issued on 18 August 2013.

### **1.5 Research Methodology:**

The methodology used for the purpose of this study includes review of several academic materials, such as books, journals, magazines, scholarly articles, working papers, etc. This study uses a systematic approach to collect these materials in gathering information that is relevant to the main research questions. Various online subscriptions, such as Kluwer Law, Practical Law Company and Westlaw Gulf have also been utilized to conduct legal research on this topic.

As most of the arbitration legislation of the leading international arbitration jurisdictions are adopted from the prevailing international standards contained in the United Nations Commission on International Trade Law (UNCITRAL) Model Law, this study examines the UNCITRAL Model Law, and it forms a crux of the study. This study notably examines the provisions of the New York Convention, which forms a primary focus of the study, and particularly endeavors to analyze the extent to which the UAE has succeeded in fulfilling its contractual obligations by applying correctly the provisions of the New York Convention to recognize and enforce foreign arbitral awards.

This study reviews the UAE legislation on arbitration - UAE CPL and the arbitration legislation of selected jurisdictions, which includes the Switzerland Federal Code on Private International Law of 1987 ("Swiss Code"); the French Code of Civil Procedure ("CCP") and the Decree No 2011-48 of 13 January 2011 of France on arbitration; Egypt Law No. 27 of 1994 on Arbitration in Civil and Commercial matters dated 18 April 1994 (Amended by Egypt Law No. 9 of 1997); and the Lebanese Code of Civil Procedure (CCP) enacted by Decree Law 90/83 with amendments resulting from Law No. 440 dated 29 July 2002.

To evaluate the position of the UAE courts subsequent to the UAE's accession to the New York Convention, various cases, jurisprudence and legal commentaries on the judgments of the UAE courts, both before and after acceding to the New York Convention, are analysed. To identify the best international practice, this study also adopts to a limited extent a comparative method to study the approach adopted by national courts of various jurisdictions, which includes Egypt, Lebanon and such arbitration friendly jurisdictions as France and Switzerland. In addition, a wide variety of decisions on arbitration by different national courts, such as the Supreme Court of India, will be analyzed.



### **1.6 Significance and Scope of the Thesis:**

One major significance of this study is that it is the only study devoted to the critical evaluation of the lack of the concept of international arbitration and its effects on the recognition and enforcement of foreign arbitral awards in the UAE. This study will be valuable to UAE legislators, lawyers, arbitration practitioners and commercial traders/investors by allowing them to understand the role of international arbitration in the UAE and the challenges affecting the enforcement process of foreign and international arbitral awards.

Arbitration practitioners in the UAE point out that issues exist in the recognition and enforcement of foreign awards in the UAE when compared with the internationally accepted best practices. However, few of the arbitration practitioners and scholars understand that the underlying problem with the enforcement of foreign/international awards in the UAE lies in the absence of the concept of international arbitration, which albeit has a prominent place in every internationally accepted best practices jurisdiction. Unfortunately, as will be demonstrated by this research, this concept and its ramifications are absent in the UAE. The uniqueness of this study therefore lays in the fact that it endeavors to explore the root cause of the problems underlining the enforcement of arbitral awards in the UAE instead of merely pointing to the problems as has been the case with other published work.

In particular, this thesis will assist the UAE legislators to understand the current shortcomings and to remedy these flaws in the new draft law on arbitration<sup>12</sup>. Overall, this study aims to propose measures, suggestions and recommendations required for the UAE to become positioned as a globally recognized arbitration hub in the region and to overcome the existing problems in the development of arbitration in the UAE.

---

<sup>12</sup>The UAE Ministry of Economy has released several drafts of the proposed draft law on arbitration since 2006 and the most recent draft was released in 2013. It is not confirmed when the UAE government will issue the new Federal Arbitration Law. Please refer to Jalal El Ahdab, "The Draft of the Federal Arbitration Law of the United Arab Emirates", published by the International Bar Association (IBA) Arbitration Newsletter (March 2011), pp 126-131 for further details on the draft law.

## PART TWO

### 1.7 The UAE Legal System:

#### 1.7.1 Sources of Law

The State of the United Arab Emirates is a federation of seven Emirates comprised of Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Ajman, Fujairah and Umm Al Quwain. In establishing the UAE, the rulers of six of the Emirates signed a Provisional Constitution on 2 December 1971. The Emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain and Fujairah were the initial signatories; Ras Al Khaimah joined the Federation in February 1972. The Constitution was agreed to and made final in terms of the Constitutional Amendment Act No.1 of 1996, which was signed by the President of the UAE on 2<sup>nd</sup> of September 1996<sup>13</sup>. The Constitution establishes the UAE as an independent, sovereign, federal and Islamic state.

The Constitution governs the legal framework for the Federation and provides for the establishment of the Supreme Council of the Union, which forms the highest authority in the Union and consists of the rulers of all the Emirates thereby composing the Union<sup>14</sup>. By virtue of the Constitution, a President and a Vice President of the Union shall be elected from amongst its members, and their terms of office shall be five Gregorian years.<sup>15</sup> The Supreme Council has exclusive executive, legislative and ratification powers. It has an outright legislative privilege giving it the ultimate authority on federal legislation and decisions concerning matters of general policy of the Federation. The Council approves Federal laws, ratifies treaties, determines international agreements and approves the appointment and removal of the President of the Federal Council of Ministers and of Federal judges.<sup>16</sup>

The Constitution also provides for the Council of Ministers of the Union, which consists of the Prime Minister, his Deputy and a number of Ministers<sup>17</sup>. The Council of Ministers is the executive branch of the Federation. Under the supervision of the President and the Supreme Council, the Council of

---

<sup>13</sup> Essam Al Tamimi, Practical Guide to Litigation and Arbitration in the United Arab Emirates, Kluwer Law International, 2003 p 1.

<sup>14</sup> Article 19 of the UAE Constitution.

<sup>15</sup> Articles 51 and 52 of the UAE Constitution.

<sup>16</sup> Article 47 of the UAE Constitution.

<sup>17</sup> Article 55 of the UAE Constitution.

Ministers is responsible “for carrying out all the internal and external affairs entrusted to the Union”<sup>18</sup>.

The UAE's legal system is based on a combination of the civil law system and Shari'a law. Legal principles in the UAE have largely been modelled on Egyptian laws. The UAE Constitution expressly declares that the Islamic Law (Shari'a) is a main source of UAE law<sup>19</sup>. This general principle is confirmed by several provisions of the UAE Civil Transactions Code (Federal Law No 5 of 1985 as amended by Federal Law No 1 of 1987), which tries to reconcile modern legal concepts with those of Shari'a<sup>20</sup>. Shari'a, meaning 'way' or 'path', is the divine law of Islam, and its principles are mostly derived from the Qur'an and the Sunnah, which are the sayings and deeds of the Prophet Mohammed.

The Federal legislature and the individual Emirates have promulgated several laws since 1971, and the UAE's legislative coverage is fairly comprehensive in most areas of the law. It is notable in practice, however, that, whenever legislation exists in a particular area of law, the role of Shari'a is secondary, basically providing a source of guidance for the courts to interpret legislation and to render a decision accordingly. As such, laws, decrees and regulations effectively form the primary source of UAE law. The core principles of law in the UAE are drawn from Shari'a, while most of the legislation is a mix of Islamic and European concepts of civil law that have a common root in the Egyptian legal code established in the late 19th century.<sup>21</sup>

There is no formal system of judicial precedent in the UAE, although precedents established by the Supreme Courts<sup>22</sup> are recognized by lower courts at both federal and local levels. The region's customs and practices are also important sources of law. The courts look at the established principles of natural justice, either as the court itself perceives them, or as they have been interpreted in other Arab jurisdictions.

Civil and commercial transactions are governed by the relevant codified laws. The rules on Civil Procedure are clearly set out in Federal Law No.10 of 1992 on Evidence in Civil and Commercial Matters (“Evidence Law”) and Federal Law No.11 of 1992 on Civil Procedure Law (the “UAE CPL”)

---

<sup>18</sup> Article 60 of the UAE Constitution.

<sup>19</sup> Article 7 of the UAE Constitution.

<sup>20</sup> Abdel Hamid El-Ahdab and Jalal El Ahdab, “Arbitration with the Arab Countries” (third revised and expanded edition) Wolters Kluwer Law and Business, 2011, p 781

<sup>21</sup> Diana Hamade, The National: Lawyers have to bridge the gap in a split legal system (last view on January 2016).

<sup>22</sup> The court structure in the UAE will be explained in part two section 1.7.2 of this Chapter.

(as amended by Law No.30 of 2005 and Law No 10 of 2014). The UAE CPL has unified the procedure for civil and commercial cases in all of the UAE courts, whether they are local or Federal. However, some Emirates continue to deal with local laws for certain procedural aspects, such as the Emirate of Dubai, which has its own law on court fees, i.e. Law No.1 of 1994. On further matters pertaining to issues related to rent, each Emirate has its own laws, and cases arising under such laws are usually dealt with by special committees.

The UAE CPL also contains a number of standard provisions relating to the jurisdiction of the courts that pertain to the issuance of proceedings, appearance and representation of the parties, service of summons, filing of pleadings and evidence, procedure of hearings, preliminary objections, joinder of parties and actions, interim applications, cross claims, adjournments, hearing of witnesses, withdrawal and discontinuance of proceedings, judgments, summary judgments, appeals, arbitration, attachment of assets, confiscation of passports, prohibition from travel, temporary detention of defendants, execution and enforcement of domestic and foreign judgments and arbitration awards. Chapter two of this study examines the arbitral provisions contained in the UAE CPL and the procedures for enforcing the arbitral award in the UAE.

Criminal matters are dealt with by the Court in accordance with the provisions laid down in the Criminal Procedure Code, Federal Law No 35 of 1992 ("Penal Code") and its amendments. In addition, bi-lateral and multi-lateral treaties, international conventions and protocols concluded or ratified by the UAE also form a significant source of law. The UAE is currently party to several multi-lateral conventions, such as the New York Convention on recognition and enforcement of foreign arbitral awards (1958), the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention of 1965), the Riyadh Convention of Judicial Cooperation between States of the Arab League (1983) and the Gulf Cooperation Council (GCC) for the Execution of Judgments, Delegations and Judicial Notifications (1996), all of which form part of the UAE law.

### **1.7.2 Court Structure**

In the UAE, a federal judicial structure was established in 1971, which deals with civil and criminal matters. The UAE Constitution permits each Emirate to have the power to retain its own judicial system. Accordingly, there are federal courts and local courts established throughout the Emirates.

Sharjah, Ajman, Fujairah and Umm Al Quwain have adopted a federal structure for their judicial systems. The Federal systems are comprised of a Court of First Instance, a Court of Appeal and a Federal Supreme Court, which is located in Abu Dhabi and which accepts appeals from the appeal courts of the Emirates that fall within the jurisdiction of the Federal court system. Two of the emirates, Dubai and Ras Al Khaimah, remained outside of the Federal structure and maintain their own independent judicial system, which includes a Court of First Instance, a Court of Appeal and their own Court of Cassation that hears cases within their jurisdictions. In 2007, the Emirate of Abu Dhabi established its own independent judicial system similar to Dubai and Ras Al Khaimah. Hence, there exist four high courts in the UAE, namely the Federal Supreme Court, the Abu Dhabi Cassation Court, the Dubai Cassation Court and the Ras Al Khaimah Cassation Court. These four courts are the higher authority and hold the last stage in the appeal process and rule only on matters of law.

Within each Emirate there are two types of court that make up the legal framework, namely the Civil Courts and the Islamic Shari'a Court. The Civil Courts have exclusive jurisdiction over civil, commercial, banking, insurance, property, labour and maritime matters. The Shari'a Courts have exclusive jurisdiction in connection with all family law matters and those relating to personal status. The Federal Supreme Court hears disputes between individual Emirates and between the Emirates and the Federal Government. The Supreme Court is also responsible for the constitutionality of legislation issued at the Federal or the Emirate level, the interpretation of the Constitution and serious offences against the Federation. The Court of First Instance has jurisdiction to hear claims with a value not exceeding AED 500,000 and sits with a single judge. Claims for more than AED 500,000 and claims for an undetermined amount are heard by a panel of three judges. The Court of Appeal sits as a panel of three judges, including a Chairman, and the Court of Cassation consists of a Chairman and a maximum of five judges. The decisions made at the Court of Cassation are final and binding. Most of the arguments presented to the Court are by way of written submissions or memoranda, and it is usual for a case to be adjourned several times while the parties exchange pleadings and documentation before the matter is reserved for judgment. The civil courts may, upon the request of either party, call witnesses or refer the matter to an expert for an expert opinion on a factual or technical aspect<sup>23</sup>.

---

<sup>23</sup> Supra note 13 pp 10-15.

In addition to the Court system, there are a number of specialist tribunals, such as the Labour Department Committee to hear labour disputes and a Trading Agencies Committee of the Ministry of Economy to hear commercial agency disputes. In the Emirate of Dubai, the Center for Amicable Settlement of Disputes was established<sup>24</sup> by the Department of Economic Development in co-operation with the Dubai courts to provide an alternative mediation service to the judicial process.

In addition to the local UAE courts, an independent common law judiciary is based in the Dubai International Financial Centre (DIFC), namely the DIFC Courts, that has jurisdiction to adjudicate civil and commercial disputes nationally, regionally and worldwide. The DIFC Courts are outside the scope of this study, which aims to examine the lack of the concept of the international arbitration with respect to the proceedings before the UAE courts (excluding the DIFC Courts). Similar to the DIFC, the Abu Dhabi Global Market (“ADGM”) is a financial free zone that was established in Abu Dhabi and began operating in 2014. The ADGM Courts follow the common law framework to adjudicate civil and commercial disputes. They consist of the Court of First Instance and the Appeal Court to oversee the jurisdiction of the ADGM.

### 1.7.3 Historical Background of Arbitration in the UAE

Since the early days of Islam, arbitration has been practiced in the Middle East<sup>25</sup>. Both the Qu’ran and the Sunna of the Prophet (two of the main sources of the Shari’a) refer to arbitration<sup>26</sup>. Historically, parties in the UAE, particularly local entities, have preferred to use the courts to settle disputes, as arbitration was generally considered to be expensive, and arbitral awards are considered to be more difficult to enforce<sup>27</sup>. But, due to the rapid increase in commercial activities, the UAE continued to emerge as the regional business hub of the Middle East. Thus, the need for effective and acceptable arbitration began to rise, because arbitration is globally accepted as an efficient and vital means for resolving international trade and investment disputes. Accordingly, commercial entities conducting business in the UAE became more inclined to enter into arbitration agreements.<sup>28</sup> Resorting to international arbitration as an accessible means of resolving

---

<sup>24</sup> Dubai Law No 16 of 2009, which establishes the Center for Amicable Settlement of Disputes.

<sup>25</sup> Lovells, Client Note: Project Dispute Resolution in the Middle East: arbitration and enforcement, at p 1 (Lovells 2006).

<sup>26</sup> Stephen Jagusch & James Kwan, Middle East Overview, the European & Middle Eastern Arbitration Review 2008 (Global Arbitration Review, 2008).

<sup>27</sup> Ian Clarke and Charles Lilley, The European, Middle Eastern and African Arbitration Review 2013, Global Arbitration Review available at <http://globalarbitrationreview.com/>.

<sup>28</sup> Saloni Kantaria, The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law, available online and last view on January 2016.

commercial disputes has gathered pace more recently and developed accordingly.<sup>29</sup> International companies are more comfortable with arbitration as the forum to resolve disputes, as the official language of arbitral proceedings need not be Arabic, a specialist tribunal can be appointed as opposed to the more generalist UAE courts, and, of course, the private nature of arbitration is attractive<sup>30</sup>. The unprecedented number of disputes arising out of the global economic crisis and, in particular, the increased number of disputes in the construction industry, have been major contributory factors in this rapid development of arbitration in the UAE.

The lack of a precise definition to international arbitration in the current UAE legislation has led to several problematic issues in relation to the enforcement of domestic, international and foreign awards in the UAE. This research conducts an in-depth analysis of the consequences of the absence of the concept of international arbitration in the UAE and its underlying legal issues affecting the enforcement process. Additionally, this research examines the concept of international arbitration as applied in international arbitration friendly jurisdictions such as France, Switzerland and also civil jurisdictions such as Egypt to determine the prevailing legal issues in the enforcement process in the UAE and propose reformative measures to harmonise the UAE's approach with the best international practice.

#### **1.7.4 Arbitration Centers in the UAE:**

To keep up with the growing demands of arbitration in the UAE, several arbitration centers were established. Prominent arbitration centers include the Dubai International Arbitration Centre (DIAC), the Dubai International Financial Centre - LCIA Arbitration Centre (a joint venture between the London Court of International Arbitration ("LCIA") and the Dubai International Financial Centre ("DIFC")), and the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC"). The arbitration centers offer their own procedural rules and regulations for the amicable settlement of disputes through arbitration.

The DIAC was formed in 1994, and the rules applied for administering arbitration proceedings in the DIAC are the DIAC Arbitration Rules, 2007. Following its inception, the number of arbitrations

---

<sup>29</sup> Wafa Janahi, Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts available online and last viewed in July 2016.

<sup>30</sup> Supra note 13.

registered with DIAC has tremendously increased, making it one of the most prominent arbitration institutions in the UAE.

The DIFC-LCIA administers arbitrations under the DIFC-LCIA International Rules of Arbitration 2008, which are modeled on the Rules of Arbitration of the LCIA, in association with the London-based LCIA. The Dubai International Financial Centre (DIFC) is a common law jurisdiction, and arbitration is governed by the DIFC Arbitration Law No. (1) 2008 based upon the UNCITRAL Model Law. The Dubai International Financial Centre is gaining popularity as the nominated seat of arbitration for contracts entered into in the United Arab Emirates<sup>31</sup>. Arbitration proceedings in the Abu Dhabi Commercial Conciliation and Arbitration Centre are administered in accordance with ADCCAC Procedural Regulations. ADCCAC, as an arbitration institution for resolving commercial disputes, is preferred mostly by Abu Dhabi based parties. Other Emirates, such as Sharjah, Ajman and Ras Al Khaimah, also feature arbitral institutions and rules, which are intended to cater to domestic arbitrations. However, they are less prominent than their counterparts in Abu Dhabi and Dubai. In addition, the Islamic Centre for Reconciliation and Arbitration is intended to facilitate the resolution of disputes of an Islamic financial nature, thereby further increasing the choices available for the arbitration process in the UAE.<sup>32</sup>

---

<sup>31</sup> Nigel Duffield, "International arbitration in the UAE - Dubai, a two-seater city", published in Clayton Utz Insights newsletter available online and last viewed on July 2016.

<sup>32</sup> John Gaffney and Dalal Al Houti, "Arbitration in the UAE: Aiming for excellence", published in the Law Update, Al Tamimi & Company, May 2014 available online at <http://www.tamimi.com> (last viewed on July 2016).



Chapter Two  
**LACK OF THE CONCEPT OF “INTERNATIONAL ARBITRATION” AND ITS  
 IMPACTS ON THE CURRENT ARBITRATION LEGISLATION IN THE UAE**

## 2.1 Arbitration in the UAE

Arbitration is fundamental to the world of business, because it allows for the settlement of commercial disputes through cost and time effective means. Most parties in a commercial or investment dispute resort to arbitration, recognizing the practical advantages in comparison to litigation.<sup>1</sup>

Fouchard Gaillard Goldman in International Commercial Arbitration states:

*International commercial arbitration has witnessed dramatic growth over the last two decades. Although this reflects to a certain degree the underlying development of international commerce, international arbitration has flourished for a number of other reasons: arbitration is often perceived, rightly or wrongly, as being cheaper and less time consuming than court proceedings and is unquestionably more confidential; the resulting award is generally easier to enforce than a court decision due to the New York Convention; more importantly, international arbitration is now acknowledged to be a neutral method of settling commercial disputes between the parties from different nations allowing each party to avoid the “home” courts of its co-contractors; finally international arbitration gives the parties substantial liberty to design their own dispute resolution mechanism, largely free of the constraints of national law. It is for all these reasons that international arbitration has become the normal method of resolving disputes in international transactions<sup>2</sup>.*

The UAE has a rapidly expanding economy that has implemented policies attracting investors from around the globe to invest in its key economic sectors, spanning oil, natural gas production, information technology, construction, financial services, manufacturing and real estate. This has contributed to the rapid growth of arbitration as a means to resolve global business disputes.

Subsequent to the UAE’s accession to the New York Convention and the ICSID Convention of 1965, there has been a growing interest in the field of international arbitration in the UAE. However, scepticism abounds about the efficacy of international arbitration in the UAE.<sup>3</sup> The UAE’s accession

---

<sup>1</sup> Jonathan Lawrence, Peter Morton and Hussain Khan, ‘Dispute Resolution in Islamic Finance’ (2012) Global Islamic Fin. Rep. 1-7; Ahmed Al Mutawa and A F M Maniruzzaman, “The UAE’s Pilgrimage to International Arbitration Stardom”, published by The Journal of World Investment and Trade Volume 15 (2014), pp 193-200.

<sup>2</sup> Fouchard Gaillard Goldman in International Commercial Arbitration, Edited by Emmanuel Gaillard & John Savage, published by Kluwer Law International (1999), p 1.

<sup>3</sup> Supra note 1.

to the New York Convention and the position of the UAE Courts before and after joining the Convention is examined in chapter four of this study.

Despite the UAE's reputation and posturing as a global commercial centre, the UAE at present does not have a separate arbitration law<sup>4</sup>. Arbitration proceedings in the UAE are governed by Book III, Part 1, Chapter Three of the Federal Law No. 11 of 1992, the Law of Civil Procedure ("UAE CPL") from Articles 203 to 218.

The limited number of provisions pertinent to arbitration under the UAE CPL and the lack of certainty as to how those provisions will be applied have led to unanimous agreement that the UAE CPL does not provide an adequate framework for arbitration<sup>5</sup>. In particular, under the UAE CPL, arbitration proceedings are subject to the intervention and supervision of the courts in many situations, which undermines the authority of the arbitrators. For instance, courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures, make evidentiary decisions on commission, extend the time for the arbitration and approve, correct, enforce or even nullify awards<sup>6</sup>. Under the UAE CPL, arbitrators have no power to impose fines, to compel any party to act or to require the production of documents and other information necessary to determine the arbitration award. Instead, enforcement requires that the arbitrators suspend the proceedings and apply to a competent court<sup>7</sup>.

Further, the UAE CPL does not sufficiently restrict parties from challenging arbitration awards. Any party may, while the award is being reviewed by the court, request the nullification of or otherwise contest the award on any number of grounds set forth in the UAE CPL<sup>8</sup>. The enumerated grounds for nullification cannot be waived by the parties to the arbitration under any circumstances<sup>9</sup>. Historically, the UAE courts have refused to recognize and enforce arbitration awards with only minor defects in the proceedings, such as the form or content of the award<sup>10</sup>. The 2004 case of

---

<sup>4</sup> George Anthony ("Tony") Smith and Matthew A. Marrone, Recent Developments in Arbitration Law in the UAE available online at <http://www.wwhgd.com/newsroom-news-71.html>.

<sup>5</sup> Raid Abu-Manneh, Dubai: A Regional Arbitration Centre?, Mayer Brown International, LLP, August 10, 2009, available at [http://www.martindale.com/international-law/article\\_Mayer-Brown-International-LLP\\_783158.htm](http://www.martindale.com/international-law/article_Mayer-Brown-International-LLP_783158.htm).

<sup>6</sup> UAE CPL Articles 207, 208, 209, 211, 212, 214, 215, 216 and 217. This will be discussed in detail in part one of this chapter.

<sup>7</sup> Article 209 of the UAE CPL - this article will be discussed in part 2.4.4 of this chapter.

<sup>8</sup> Article 216 of the UAE CPL.

<sup>9</sup> In France for international arbitration matters, Decree 2011-48 allows the parties to waive the right to seek to have the award set aside or annulled by a French court, irrespective of their nationality or domicile. But the parties cannot waive their right to challenge or resist the enforcement of an award in France as Article 1522 of the Code of Civil Procedure. This point will be examined in 2.6.3.2 (b) of this chapter.

<sup>10</sup> Patrick Bourke & Dominic Hennessy, Brighter times - developments in arbitration in the United Arab Emirates, International Bar Association (IBA), Arbitration Committee Newsletter, September 2008, at p 42.

*International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai*<sup>11</sup> serves as a prime example<sup>12</sup>. In *Bechtel*, an arbitration award rendered in favor of the claimant in Dubai was set aside by the Dubai Court of Cassation on the ground that the arbitrator had failed to comply with the procedural rules of the seat, i.e to swear witnesses under oath. In the wake of decisions like *Bechtel*, one UAE practitioner explains that “[t]he fear is that when an arbitration award is issued, it will be struck down by the courts - for one reason or another<sup>13</sup>.”

Enforcement of foreign awards within the UAE is also problematic even after the UAE’s accession to the New York Convention.

The UAE CPL stipulates that an award rendered in a foreign country may be enforced in the UAE under the same conditions applicable under the laws of the foreign country<sup>14</sup>. The UAE CPL, like the New York Convention, also contains a provision that allows courts to refuse to execute a foreign judgment, order or arbitral award if it violates “moral code or public order”. Thus, the UAE courts sometimes also require that the foreign award satisfy the rules and procedures of the UAE and may strike down an award if there is a violation of local laws.

An examination of recent trends in relation to the case law reveals a promising environment for international arbitration. When a party has obtained an arbitration award in a foreign or domestic arbitration, in practice, the enforcement procedures under the UAE CPL are often unpredictable and time-consuming. These complications defeat the very purpose of arbitration as a swift and efficient dispute resolution process.

## **2.2 Scope and Structure of this Chapter:**

This Chapter is structured as follows:

- (i) Part one aims to provide an overview and critical appraisal of the current arbitration provisions contained under UAE law that sets out the procedural frame work for arbitration in the UAE and outlines various problems faced by the parties seeking enforcement and recognition of arbitral awards in the UAE. It will also provide insight on the proposed new

---

<sup>11</sup> Dubai Court of Cassation case No 503/2003 dated 15 May 2004. This case will be discussed in further details in part 2.7.2.1 of this chapter.

<sup>12</sup> This case will be discussed in detail at part two of this chapter.

<sup>13</sup> Sona Nambiar, Common law needed as UAE sees spurt in arbitration, *Emirates Business* 24/7, September 9, 2009, please also refer to supra note 5.

<sup>14</sup> Article 235 of the UAE CPL.

draft of the UAE Federal Arbitration Law, which has yet to be promulgated by the UAE government.

- (ii) Part two focuses on and investigates the major obstacles confronted by the parties when seeking recognition and enforcement of foreign/international arbitral awards in the UAE, whilst the UAE national courts continue to apply the current national arbitral provisions. It examines the concept of “international arbitration” and particularly how this concept is defined and applied in some countries, such as France, Switzerland, the United States, Egypt and Lebanon. This segment pays particular attention to the underlying problems in the UAE caused by the lack of the concept of international arbitration and its effectiveness on the UAE as a preferable seat for arbitration. Furthermore, it examines in detail the judgment in *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai*<sup>15</sup>, in which the UAE national court refused to apply the principles of international arbitration.

---

<sup>15</sup> Supra note 11.

## PART ONE

### 2.3 Arbitration Legislation in the UAE:

The arbitration proceedings in the UAE are governed by Book III, Chapter 1, Section Three of the Federal Law No. 11 of 1992, the UAE CPL from Articles 203 to 218. Articles 203 to 218 specifically deal with arbitration, the appointment and disqualification of arbitrators, the jurisdiction of the arbitral tribunal, the arbitration process, the validity of the arbitration award, procedures to ratify<sup>16</sup> an award and the conditions required to annul an arbitration award.

Book III, Chapter I, Section Four, Articles 235 to 238 of the UAE CPL deal with the conditions and requirements for enforcing foreign judgments, orders and awards that are issued in foreign countries and presented for enforcement within the UAE. Article 238 of the UAE CPL is without prejudice to the provisions of treaties between the UAE and other countries.

The provisions of the New York Convention are applied to the enforcement of the foreign arbitral awards as a treaty obligation of the UAE. In spite of this, there have been difficulties with the enforcement of foreign awards in some cases in the UAE. These difficulties arise primarily from the courts' willingness to entertain arguments to set aside foreign awards on grounds that they do not meet the requirements of the procedural law of the UAE.<sup>17</sup> Chapter four of this study discusses the objectives, scope and application of the New York Convention, examines the apparent defects of the New York Convention and evaluates numerous reasons for the inconsistent rulings by the UAE national courts regarding the recognition and enforcement of foreign arbitral awards.

On several occasions, the highest courts in the UAE have made it clear that the provisions of the UAE CPL should have no application to the enforcement of foreign awards in the UAE and that only the provisions of the international convention are applicable. However, there have been occasional setbacks, such as the *CCI v. Sudan* Case<sup>18</sup>, which will be discussed in part 4.5 of chapter four of

---

<sup>16</sup> Ratification is the process required to allow enforcement of a domestic award in favor of the successful party against the unsuccessful party. This topic will be discussed in further detail in part 2.5.1 of this chapter.

<sup>17</sup> Jessika Stadwick, Clyde & Co, "The birth of a New UAE Federal Arbitration Law; A Long and Difficult Labour", published in Kluwer Arbitration Blog, August 2014.

<sup>18</sup> Dubai Court of Cassation (Civil) Case No 156/2013 dated 18 August 2013. In this case, the Cassation Court refused to enforce a foreign arbitral award on the ground of lack of jurisdiction. This case will be examined further in Part 4.5 of Chapter four of this thesis.

this thesis. One of the major criticisms leveled against the current provisions of the UAE CPL is that it does not meet the requirements of the modern complex arbitral proceedings<sup>19</sup>.

As observed by Smith and Marrone:

*The limited number of provisions pertinent to arbitration under the UAE Code and the lack of certainty as to how those provisions will be applied have led to unanimous agreement that the UAE Code does not provide an adequate framework for arbitration. So, while the UAE seems poised to meet international arbitration standards, it is still being held back from the finish line because of its failure to update the UAE Civil Procedure Code.*<sup>20</sup>

With a view to satisfy the recent needs arising out of international arbitration, some Middle East countries such as Bahrain, Oman, Lebanon and Egypt have enacted separate arbitration legislation.<sup>21</sup>

### **2.3.1 Why UAE Needs a Separate Arbitration Law?**

During the last decade, the interpretation, meaning, application and effect of the UAE's arbitration legislation contained in Articles 203-218 of the UAE CPL have been subject to a wide and varied set of legal, jurisdictional and practical challenges that largely appeared when a successful party attempts to ratify the award before the domestic courts. On some occasions, awards have been rejected by the UAE national courts on what have seemed to be technical grounds or often on minor formalities. These occasions, which will be discussed part 3.4.3 of this chapter, adversely affected confidence in arbitral proceedings and further damaged the parties' anticipation of securing and enforcing an award successfully in the UAE. All of these factors together affected the perception of the UAE as a desired venue to engage in arbitration.<sup>22</sup>

During the recent decade, the UAE has progressively responded towards the enforcement of awards and in some cases rejected the challenges raised by award debtors against enforcing awards, for example on technical grounds, such as the form or content of the award. Case law is discussed in chapter four of this study. Nonetheless, the legal obstacles in relation to the procedures concerning recognition and enforcement of foreign and international awards remains the same. In

<sup>19</sup>Ian Clarke, Charles Lilley "United Arab Emirates" Global Arbitration Review (GAR) The European, Middle Eastern and African Arbitration Review 2013.

<sup>20</sup>George A. Smith and Matthew A. Marrone, "Recent Developments in Arbitration Law in the Middle East", available online on [www.wwhgd.com](http://www.wwhgd.com), (10 December 2013).

<sup>21</sup>Y Zainal, "The Prevalance of Arbitration in the Gulf Cooperation Council Countries" Journal of International Arbitration vol 18, no 6 (2001).

<sup>22</sup>Paul Taylor, On the Path to Sophistication, published in the Oath Magazine, Issue 49, Feb 2016, pp 30-32.

addition, UAE courts' lack of appreciation to the concept of international arbitration has led to inconsistent judgments on the enforcement of foreign and international awards. Enacting a separate arbitration law to govern the recognition and enforcement of arbitral awards is one of the permanent solutions that will bring a consistent approach amongst the UAE national courts to the recognition and enforcement of arbitral awards.

### **2.3.2 Brief about the Draft Federal Arbitration Law:**

Enactment of a Federal Arbitration Law ("Draft law") has been imminent since the UAE's accession to the New York Convention. It would be a positive step toward making enforcement of arbitral awards in the UAE much easier and in line with international standards.<sup>23</sup> It is expected that, once enacted, the Draft Law will repeal and replace the existing law (Articles 203-218 of the UAE CPL) that currently governs the arbitral process in the UAE.

Several drafts of the proposed draft law have been released over the years by the UAE Ministry of Economy, the most recent of which was released in 2013<sup>24</sup>. The UAE expects to pass a draft arbitration law that has been under consideration by the UAE legislators since 2006. This law is expected to help boost investor confidence and strengthen the country's investment environment. The Draft Law shall apply to all arbitrations conducted pursuant to the UAE procedural law<sup>25</sup>. The much-anticipated Draft Law is inspired by the Egyptian arbitration law, which, in turn, is based on the UNCITRAL Model Law<sup>26</sup>.

The purpose of the Draft Law is to achieve country's declared objective of building a recognized seat able to welcome regional and international arbitrations<sup>27</sup>. The draft law is expected to address several issues that are not in the purview of the current UAE Code's applicability and effectively deal with international arbitration.

---

<sup>23</sup> Patrick Bourke and Adam Vause, "Latest Draft of UAE Federal Arbitration Law Released", available on [www.martindale.com](http://www.martindale.com) (14 March 2012).

<sup>24</sup> Supra note 17.

<sup>25</sup> Jalal El Ahdab, "The Draft of the Federal Arbitration Law of the United Arab Emirates", published by the International Bar Association (IBA) Arbitration Newsletter (March 2011), pp 126-131.

<sup>26</sup> Model Law on International Commercial Arbitration dated 21 June 1985 was issued by the United Nations Commission on International Trade Law.

<sup>27</sup> Supra note 25, p 126.

As the UAE is a signatory to the New York Convention, the Draft Law may be aimed at further facilitating the enforcement of foreign awards and at better framing any annulment risks related thereto<sup>28</sup>. The stated objective of the Draft Law is:

*to provide for domestic and international arbitration within the State and for the efficient enforcement of arbitration awards within its territory*<sup>29</sup>.

The Draft Law expands the scope of the application of the Model Law by providing that the Draft Law applies to domestic and international commercial arbitrations with a more expansive scope of what constitutes commercial arbitration. It retains some provisions of the UAE CPL, and, in the point of view of some of the legal scholars, such an inclusion of certain provisions of the UAE CPL does not accord with the international best practice<sup>30</sup>.

In addition, some legal scholars have also remarked that the Draft Law should be more coherent and aligned with the UAE's objective of becoming an internationally recognized arbitration seat, should further limit the involvement of national courts, and take a much less formalistic approach to various aspects of arbitration laws<sup>31</sup>. According to Abdel H. El-Ahdab, enforcement of arbitral awards under the Draft Law would be much easier. However, whether the Draft Law marks a significant change in the arbitration culture of the UAE will be known only after it is implemented.<sup>32</sup>

#### **2.4 Summary of the Current UAE Arbitral Provisions:**

This part provides an overview of the current arbitration provisions contained in the UAE CPL. This summary endeavours to give a general overview about arbitration proceedings in the UAE and contains key practical issues concerning arbitration agreements, conduct of arbitration proceedings, application of the mandatory provisions, procedures for the enforcement of awards, role of the UAE national courts in arbitration matters etc.

Arbitration provisions contained in the UAE CPL (Articles 203-218) have raised various confrontations, such as legal, jurisdictional and practical challenges for parties when attempting to ratify and enforce arbitral awards in the UAE. This limited set of arbitration provisions in the UAE

---

<sup>28</sup> Supra note 25, p 128.

<sup>29</sup> Article 2 of the Draft Law.

<sup>30</sup> Supra note 17.

<sup>31</sup> Supra note 25, p 128.

<sup>32</sup> Abdel Hamid El-Ahdab and Jalal Halal El Ahdab, "Arbitration with the Arab Countries", Third Revised and Expanded Edition, published by Wolters Kluwer in 2011, pp 818-819.



CPL does not provide an adequate framework for arbitration and is not in line with international standards. It also fails to meet the growing demands of the parties in relation to international arbitration.

To analyze why the current arbitral provisions are considered inadequate, the following part conducts a detailed study of the major arbitral provisions of the UAE CPL.

#### **2.4.1 Arbitration Agreements:**

An agreement to arbitrate is the most essential part of arbitration. The parties agree to bring all legal claims against each other to arbitration rather than filing a lawsuit in court. The UAE courts view arbitration as a special method of resolving disputes and terminating the rights of the parties to seek the assistance of the UAE courts, and it is important to satisfy the court that there is a clear agreement to arbitrate. The UAE Courts may use any doubt about the agreement to arbitrate to assert jurisdiction.<sup>33</sup>

Generally, the UAE courts are inclined to enforce arbitration agreements only if there is sufficient evidence to prove the clear intention of the parties to be bound by arbitration as a means of dispute resolution.<sup>34</sup> For instance, a clause in a contract governed by UAE law that gives one party a right to elect either court litigation or arbitration can be considered ambiguous or at least not sufficiently clear to show that both parties agreed to arbitrate.<sup>35</sup>

Arbitration agreements are enforced in accordance with Article 203 of the UAE CPL. The UAE CPL provides that the arbitration agreement must be evidenced in writing<sup>36</sup> and can be stipulated in the main contract or by means of a separate agreement<sup>37</sup>. Matters that are outside of the realm of conciliation cannot be arbitrated<sup>38</sup>. The subject matter of the dispute must be defined either in the arbitration agreement or during the course of the proceedings<sup>39</sup>. Most civil and commercial disputes are arbitrable. However, issues of personal status, criminal, bankruptcy, labour disputes, commercial agency disputes and other issues relating to public policy are not arbitrable. If the court

---

<sup>33</sup> Robert Karrar Lewsley, John Gaffney and Dalal Al Houti, "United Arab Emirates", published by Global Legal Insights (2015) pp 323-334.

<sup>34</sup> Faris Nasrallah, Baker Botts LLP "Arbitration in the UAE" published in Lexology Navigator Question & Answer (2014) available online at [www.lexology.com](http://www.lexology.com) (last accessed on September 2016).

<sup>35</sup> Supra note 23, p 128.

<sup>36</sup> Article 203(2) of the UAE CPL.

<sup>37</sup> Article 203(1) of the UAE CPL.

<sup>38</sup> Article 203(4) of the UAE CPL.

<sup>39</sup> Article 203(3) of the UAE CPL.

finds that an arbitrator has resolved an issue relating to a non-arbitrable matter, the court will be compelled to annul the entire award.

An agreement to arbitrate shall be valid only if it is concluded by a person having the legal capacity to make a disposition. Pursuant to Articles 58 and 203(4) of the UAE CPL, the authority of the signatories to sign the arbitral agreement must be proven<sup>40</sup>. If one party initiates court proceedings rather than arbitration, and the other party does not object to it at the first hearing, the court will infer that the parties have waived their right to consider arbitration, and the arbitration agreement will be deemed cancelled<sup>41</sup>.

#### **2.4.2 Arbitral Tribunal**

In general, there is no restriction on the parties' freedom to choose arbitrators<sup>42</sup>. There are no mandatory requirements in the UAE CPL in relation to the gender, nationality, residency, religion or professional qualifications of arbitrators appointed. However, there must be an odd number of arbitrators.<sup>43</sup> The arbitrator must not be a minor, have a criminal conviction, be bankrupt or be deprived of his civil rights. Parties to the contract are free to appoint arbitrators. There is no requirement that an arbitrator be a member of the local bar, and arbitrators do not need to be listed on a particular list<sup>44</sup>. However, in practice, arbitration centers in the UAE have their own panel of arbitrators.

It is a well-known principle of arbitration that all of the proceedings must be impartial and conducted in an independent matter. Arbitrators must remain independent and impartial from the parties, their counsel and the subject matter of the dispute. There are no disclosure requirements for "impartiality" and/or "independence" under the law. However, most of the arbitration institutional rules impose such disclosure requirements<sup>45</sup>.

If a dispute arises between the parties concerning the appointment of the arbitrator or the number of arbitrators, the court shall appoint the arbitrator, and this decision will be final and non

---

<sup>40</sup> Dubai Court of Cassation Case No 164 of 2008 dated 10 October 2008. The court held that, for UAE Companies, it cannot be assumed that the signatory has actual authority to bind the company to arbitration. Therefore, the power to bind a company has to be given to the signatory explicitly.

<sup>41</sup> Article 203(5) of the UAE CPL.

<sup>42</sup> Karyl Nairn, Patrick Heneghan, "Arbitration Word Jurisdiction Comparisons", published by Thomson Reuters, Fourth Edition 2012, p 845.

<sup>43</sup> Article 206(2) of the UAE CPL.

<sup>44</sup> Supra note 42, p 846.

<sup>45</sup> Supra note 42, p 846.

appealable<sup>46</sup>. A party to arbitration can challenge the appointment of an arbitrator if the party has grounds to believe that the arbitrator is unfit to issue an award, or if it is proved that the arbitrator has deliberately failed to act in accordance with the arbitration agreement<sup>47</sup> after the matter has been brought to his attention in writing. However, it states that such an application should be made to the court within five days of the issue coming to the attention of the party. Most arbitral institutions contain their own provision on how such challenges must be made, but these do not fetter the right of a party to seek assistance from the local courts.

If a party seeks to annul the award by challenging the independence or capability of the arbitrator, such an application is unlikely to succeed, as the court will take the view that such a challenge should have been made and resolved during the arbitration process and that the party is only raising the objection now because of the adverse award<sup>48</sup>.

The law allows a party to challenge an arbitrator on the same basis that a local judge might be challenged<sup>49</sup>. An application to remove an arbitrator must be made within five days of either the arbitrator's appointment or the date on which the challenging party became aware of the grounds for dismissal. However, in any case, an application to remove an arbitrator will not be considered if the pleadings are closed, or if the arbitrator has issued the award.<sup>50</sup>

Where an arbitrator is removed or rejected, upon the application of one of the parties, the court having the original jurisdiction shall appoint the necessary arbitrators<sup>51</sup>. If an arbitrator deliberately fails to act in accordance with the arbitration agreement in spite of being notified of this failure, on the application of one of the parties, the court may with the consent of the parties appoint a substitute arbitrator<sup>52</sup>.

### **2.4.3 Conduct of Arbitration Proceedings:**

In general, arbitration commences with the filing of a request for arbitration, by the claimant, with the competent arbitration institution and by serving written notice of arbitration upon the other

---

<sup>46</sup> Article 204 (1) and (2) of the UAE CPL.

<sup>47</sup> Article 207(3) and (4) of the UAE CPL.

<sup>48</sup> Supra note 33, p 328.

<sup>49</sup> Article 207(4) of the UAE CPL.

<sup>50</sup> Article 207(4) of the UAE CPL.

<sup>51</sup> Article 204(1) of the UAE CPL.

<sup>52</sup> Article 207(3) of the UAE CPL.

party<sup>53</sup>. Within 30 days from the date of accepting the arbitration, the arbitrator must notify the parties of the date and venue of the first hearing and specify the time for submitting memoranda and pleadings.<sup>54</sup>

If a party fails to attend proceedings within the time limit provided, the arbitrator can proceed with issuing an award on the basis of one party alone participating in the proceedings<sup>55</sup>. The arbitrator must follow the procedural rules chosen by the parties, and, if the parties have not agreed on procedural rules or if the chosen procedural rules are silent on any particular issue, the arbitrator may conduct the proceedings in accordance with the provisions set out in the UAE CPL.

While conducting arbitration proceedings, an arbitrator is not bound to follow the rules of procedure followed by the court. Generally, arbitrations are conducted in accordance with institutional arbitral rules agreed to by the parties.

In furtherance to the mandatory provisions in the UAE CPL relating to the appointment of the tribunal, certain other mandatory provisions<sup>56</sup> regulate the conduct of arbitration. For instance, the arbitrator must administer the oath to each witness before the witness presents any evidence.<sup>57</sup> Similarly, arbitration proceedings must not violate the UAE's public policy. Some provisions of the UAE laws set out mandatory procedures of which the parties should be aware and which may invalidate the award if compliance with the procedures does not occur. These procedural requirements will be discussed separately in part two of this chapter.

#### **2.4.4 Court's Assistance in Conducting Arbitration:**

The UAE CPL provides for frequent court intervention during the course of arbitration and allows essentially a *de facto* review of the arbitral award<sup>58</sup>. The UAE national courts are allowed often to intervene and supervise arbitration proceedings, a policy that too often limits and undermines the power of arbitrators. An arbitrator may seek the assistance of the court during the conduct of the arbitral proceedings, such as to request a penalty for any witness who fails to attend or refuses to

---

<sup>53</sup> Gordon Blanke and Soraya Corm Bakhos, chapter on United Arab Emirates, published in *Getting the Deal Through* (2014) available online at <https://gettingthedealthrough.com/area/3/jurisdiction/33/arbitration-united-arab-emirates/>.

<sup>54</sup> Article 208(1) of the UAE CPL.

<sup>55</sup> Article 208(2) of the UAE CPL.

<sup>56</sup> The arbitration provisions of the UAE CPL (Articles 203-218) are mandatory in the sense that they govern all arbitrations with a seat in any part of the UAE excluding the Dubai International Financial Centre ("DIFC").

<sup>57</sup> Article 211 of UAE CPL.

<sup>58</sup> Articles 207 and 209 of the UAE CPL.

answer questions<sup>59</sup>, to obtain documentary and witness evidence, i.e. to order a third party to produce a document in his possession, which is necessary for judgment in the arbitration<sup>60</sup>, and to request judicial letters rogatory.<sup>61</sup>

#### **2.4.5 Arbitral Award:**

The UAE CPL provides that an arbitration award must be issued within six months from the date of the first hearing<sup>62</sup>. However, the parties can agree to extend this time limit or the court can extend this time limit upon application by the tribunal or either one of the parties to the dispute.<sup>63</sup> In issuing the award, arbitrator is bound to follow the rules of law. However, if the parties have expressly agreed to a specific procedure, then the arbitrator must follow that procedure. In any event, the arbitrator will be bound by all mandatory rules or by rules of public policy<sup>64</sup>.

An award must be issued in writing and signed by a majority of the arbitrators. It must include a copy of the arbitration agreement, a summary of the statements and documents of the parties, reasons for the award and the order issued, the date and place of issue and the signatures of the arbitrators<sup>65</sup>. Unless otherwise agreed by the parties, the award shall be in Arabic<sup>66</sup>. If one of the tribunal members issues a dissent, the dissenting award should be attached to the main award, and the dissenting arbitrator's refusal to sign the award should be expressly stated. The award must provide a summary of each party's case and evidence, and the award must be reasoned. The award shall be issued in the UAE failing which rules in relating to foreign arbitral awards shall apply<sup>67</sup>. The date of the award shall be the date on which the arbitrator signed the award<sup>68</sup>.

The arbitrator should also sign both the reasoning of the award and the dispositive section; otherwise the award may be considered void. Some arbitrators sign the final page of the award containing the order and may not sign the dispositive section of the award. The national courts in

---

<sup>59</sup> Article 209(2)(a) of the UAE CPL.

<sup>60</sup> Article 209(2)(b) of the UAE CPL.

<sup>61</sup> Article 209 of the UAE CPL.

<sup>62</sup> Article 210(1) of the UAE CPL.

<sup>63</sup> Article 210(2) of the UAE CPL.

<sup>64</sup> Article 212(1) and (2) of the UAE CPL.

<sup>65</sup> Article 212(5) of the UAE CPL.

<sup>66</sup> Article 212(6) of the UAE CPL.

<sup>67</sup> Article 212(4) of the UAE CPL. This article has several problematic issues that will be discussed in part two 2.7 of this chapter. This issue is also discussed in chapter three of this thesis.

<sup>68</sup> Article 212(7) of the UAE CPL.

the UAE, in some occasions, refused to ratify award due to the lack of clear proof that every page of the award was not signed by arbitrators.<sup>69</sup>

An arbitrator can exercise discretion in awarding costs and can issue an award that directs the losing party to pay either the whole or part of the entire costs of the arbitration. However, UAE courts have recently set out that, to award legal costs, the arbitration agreement must specifically provide for the award of such costs or it must be permitted by the institutional rules governing that particular dispute<sup>70</sup>.

## **2.5 Recognition and Enforcement of Arbitral Awards in the UAE:**

The process of recognizing and enforcing arbitral awards in the UAE is lengthy, complex and unpredictable. This is one of the major challenges faced by parties seeking the recognition and enforcement of foreign awards. This issue is discussed in chapter three of this thesis. Another notable challenge is presented by the UAE courts' inclination to apply the domestic arbitration provisions to recognition and enforcement of a foreign arbitral award, in spite of the UAE's accession to the New York Convention. This has led to inconsistent judgments being issued by the courts on the enforcement of awards. This issue is examined in further detail in chapter four of this study.

The UAE CPL does not adequately limit parties from challenging arbitral awards. Any party may request the nullification of the award or otherwise challenge the award on any number of grounds set forth in the UAE CPL, while the application for recognition and enforcement of the award is being reviewed by the UAE court<sup>71</sup>. The following portions examines major provisions of the UAE CPL that deal with the ratification of domestic awards, the recognition and enforcement of foreign awards, and the grounds for challenging awards.

### **2.5.1 Ratification and Enforcement of Domestic Arbitral Awards:**

Arbitral awards are final and not appealable<sup>72</sup>. However, any judgment "ratifying the arbitrator's award may be contested in any of the appropriate manners of appeal"<sup>73</sup>. This means that a judgment concerning an arbitral award may be appealed from the UAE Court of First Instance to the Court of

---

<sup>69</sup> Dubai Court of Cassation, Case No 233 of 2007 dated 13 January 2008.

<sup>70</sup> Dubai Court of Cassation Case No 282 of 2012 dated 3 February 2013.

<sup>71</sup> Dubai Court of First Instance Commercial Case No 688/2014 dated 17/9/2014.

<sup>72</sup> Article 217(1) of the UAE CPL.

<sup>73</sup> Article 217(2) of the UAE CPL.

Appeal and ultimately to the Court of Cassation<sup>74</sup>. The UAE CPL governs the procedures for enforcing domestic arbitral awards in the UAE.

The party seeking to enforce the award must ask for ratification of the award under Article 215 of the UAE CPL from a UAE court. This ratification process has been criticized widely as unpredictable, time-consuming and a “frustrating undertaking”<sup>75</sup>, because the judgment by the Court of First Instance is subject to appeal to the Court of Appeals and ultimately to the Court of Cassation. The process may take 18 months or more.<sup>76</sup> Additionally, the court can return the award back to the arbitrator for clarification, which is time consuming and essentially allows the court to examine the merits of the award.<sup>77</sup>

Once the award is ratified by the UAE courts, the award becomes equivalent to a UAE court judgment. It can thereafter be enforced by application to the execution department of the relevant UAE court.<sup>78</sup>

The ratification process is almost identical to the procedure for making a “regular” claim in the courts. However, once the ratification claim is filed, it is the court’s discretion either to ratify or annul the award.

The successful party in arbitration commences the ratification process by issuing a claim form, which must meet the requirements of Article 42<sup>79</sup> of the UAE CPL, accompanied by supporting documents, all of which the courts serve on the other party. The unsuccessful party may apply for an annulment application as a defense to the action for ratification or through a counterclaim. It is

---

<sup>74</sup> Supra note 33, p 323. Chapter three of this thesis will examine the problematic issues of enforcement procedures while executing awards in the UAE.

<sup>75</sup> Alec Emmerson and Keith Hutchison, “The UAE Enforcement Saga: A New Dawn”, Clyde & Co, 8 November 2012 [www.clydeco.com/insight/updates/the-uae-enforcement-saga](http://www.clydeco.com/insight/updates/the-uae-enforcement-saga) (12 January 2013).

<sup>76</sup> Karim Nassif, Gordon Blanke and Soraya Crom-Bakhos, “Arbitration under UAE Law: Towards a Modern Legal Framework?” *The In-House Lawyer*, 9 September 2010 (viewed on 16 October 2012).

<sup>77</sup> Saloni Kantaria, “The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law” (2012) 2 *Int’l Arb. L. R.* 61.

<sup>78</sup> Mark Beswetherick and Keith Hutchison, “Enforcement of arbitration awards: Moving in the right direction”, available online at <http://www.clydeco.com/insight/updates/view/enforcement-of-arbitration-awards-moving-in-the-right-direction>.

<sup>79</sup> Article 42 of the UAE CPL states: “An action shall be brought before the court upon the application of the plaintiff by a statement [of the claim] lodged with the court office. The statement must contain the following particulars:  
 1 - the name and surname of the plaintiff and his profession or occupation, his domicile and place of work, and the name and surname and profession or occupation and domicile and place of work of the person representing him;  
 2 - the name and surname of the defendant and his profession or occupation, his domicile and place of work, and the name and surname and profession or occupation and domicile and place of work of the person representing him if he is acting for another, and if the defendant or the person representing him does not have a known domicile or place of work, then his last domicile and place of residence or place of work;  
 3 - appointment of the plaintiff’s elected domicile in the State, if he does not have a domicile therein;  
 4 - the subject matter of the action, the applications made, and the grounds for them;  
 5 - the date the statement was submitted to the court;  
 6 - the court before which the action is brought; and  
 7 - the signature of the person bringing the action or his representative”.

common practice for unsuccessful parties, “once served with notice of ratification proceedings, to make a counter application for the annulment of the award”.<sup>80</sup>

After the unsuccessful party has been served with the notification, the court will hear both parties, consider the submissions made by them, and review the evidence submitted before the court. Once all of the pleadings have been made, the court will reserve the matter for issuing judgment.

After the court delivers its decision, the unsuccessful party has the right to appeal to the Court of Appeal and thereafter to the Cassation Court. These procedures are examined in detail in chapter three of this study. The UAE CPL does not permit the court to reconsider the merits of the tribunal’s findings; the court must decide purely on procedural irregularities.<sup>81</sup> Domestic arbitral awards may be challenged on various procedural grounds or on grounds of public policy.

The extent of the review by the courts under UAE law is limited to those cases set out in Article 216<sup>82</sup> of the UAE CPL or those related to public policy. Articles 211, 212(1) and 212(2) of the UAE CPL also provide for some mandatory provisions on arbitration procedures from which the parties may not deviate<sup>83</sup>.

The Dubai Court of Cassation in some decisions<sup>84</sup> has classified the grounds for challenges under the following two categories:

- (i) Grounds linked to the arbitration agreement, such as a non-existent or invalid arbitration agreement; an expired arbitration agreement, arbitrator’s exceeding his authority by addressing matters outside the scope of the arbitrator’s mandate (listed in Article 216 above) or infringing a public order;

---

<sup>80</sup> Supra note 78.

<sup>81</sup> Articles 212 and 216 of the UAE CPL.

<sup>82</sup> Article 216 states: “The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the following circumstances.

(a) The award is given without an agreement to arbitrate or is based on an invalid agreement to arbitrate, or if it is void because a time limit has been exceeded, or if the arbitrators have exceeded the limits of the agreement to arbitrate;

(b) If the ruling has been given by arbitrators not appointed according to the law, or if given by some of them without being so empowered in the absence of the others, or if given under an agreement to arbitrate in which the subject of the dispute is not stated, or if given by someone not competent to agree to arbitration or by an arbitrator who does not fill the legal requirements; or

(c) If there is something invalid in the ruling or in the procedures affecting the ruling.”

<sup>83</sup> Articles 212(1) and 212(2) of the UAE CPL.

<sup>84</sup> Dubai Court of Cassation Case Number 270/2008 dated 24 March 2009; Dubai Court of Cassation Case Number 32 of 2009 dated 29 March 2009. Please also refer to Supra note 42, p 857.



- (ii) Grounds linked to arbitration proceedings, such as irregular composition of the tribunal, issuance of the award by a truncated arbitral tribunal with no authorization, lack of capacity by a party to enter into an arbitration agreement, a due process violation, a denial of the opportunity to present one's case or if the arbitration proceedings become void which impacts the award.

Usually the unsuccessful party, during the ratification, process raises several arguments to nullify the award on procedural grounds, since the courts are not permitted to re-examine the merits of the underlying dispute. As a result, the entire process of ratification may take from twelve to eighteen months or more to complete depending upon the parties and complexity of the case. However, the time frame for obtaining a final judgment may increase if the aggrieved party resorts to the Court of Appeal and to the Cassation Court<sup>85</sup>.

The successful challenge of an award before the UAE national courts may result in the award being declared null and void, which is the only remedy that the UAE CPL provides. However, the Dubai Court of Cassation held in a case<sup>86</sup> that, in such an event, the dispute cannot be remitted back to the arbitrators, unless the parties consent, as the mandate of the arbitrators ends by their rendering of the award. The dispute can be referred to the courts, but such a referral is not automatic. The court setting aside the award is denied the power to judge the case on the merits once the award is annulled. The aggrieved party has to initiate separate proceedings.

### **2.5.2 Recognition and Enforcement of Foreign Arbitral Awards:**

Foreign arbitral awards may be enforced in the UAE under the New York Convention and a number of multinational conventions in which the UAE has entered, notably the Riyadh Convention on Judicial Cooperation between States of the Arab League, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications and the ICSID Convention. The UAE has also entered into numerous bilateral investment treaties containing arbitration provisions and judicial cooperation treaties<sup>87</sup>.

---

<sup>85</sup> For further details, please refer to chapter three of this study, which explains the lengthy court proceedings as an obstacle to the enforcement of arbitral awards in the UAE.

<sup>86</sup> Dubai Court of Cassation Case No 263 of 2007 dated 3 February 2008; Dubai Court of Cassation Case No 192 of 2007 dated 27 November 2007. Please also refer to supra note 42, p 858.

<sup>87</sup> Supra note 42, p 859. For further details on bilateral treaties concluded by the UAE, please refer to the UAE Chapter contributed by Hassan Arab and Hussain Eisa to Global Arbitration Review (GAR) published online (2016) and available at <http://globalarbitrationreview.com/know-how/topics/88/jurisdictions/33/united-arab-emirates> (last accessed in September 2016).

To enforce a foreign arbitral award in the UAE, the successful party (award creditor) must file an application with the competent Court of First Instance asking that it recognise and declare the enforceability of the arbitral award. The successful party must prove that the application for recognition and enforcement of the award fulfills the conditions specified in Articles VI and V of the New York Convention. The decision made by the Court of First Instance can be appealed to the Court of Appeal and further to the Court of Cassation<sup>88</sup>.

If no treaty or convention has been signed, awards shall be enforced as foreign judgments. To enforce a foreign judgment in the UAE, the conditions of Article 235 of the UAE CPL must be satisfied namely:

- (i) The UAE national courts do not have jurisdiction over the place in which the judgment was issued or the order made, and the foreign courts that issued the judgment have jurisdiction therein under the international rules for legal jurisdiction;
- (ii) The judgment or order has been issued by a court having jurisdiction under the law of the country in which it was issued;
- (iii) The parties to the suit have been properly summoned to appear and have duly appeared;
- (iv) The judgment or order is final and not subject to appeal under the law of the court that issued it; and
- (v) The judgment or order does not conflict with a judgment or order previously issued by a court in the state and contains nothing in breach of public policy or public order in the state.

In addition, the subject matter of the foreign award must be arbitrable in the UAE and enforceable in the country where the award was issued<sup>89</sup>.

The information above focuses on the legislative framework of arbitration in the UAE and analyses the arbitral provisions contained in the UAE CPL, which are not analogous with the internationally accepted best practices. The procedural challenges emanating from the application of these arbitral

---

<sup>88</sup> Please refer to part 3.4.2.3 of chapter three of this thesis, which explains in detail regarding the procedure concerning recognition and enforcement of foreign arbitral awards.

<sup>89</sup> Article 236 of the UAE CPL.

provisions by the UAE courts to the recognition and enforcement of foreign awards are detailed in chapter three of this study.

Part two below discusses the major practical impediments faced by the parties seeking recognition and enforcement of foreign arbitration awards in the UAE particularly owing to the lack of the notion of international arbitration and to the absence of a separate arbitration law in the UAE to determine if an award is purely “domestic” or “international”. The absence of the concept of international arbitration signifies its lack both in terms of defining international arbitration and with respect to implementing it by national courts due to the absence of a separate law and the lack of proper understanding by judges.

These factors have contributed significantly towards inconsistent judgments on the enforcement aspects by the UAE courts. These problems and their impact on the UAE, as a preferred seat of arbitration, will be explored further in the following parts.

## PART TWO

### 2.6 Introduction

The UAE national courts apply the prevailing arbitral provisions of the UAE CPL when considering applications for recognition and enforcement of foreign arbitration awards. The current arbitration provisions of the UAE CPL are not in line with the internationally accepted standards. This part will outline the reasons why the current arbitral provisions are inadequate to fulfill the growing demands of international arbitration. Further, this presents an in-depth study of these factual issues and examines some specific case law of judicial intervention and practical examples that explore this issue further.

From the UAE perspective, there are certain fundamental procedural irregularities that exist due to the application of the prevailing arbitral provisions, when the UAE national courts deal with international arbitration. These irregularities include:

- (i) The interpretation by the UAE national courts of the seat of arbitration and their application of geographical factors when determining if arbitration is domestic or international have affected the enforcement of international arbitral awards. Furthermore, the incorrect application of law by national courts is another predominant issue. For instance, UAE courts require that the award be signed in the UAE or they will consider the award to be a foreign award. If the award is considered a foreign award, the court will refuse to ratify the award for lack of jurisdiction even though the parties clearly agreed that the seat is UAE<sup>90</sup>.
- (ii) If the domestic mandatory rules are violated by the tribunal while conducting the arbitration proceedings, the award will be declared invalid and not binding on the parties by the UAE national courts. For instance, if the award relies on any witness statements submitted by the parties, unless the statement is taken under oath within the prescribed formula contained in accordance with the UAE Evidence Law in Civil and Commercial Transactions (“Law of Evidence”)<sup>91</sup>, the award will be declared invalid<sup>92</sup>.

---

<sup>90</sup> This point will be discussed further in part 2.7.1 of this chapter.

<sup>91</sup> UAE Federal Law No (10) of 1992 Amended by Law No. (36) of 2006 amending certain provisions of the law of the Evidence in the Civil and Commercial Transactions.

<sup>92</sup> Supra note 11.

The absence of the concept of “international arbitration” is a major challenge that has created several procedural issues such as those explained above, and these issues should indeed be considered a priority by the UAE legislators in enacting the new arbitration law. This topic will be explored in detail in part 2.7 of this chapter.

The procedural irregularities explained in points (i) and (ii) above are inconsistent with the spirit of international arbitration and present obstacles that constitute a burden on the parties' autonomy to choose the rules and procedures that best achieve the resolution of their disputes. Additionally, it is more burdensome for the tribunal, as its members must confront innumerable difficulties to take appropriate measures in applying the tribunal's discretion. They must be concerned that they apply the right procedures that might be considered to contradict the rules of the domestic law of the United Arab Emirates and that might consequently lead to the award being set aside.

In general, the notion of international arbitration varies from country to country. Usually, the local arbitration law in each country determines the international nature of arbitration by following external criteria, such as nationality, the parties' domicile or headquarters, the seat of the arbitral institution, the place of arbitration or the law applicable to the merits or a combination of some of the above criteria, etc. If arbitration is determined to be “international” by following the above criteria, national courts treat them differently from domestic arbitration. The UAE CPL does not stipulate any provisions for determining whether arbitration is international, which consequently impacts the recognition and enforcement of foreign/international awards in the UAE.

The following part discusses the notion of international arbitration, its characteristics, the importance of distinguishing international arbitration from domestic arbitration, and the criteria employed by various jurisdictions to determine an international arbitration. In addition, this part covers important case law from some jurisdictions, such as France, Egypt, the United States, Lebanon and Switzerland and the approach of their respective jurisdictions towards the concept of international arbitration.

### 2.6.1 The Concept of International Arbitration

It is essential to understand the real meaning of the international nature of arbitration, as that is central to the private international law regime governing arbitration.<sup>93</sup> Sir Robert Jennings, former President of the International Court of Justice, said in the preface to the first edition of this book:

*International commercial disputes do not fit into orthodox moulds of dispute procedures—they lie astraddle the frontiers of foreign and domestic law—and raise questions that do not fit into the categories of private international law either. Not least they raise peculiar problems of enforcement.*<sup>94</sup>

This means that, in practice, the effectiveness of international arbitration depends upon the support of different national systems of law, such as (i) the arbitration law of the country which is the seat of the arbitration, and (ii) the law of the country or countries in which recognition and enforcement of the arbitral tribunal's award is sought<sup>95</sup>.

There is no universally agreed definition of the term “international” in the context of international commercial arbitration. The term “international” is used to mark the difference between arbitrations that are purely national or domestic and those that are international, as they transcend national boundaries in some way.

Each state has its own test to determine whether an arbitration award is “domestic” or “foreign”. This fact is recognized by Article I(l) of the New York Convention, which defines foreign awards as awards that: (i) are “made” in a state other than the Contracting State where recognition is sought, or (ii) are “not considered as domestic awards” under the law of the recognizing state. The result is that an award that one country considers to be “domestic” might be considered by the state where enforcement is sought as not being “domestic” (as it may involve the interests of international trade)<sup>96</sup>.

The enduring popularity of international arbitration as a means of dispute resolution is reflected by a number of developments, which include steadily increasing case-loads at leading arbitral institutions. The following table clearly indicates the fact that international arbitration has become

<sup>93</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, published by Kluwer Law International (1999), p 170.

<sup>94</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin H. Hunter, *An Overview of International Arbitration*, published in *Kluwer Arbitration*, (Oxford University Press 2009) p 52.

<sup>95</sup> *Supra* note 94, p 52.

<sup>96</sup> Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, published by Sweet & Maxwell (2004) pp 13-22.

one of the principal methods of resolving disputes between states, individuals, and corporations and that its popularity has grown over the years.<sup>97</sup>

Arbitral Institute	2006	2007	2008	2009	2010	2011	2012	2013
AAA (ICDR)	586	621	703	800	888	994	996	1165
CIETAC	442	429	548	560	418	470	331	N/A
ICC	593	599	663	817	793	796	759	767
HKIAC	394	448	602	429	291	275	293	263
KCAB	47	59	47	78	52	77	85	N/A
LCIA	133	137	215	272	246	224	265	290
SIAC	47	55	71	114	140	N/A	N/A	223
SCC	64	81	74	96	91	96	92	86
ICSID	23	27	21	25	26	38	50	40
VIAC	N/A	N/A	N/A	60	68	75	70	56

One of the significant trends in international commercial arbitration is to respect the will of the parties regarding the choice of law and the procedure for carrying out their arbitration<sup>98</sup>.

Furthermore, international arbitration is designed to avoid the formalities and technicalities that are associated with many national litigation systems.<sup>99</sup>

One of the fundamental objectives of international arbitration is to ensure that, unless the parties agree otherwise, disputes will not be resolved in accordance with the procedures of the home jurisdiction of any party, which may favour that party over the other party<sup>100</sup>.

### 2.6.2 Why to Distinguish Between National and International Arbitration:

It is essential to differentiate between national and international arbitrations for several reasons. An international arbitration will usually have no connection with the state in which the arbitration takes place, other than the fact that it is taking place on the territory of that state. Further, parties to international arbitration will usually be corporations or state entities rather than private individuals. But domestic arbitrations will usually involve claims by private individuals.<sup>101</sup>

It is important for international trade to allow arbitrations of an international character to take place in a country without subjecting the arbitration to the risks inherent in using the local law. Historically,

<sup>97</sup> Mark Bezzant, James Nicholson and Howard Rosen, "Trends in International Arbitration", published in FTI Journal, February 2015.

<sup>98</sup> S M Hyder Razvi, Mandatory Rules in Law in International Business Arbitration, published in the Lahore Journal of Economics, Vol 3, No 2.

<sup>99</sup> John Gaffney and Aissatou Ndong, International Commercial Arbitration Procedural Approaches in Civil Law Versus Common Law, published in Transnational Dispute Management (2015), p 1.

<sup>100</sup> Supra note 96, pp 15-20.

<sup>101</sup> Supra note 96, p 12.

the justification for the distinction was that local law was archaic and full of pitfalls that international business would not tolerate<sup>102</sup>. In modern times, developing countries are becoming aware of the importance of the dispute resolution mechanisms, including arbitration, which allow parties to domestic and international transactions a right to submit to an arbitration mechanism that provides flexible rules but also limits the participation of local courts of competent jurisdiction<sup>103</sup>. In particular, such a distinction may also be important for determining the matters that can be considered by the arbitral tribunal.

The question as to whether arbitration is international is relevant to determining whether the arbitration will be governed by a particular law or a different law from domestic arbitrations<sup>104</sup>. In the realm of international commercial transactions, arbitration has become the preferred method of dispute resolution over judicial methods of dispute resolution, because the parties have considerable freedom and flexibility with regard to the choice of arbitrators, the location of the arbitration, the procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties<sup>105</sup>.

One of the major reasons for distinguishing between “international” and “domestic” arbitration is that, it is common for the state itself (or its entities) to enter into an agreement to arbitrate disputes arising out of international transactions. In such cases, it is necessary to know how such transactions are defined and whether arbitration with respect to them will be considered “international” by the state concerned<sup>106</sup>. The determination of whether arbitration is international or domestic is significant, because most countries have different legal regimes to govern each type of arbitration<sup>107</sup>. In addition, different nationalities, different legal backgrounds and cultures, and different legal systems and principles will almost certainly be involved in international arbitrations, and, to work with such a system, it is necessary to abandon narrow concepts of how arbitration

---

<sup>102</sup> James O Rodner, *International and National Arbitration: A Fading Distinction*, *International Journal for Arbitration*, Vol 12, (2002) Issue 5. p 491, available on Kluwer Arbitration.

<sup>103</sup> *Supra* note 102, p 492.

<sup>104</sup> United Nations Conference on Trade and Development, *Dispute Settlement (Course Module)* published in 2005, p 17.

<sup>105</sup> Gary B. Born, *International Arbitration: Law and Practice*, published by Kluwer Law International (2012) pp. 40-42.

<sup>106</sup> *Supra* note 96, p 12.

<sup>107</sup> Fouchard Gaillard Goldman, *International Commercial Arbitration* (Edited by Emmanuel Gaillard & John Savage), published by Kluwer Law International (1999), p 36.



should or should not be conducted. This requires a truly “internationalist” approach to such situations<sup>108</sup>.

The existence of a conflict of laws arises in the context of international arbitration. However, that is not the only important consequence of the international nature of arbitration. More importantly, the increasingly arising issue created by the international nature of arbitration is whether a set of specific substantive rules applies to it<sup>109</sup>.

An international or foreign arbitral award will not be subject to the same degree of restrictive judicial review as a domestic arbitral award, as it is subject to the provisions of the Convention regarding enforcement. Hence, it is important that a distinction is made or referred to in the relevant legislation differentiating between a domestic award and international or foreign arbitral awards in the national legal order.

Many jurisdictions have a different set of rules for international arbitrations than they have for domestic arbitrations. France, Switzerland, Belgium, Brazil, Singapore, and Hong Kong are some examples<sup>110</sup>.

Generally speaking, arbitrations are distinguished between domestic and international based on several factors, such as the nature of the dispute and the nationality of the parties or some other relevant factors.<sup>111</sup> The approach adopted by the UNCITRAL Model Law<sup>112</sup> is a combination of the first two factors (nature of the dispute and nationality of the parties) plus a reference to the chosen place of arbitration.<sup>113</sup>

However, in the era of global commercial transactions, it is sometimes difficult to determine the international character of a transaction. There may be much speculation as to what possible factor

---

<sup>108</sup> Supra note 96, p 12.

<sup>109</sup> Supra note 105, p 42.

<sup>110</sup> France adopted a modern arbitration statute two arbitration regimes ie. one for domestic arbitration and the other for international arbitration in 1980 and 1981. On January 13, 2011 France adopted Decree 2011-48, which redrafted set of 85 articles divided into Title I (Domestic Arbitration: Articles 1442 to 1503 of the code) and Title II (International Arbitration: Articles 1504 to 1527 of the code). Please refer to “A comparative guide to arbitration laws in 25+ different jurisdictions”, published in Lexology (last viewed in September 2016). Similarly, Swiss law distinguishes between international and domestic arbitration. Chapter 12 of the Federal Statute on Private International Law applies to international arbitration (ie, where at least one of the parties has its domicile or regular place of residence outside of Switzerland at the time it enters into the arbitration agreement). The rules of the Swiss Civil Procedure Code - in particular, Part 3 (Articles 353 and following) - apply to domestic arbitration. Please refer to “A comparative guide to arbitration laws in 25+ different jurisdictions”, published in Lexology (last viewed in September 2016).

<sup>111</sup> Alan Redfern, *Law and Practice of International Commercial Arbitration*, published by Sweet & Maxwell, pp 10-17.

<sup>112</sup> The UNCITRAL Model Law (the Model Law) adopted by the United Nations Commission on International Trade Law on 28 June 1985.

<sup>113</sup> The approach adopted by the UNCITRAL Model Law will be discussed in part 2.6.3.4 of this chapter.

could truly make arbitration international rather than domestic. For instance, the French arbitration law has clearly adopted an economic factor to determine if arbitration is international<sup>114</sup>. The nationality of the parties determines whether arbitration is international in Switzerland. In contrast, Egypt is an example of a country that has adopted the Model Law approach<sup>115</sup>.

### 2.6.3 How to Determine if Arbitration is International

*International arbitrations usually have a foreign element to them, and most countries treat such arbitrations much more liberally than they do arbitration with purely domestic elements. The liberal treatment of international arbitrations includes greater respect for expressed intentions of the arbitrating parties and far less judicial instruction in the arbitration process than is the case in domestic arbitrations.*<sup>116</sup>

Legal scholars employ several factors in determining whether an arbitral award can be considered international. Most importantly, the method involves examining a situation or relationship and seeking to establish a connection with one or more legal systems. According to some legal scholars, an arbitration involving elements that are foreign vis-à-vis a particular country is considered to be international, and this is considered a minimal interpretation of the word “international”.<sup>117</sup>

Another group of scholars considers that there are three ways to establish the international character of arbitration. Arbitration may be international, because (i) the subject matter, its procedure or its organization is international; (ii) the parties involved are from different jurisdictions; or (iii) there is a combination of both<sup>118</sup>.

To determine whether arbitration is international in nature depends on various factors, and this part endeavors to examine some factors or criteria employed by some legal commentators.

#### 2.6.3.1 Legal Factors

There are several facets connected to legal factors, and the method involves examining the agreement or agreements between the parties and analysing whether the relation or legal situation seeks to establish a connection with one or more legal systems. The possible factors connecting one or more legal systems can be the following:

---

<sup>114</sup> This will be discussed in part 2.6.3.2 of this chapter.

<sup>115</sup> The approach adopted by Egypt and Switzerland will be explained in parts 2.6.3.1 and 2.6.3.3 of this chapter.

<sup>116</sup> Supra note 105, p 46-52.

<sup>117</sup> Supra note 105, p 46.

<sup>118</sup> Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration, published by Kluwer International (2003) p 58.

- nationality of the arbitrators or the parties;
- place or seat of arbitration;
- domicile of the parties;
- law chosen to govern the arbitration proceedings and the law chosen to govern the merits of the dispute; and
- place where the contract was signed<sup>119</sup>.

According to some legal commentators, if all of these connecting factors are linked to one legal system, then the arbitration can be considered as a domestic arbitration. For example, if two French nationals, both residing in France, submit a dispute concerning a contract that they signed and performed entirely in France to a French arbitrator, and, if the entire arbitral procedure takes place in France, with the arbitrator applying French law, this will be a French domestic arbitration. But, if one or more of the connecting factors leads to one or several other countries, this can be considered an international arbitration<sup>120</sup>.

The arbitration agreement concluded between the parties and the seat of arbitration are two effective elements in determining whether arbitration is international in nature.<sup>121</sup> In the arbitration agreement, the parties are free under the doctrine of the freedom of contract to agree on the rules and procedures governing the arbitration process as the parties deem appropriate.<sup>122</sup>

**(a) Parties' Agreement on the Governing Law:**

The parties to an arbitration agreement may try to agree on a particular law as being applicable to their dispute.<sup>123</sup> The governing law chosen by the parties has a major role in determining the international character of arbitration, as the parties usually agree to choose a law which is well developed to govern their agreement. The international conventions and the model rules on international commercial arbitration recognize the freedom of the parties to choose the law that governs their contract or arbitration agreement. However, some scholars are of the view that this factor is not adequate to determine if arbitration is international, because arbitration is not derived, as in the case of national courts, from a sovereign state or a legal system chosen by the parties to govern the dispute.<sup>124</sup>

---

<sup>119</sup> Dr Ousama Ousta, "Judicial Control Over International Awards", published by Sader Publishers, part 1, p 77.

<sup>120</sup> Supra note 105, p 47.

<sup>121</sup> Supra note 119, p 77.

<sup>122</sup> Pakorn Nilrapunt, Judicial Control over International Commercial Arbitration, published in [www.lawreform.go.th](http://www.lawreform.go.th) (2004).

<sup>123</sup> Lew J.D.M., Applicable law in international commercial arbitration (New York 1978) p 85.

<sup>124</sup> Supra note 119, pp 77-78.

**(b) Place of Conducting Arbitration:**

Legal scholars justifying this view argue that the nationality of arbitration is linked to the place where the arbitral award is issued<sup>125</sup>. But the application of this view may cause several problems, and it is criticized, because (i) the place (venue) of conducting the arbitration may have less importance to the dispute due to other prominent factors (such as if it involves the interest of international trade); (ii) in modern arbitration practice, the arbitral tribunal, for reasons of convenience, may meet at different places during the proceedings, or, for cost efficiency, the number of meetings may be kept to a minimum and replaced by written communications, or alternatively the case may fully be resolved without the arbitrator and the parties actually meeting or convening a physical hearing for the matter. Furthermore, draft awards are often circulated among arbitrators, and sometimes the awards are signed at different places. Hence, the place of arbitration should not be so strict that, in practical terms, the arbitration process will be limited to the boundaries of one country.<sup>126</sup> For these reasons, the place of conducting arbitration cannot be considered an adequate factor to determine if an award is international.

In the context of this point, it is important to examine the role of the place of arbitration in determining the intervention or supervisory powers of the state courts. The issuance of an award in one country cannot predominantly link an arbitral award to that particular procedural legal system. Some states treat an arbitral award as domestic even though it is issued outside of the state's territory if the award is based on its procedural law. Other states regard an award as domestic, if it is issued inside the state's territory even though a foreign procedural law is applied.<sup>127</sup> Most jurisdictions accept the view that their courts may intervene with arbitral proceedings, provided the place of arbitration is located in their country.

**(c) Nationality of the Parties:**

An alternative approach to establishing the international nature of arbitration award is to focus at the nationality of the parties,<sup>128</sup> which involves examining the place of residence or place of business of the parties to the arbitration agreement. This approach contends that the parties,

---

<sup>125</sup> Supra note 119, p 78.

<sup>126</sup> Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, *Northwestern Journal of International Law & Business*, Volume 1, Issue 1, pp 55-58.

<sup>127</sup> Supra note 119, p 78.

<sup>128</sup> Charles Manzoni, "International Arbitration - The Key Elements", published on 5 May 2004 available online on [http://www.39essex.com/docs/articles/CMZ\\_International\\_Arbitration\\_050504.pdf](http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf).

individuals or companies should come from different jurisdictions<sup>129</sup>. The European Convention<sup>130</sup> on International Arbitration (1961) follows the following nationality approach:

*Arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding their agreement, their habitual place of residence or their seat in different contracting states.*<sup>131</sup>

**(i) International Arbitration - Approach Adopted by Switzerland:**

Switzerland is one of the world's most preferred places for international commercial arbitration and is an example of a country in which the nationality of the parties determines whether arbitration is international. International arbitrations that are located in Switzerland are governed by Switzerland's law on international arbitration i.e. Chapter 12 of the Swiss Private International Law Act of 18 December 1987<sup>132</sup>.

The provisions of the Swiss Private International Law apply to an arbitration if both (a) the seat of the tribunal is in Switzerland and (b) at least one of the parties had neither its domicile nor its habitual residence in Switzerland when the arbitration agreement was concluded.

The Swiss Federal Court decided that arbitration is international if, among the "parties to the arbitration proceedings", at least one had its domicile or habitual residence abroad at the time of entering the arbitration agreement. Therefore, an arbitration having its seat in Switzerland is considered domestic for the purpose of the challenge proceedings, if the parties to the arbitration proceedings (or their legal predecessors) were domiciled in Switzerland when they (or their legal predecessors) executed the arbitration agreement<sup>133</sup>. Swiss law requires no connecting factor with Switzerland in addition to the seat of arbitration.

A business establishment outside of Switzerland is not sufficient to fulfill the aforementioned requirement. The subject matter of the dispute is irrelevant to determining the intentional nature of arbitration under Swiss law. The domicile of a company is meant to include the statutory seat or, failing such designation, the actual place of management. The domicile of a person is the place where he resides with the intent to permanently reside there whereas; the habitual residence is the

---

<sup>129</sup> Supra note 105, p 59.

<sup>130</sup> European Convention on International Commercial Arbitration, which was conducted at Geneva, April 21, 1961.

<sup>131</sup> Article I. 1(a) of the European Convention of 1961.

<sup>132</sup> The Switzerland Federal Code on Private International Law of 18 December 1987 came into force on 1 January 1989.

<sup>133</sup> Veronica Junger, International Requirements under UNICITRAL Model Law published by Juridice dated 27 October 2014.

place where he lives for an extended period (eg, a couple of months), even if this period was limited at the outset. The Swiss legislator uses these purely formal factors for reasons of clarity and simplicity<sup>134</sup>.

Article 176(1) of the Swiss Private International Law Act reads as follows:

- (1) *The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.*

The Federal Tribunal<sup>135</sup> of Switzerland has clarified that the test is addressed to the domicile (or place of incorporation) at the time of the entering into of the arbitration agreement of persons or entities that are parties to the arbitral proceedings.<sup>136</sup>

**(ii) International Arbitration - Approach Adopted by the United States:**

It may be noted that for the purposes of the New York Convention, United States applies the “nationality” test. Chapter II of the American Federal Arbitration Act (“FAA”)<sup>137</sup> implements the New York Convention in the United States.

Section 202 of the FAA provides:

*An agreement or award...which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.*

An agreement or award between an American party and a non-American party would fall under the Convention. Principally, the enforcement of an international arbitration award in the United States depends on the nationality of the parties. One of the conditions for the New York Convention to apply to an arbitration agreement or award in the United States is that the agreement or award must be foreign or not domestic<sup>138</sup>. A commercial arbitral award falls under the New York Convention

<sup>134</sup> Mistellis, *Concise Arbitration*, published by Kluwer Law International (2010), p 913.

<sup>135</sup> The Swiss Federal court is known as the Federal Tribunal. For further details on the jurisdiction of the Swiss Federal, please refer to [http://www.kkhsou.in/main/polscience/swiss\\_judiciary.htm](http://www.kkhsou.in/main/polscience/swiss_judiciary.htm).

<sup>136</sup> Elliott Geisinger and Julie Raneda, Chapter 1- Legislative Framework in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Second Edition), 2nd edition Kluwer Law International 2013) pp 1-12.

<sup>137</sup> United States Federal Arbitration Act, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970.

<sup>138</sup> *Ledee v. Ceramiche Ragno*, 684 F.2d 184. 186-87 (1st Cir. 1982). For further details, please refer to Professor Christopher R. Drahozal, “International Arbitration Law in the United States”, University of Kansas School of Law (2007).

when the legal relationship between the parties “whether contractual or not” is not “entirely domestic in scope”. An award resolving disputes entirely between American citizens still falls under the New York Convention if the legal relationship out of which the arbitral award arises involves “property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states”.<sup>139</sup>

The United States Court of Appeals for the Second Circuit<sup>140</sup> clarified the meaning of Section 202 of the FAA, stating that an award is not domestic:

*Not because made abroad, but because made within the legal framework on another country, eg. pronounced in accordance with the foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.*<sup>141</sup>

The Second Circuit held that, when the parties to a domestic arbitration are foreign citizens, the resulting award is considered a non-domestic award and therefore enforceable under the New York Convention. American courts have consistently held that an award issued in the United States is non-domestic even when one or more of the parties are American citizens, as long as one of the parties is not an American citizen<sup>142</sup>.

### 2.6.3.2 Economic Factor

This factor examines the nature of the dispute between the parties and categorizes arbitration as international if the dispute implicates international commercial trade<sup>143</sup>. Legal scholars justify this view, because it does not give regard to the status of arbitration or the law which the parties chose to apply to the arbitration proceedings<sup>144</sup>. However, importance is given to the nature of the dispute in question.

<sup>139</sup> Section 202 of the American Federation Act.

<sup>140</sup> The United States Court of Appeals for the Second Circuit (in case citations, 2d Cir.) is one of the thirteen United States Courts of Appeals. Its territory comprises the states of Connecticut, New York, and Vermont.

<sup>141</sup> Richard Chernick, Daniel M Kolkey Practitioner’s Handbook on International Arbitration and Mediation (3rd Edition), published by Juris Publishing, Inc. pp 290-291; *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2<sup>nd</sup> Cir, 1983).

<sup>142</sup> *Jacoda (Europe), Ltd. v. Int’l Marketing Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005). Please also refer to also refer to Supra note 138.

<sup>143</sup> Ali Naser Mohamad Al Ahababi, *Setting Aside Foreign Arbitral Awards*, published by The Judicial Department of the Emirate of Abu Dhabi, First Edition, pp 47-48.

<sup>144</sup> Supra note 119, p 71.

**(a) The International Chamber of Commerce (ICC)**

The International Chamber of Commerce Court of Arbitration in Paris (“ICC”) adopted the nature of the dispute as its factor for deciding whether arbitration is international under its rules.<sup>145</sup> Briefly, the main aim of the ICC is to assure effective and consistent actions in the economic and legal fields to contribute to the harmonious growth and the freedom of international trade<sup>146</sup>. After establishing the Court of Arbitration, the Arbitration Rules were amended respectively in 1927, 1931, 1933, 1939, 1947, 1955, 1975, 1988 and 2012<sup>147</sup>.

The ICC Rules considered business disputes as international only if they involved nationals of different countries; however, the ICC altered its rules in 1927 to cover disputes that contained a foreign element, even if the parties were nationals of the same country. They do not define “business disputes of an international character”, but they provide the following guidance in the explanatory booklet issued by the ICC:

*...the international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same state for performance in another country or when it is concluded between a state and a subsidiary of a foreign company doing business in that state.*<sup>148</sup>

The amended ICC Rules defined the function of the International Court of Arbitration of the ICC as being “to provide for the settlement by arbitration of business disputes of an international character”.<sup>149</sup> The current ICC Rules are used worldwide to resolve business disputes through arbitration and came into force on 1 January 2012.

---

<sup>145</sup> Supra note 111, p 13.

<sup>146</sup> Please refer to <http://www.iccwbo.org/> for more details on the ICC.

<sup>147</sup> Ongur Ergun, The New [2012] Arbitration Rules Of International Chamber Of Commerce, available online at <http://www.ankarabarsu.org.tr/siteiler/AnkaraBarReview/tekmakale/2011-2/3.pdf>.

<sup>148</sup> The International Solution to International Business Solutions - ICC Arbitration, ICC publication No 301 (1977), p 19. Please also refer to Amazu A Asouzu, International Commercial Arbitration and African States, Cambridge University Press, (2001) p 159.

<sup>149</sup> Article I(l) of the ICC Rules before it was revised in January 2012. The 2012 ICC Rules are clearly an attempt by the ICC to respond to the business needs of the international community.



**(b) France:****(i) Characteristics of International Arbitration as Defined by French Courts:**

It is well known that France is an arbitration-friendly forum and that French law favours the enforcement of arbitral awards. French courts generally endeavour to uphold such awards.<sup>150</sup> Since 1981, French law has been at the forefront of international arbitration law and sets an example for other countries. The French Code of Civil Procedure (“French Code”)<sup>151</sup> provides a specific and friendly legal framework for arbitration.<sup>152</sup> In this context, the UAE being a civil law jurisdiction is heavily influenced from Islamic, Egyptian and French laws.

The wide interpretation of the term “international” is found in the French Code. French law has two separate legal regimes that deal with domestic and international arbitration. This distinction allows the conduct of international arbitration, even if the seat of the arbitration is in France, to be governed by more flexible and permissive principles than those applying to domestic arbitration<sup>153</sup>.

In 1980 and 1981, two decrees were passed in France that introduced progressive arbitration provisions.<sup>154</sup> The main objectives of the 1980-81 Decrees were to confirm, by way of statute, the autonomy of the parties and to limit judicial interference in arbitral proceedings.<sup>155</sup> Enactment of a separate law to determine international arbitration in the UAE is highly essential, as it will aid the UAE national courts in establishing a consistent approach towards enforcement of foreign/international awards and will also effectively lead to the development of international commercial arbitration in the UAE.

In a significant French case<sup>156</sup> prior to the 1981 reform<sup>157</sup>, the court held that a transaction will be “international” if it produces a movement across borders with reciprocal consequences in more than

---

<sup>150</sup> Sarah Francios Poncet, Brenda Horrigan and Lara Karam, “Enforcement of Arbitral Awards against Sovereign States or State Entities - France”, published by Jurisnet LLC (2009) pp 355-379.

<sup>151</sup> The Decree Law of 81-500, dated May 12, 1981.

<sup>152</sup> Tim Portwood, Jérôme Richardot and Patricia Peterson, ‘Arbitration in France’, available online (last accessed on September 2016).

<sup>153</sup> CMS Guide on International Arbitration available online on [www. cmslegal.com](http://www.cmslegal.com).

<sup>154</sup> Decree No 80-354 of 14 May 1980 related to domestic arbitration and Decree No 81-500 of 12 May 1981 related to international arbitration.

<sup>155</sup> Supra note 153.

<sup>156</sup> *Pelissier du Besset v The Algiers Land and Warehouse Co Ltd*, Cassation Civil dated 17 May 1927, Pt, I at 25 (1928) with the conclusions by Matter and H Capitant’s note. For further details, please refer to Supra note 105, p 56.

<sup>157</sup> A Decree dated 14 May 1980 was issued to deal with new rules of French domestic arbitration. Before 1981, there were no separate statutory rules to deal with international arbitration alone in France. See Supra note 107, p 64.

one county. Article 1492 of the French Code states clearly and exclusively an economic definition of the term “international”<sup>158</sup>. It states that:

*an arbitration is international when it involves the interests of international trade.*<sup>159</sup>

Several decisions issued by the French courts further confirmed the economic definition of the international character of arbitration.<sup>160</sup> This legal definition, based on “international trade interests”, is a codification of the main test that was applied by the French courts over several decades to determine which an arbitration regime should apply to a particular dispute<sup>161</sup>.

The Paris Court of Appeals interpreted the phrase “involve the interests of international trade” in several cases<sup>162</sup>. It stated that:

*the international nature of an arbitration must be determined according to the economic reality of the process during which it arises. In this respect, all that is required is that the economic transaction should entail a transfer of goods, services or funds across national boundaries, while the nationality of the parties, the law applicable to the contract or to the arbitration, and the place of arbitration are irrelevant*<sup>163</sup>.

The approach of the French courts has been consistent, which has effectively led to the development of international commercial arbitration in France<sup>164</sup>. Any international factors of a purely voluntary or legal nature are considered irrelevant, unless they involve a transaction in an economic sense; otherwise, the arbitration will remain domestic. For instance, the fact that one of the parties involved in the dispute is not a French national or that the arbitration was conducted

---

<sup>158</sup> Supra note 107, p 56.

<sup>159</sup> Article 1492 of Decree Law of 81-500, dated May 12, 1981.

<sup>160</sup> Supra note 107, pp 56-62.

<sup>161</sup> Supra note 153.

<sup>162</sup> Murgue v. Coflexip, Court of Appeal Paris March 14, 1989, 1991REV. ARB 355 and observations by J- H Moitry and C Vergne; Court of Appeal Paris April 26, 1985 Aranella v Italo- Ecuadoriana, 1985 REV ARB 311, Court of Appeal Paris December 8, 1988, Chantiers Modernes v. C M G C, 1989 REV ARB 111, Court of Appeal Paris November 14, 1991 Consorts Legrand v. European Country Hotels Ltd 1994 REV ARB 545 2<sup>nd</sup> decision and observations by J Pellerin, Court of Appeal Paris April 4, 1991 Icart v.Quillery 1991 REV ARB 659, Court of Appeal Paris November 25, 1993, Paco Rabanne Parfums v. Les Maisons Paco Rabanne, 1994 REV ARB 730, Court of Appeal Paris March 24, Deko v. Dinger, 1994 REV ARB 515, Court of Appeal Paris, October 8, 1997, Solna International AB v. S A Destouche, Dalloz I R 233 (1997). For further details, please refer to Supra note 107, p 58.

<sup>163</sup> Murgue v. Coflexip, Court of Appeal Paris March 14, 1989, 1991REV. ARB 355 and observations by J- H Moitry and C Vergne. Please also refer to Supra note 108, p 58. The French Cour de cassation approved the above interpretation in V 2000 (formerly known as Jaguar France) V Renault case, Court of Appeal Paris, December 7, 1994, V Renalut, 1996 REV ARB 245.

<sup>164</sup> Supra note 107, p 58.

before the international arbitral institutions, such as the ICC, or that French companies are controlled by non-French entities are not sufficient to term it an international arbitration<sup>165</sup>.

As pointed out by Fouchard Gaillard Goldman<sup>166</sup>, the most common scenario and straightforward cases in which a French court has considered an arbitration as “international” involve a contract for the movement of goods, services or funds across national boundaries<sup>167</sup>. For instance, the Paris Court of Appeal in the *Firme Peter Beigi* case<sup>168</sup>, considered the dispute an international arbitration, because it involved the exportation of turkey meat from France to Germany. Further, *Granomar*<sup>169</sup> (dispute relates to the sale by a Swiss company to a French Company of wheat intended for the Soviet Union), *Parfums Stern France*<sup>170</sup> (case relates to distribution in France and outside of products imported from the United States), *Sohm*<sup>171</sup> (dispute concerned the payment of the price of a Franco-Belgian sale), *V 2000* case<sup>172</sup> (dispute on the purchase by French collectors via a company incorporated in France of cars manufactured in the United Kingdom) are some examples of disputes which the Paris Court of Appeal termed as international disputes.

In short, under French law, it is the economic nature of the dispute that characterizes the international nature of arbitration, regardless of the classic extraneous elements of private international law from which international arbitration has also taken its independence<sup>173</sup>.

## (ii) Case Law Supporting Enforcement of International Arbitral Awards in France:

Some of the decisions that best represent the French philosophy of international arbitration in terms of enforcing arbitral awards are namely the *Norsolor* decision followed by cases such as *Polish Ocean Line* and especially the *Hilmarton*, *Chromalloy*, *Bechtel* and *Putrabali* decisions, which explicitly state: “An international award which is not anchored to any national legal order, is an

<sup>165</sup> Supra note 107, p 59, Court of Appeal Paris, May 26, 1992, *Guyapeche V Abba Import Aktiebolag*, 1993 REV ARB 624 and L Aynes note, Court of Appeal Paris, April 11, 1996, *OIP v Pyramide*, 1996 REV ARB 467, and D Bureau’s note.

<sup>166</sup> Supra note 107, pp 56-62.

<sup>167</sup> Please refer to Fouchard Gaillard Goldman on International Commercial Arbitration, Supra note 103, Court of Appeal February 19, 1988, *Firme Peter Beigi V Britannia*, 1990 REV ARB 657; Court of Appeal Paris June 15, 1989, *Granomar V Compagnie Interagra*, 1992 REV ARB 80 and J-J Arnaldez note; Court of Appeal Paris, April 19, 1991, *Parfums Stern France v. CFFD*, 1991 REV ARB 673 and observations by J Pellerin-; Court of Appeal Paris Feb 27, 1992 *Sohm v. Simex*, 1992 Rev ARB 590 and P Ancel’s note; Court of Appeal Paris, December 7, 1994, *V 2000*, Please refer to Supra note 162.

<sup>168</sup> Supra note 107, pp 58-60.

<sup>169</sup> Supra note 107, pp 58-60.

<sup>170</sup> Supra note 107, pp 58-60.

<sup>171</sup> Supra note 107, pp 58-60.

<sup>172</sup> Supra note 107, pp 58-60.

<sup>173</sup> Thomas Clay, Philippe Pinsolle, Thomas Voisin, *French International Arbitration Law Reports: 1963-2007*, published in *Kluwer Law International* (2014), p 12.

international judicial decision the validity of which ascertained in light of the rules applicable in the countries where recognition and the enforcement are sought<sup>174</sup>.

In this context, analysis of the enforcement of awards annulled in one jurisdiction is not within the scope of this research. However, to illustrate the fact that an international arbitral award is not fixed to any particular legal order, some important judgments issued by the French Court are discussed below.

The internationally renowned *Hilmarton- Putrabali* jurisprudence simply states that an international award does not belong to the legal order of the place where it was rendered and that it can therefore be enforced in France, even though it was annulled by the courts of the place of arbitration, or even if the annulment appeal is simply pending.<sup>175</sup> According to Emmanuel Gaillard, the underlying idea of the *Hilmarton-Putrabali* case law is that the fate of the arbitral award must not depend on the place where it was rendered. The court in that place has only the jurisdiction granted to it by the place where it rules, and it cannot impose its decision whether of validation or annulment.<sup>176</sup> This freedom allows enforcement in France of awards annulled in Switzerland (*Hilmarton* decision), Dubai (*Bechtel* case) or in England (*Putrabali* case).<sup>177</sup>

The French case law aims to delocalize international arbitration from the place of arbitration, liberating it from judicial and legislative contingencies of the forum, and at adapting it to the modern rules of international trade. In other words, it aims to release international arbitration from all of the constraints that can limit its implementation. It is therefore based on a vision of international arbitration that is disconnected from the seat of the arbitral tribunal. The idea is that arbitration is first and foremost international before it is national. The separation of the arbitration from the legal order of the forum is consistent with the economic globalization trend<sup>178</sup>.

Therefore, the international nature of arbitration depends entirely upon the broad economic criteria shown above and not upon the applicable law, venue of the arbitration or parties nationalities. The conclusions of the Court of Appeal of Paris in the case *Bourbon vs. Villeneuve*<sup>179</sup>, a dispute which involved a contract concluded between a French company and a French defendant for the

---

<sup>174</sup> Supra note 173 p 15.

<sup>175</sup> Supra note 173 p 13.

<sup>176</sup> Emmanuel Gaillard in "The Enforcement of Award set Aside in the Country of Origin", 14 ICSID Review 16 (1999).

<sup>177</sup> Supra note 173, p 18.

<sup>178</sup> Supra note 173, p 22.

<sup>179</sup> Supra note 133.

coordination and development of the claimant's commercial interests in Madagascar, the arbitration was considered to be international, since it involved the economies of more than one country, i.e. France and Madagascar.

Similarly, whenever the dispute involves a tangible or intangible cross-border transfer of goods, services or funds, the French courts' view is that the arbitration of such a dispute is international, not national. International money transfers, services performed in other states, and the export and import of goods are considered to be elements of international commerce. In this light, party nationality or residence/domicile, the location where the contract is being executed or the applicable legislation are relevant *only if interests of international commerce/trade are involved*, such implications being evaluated when the dispute arises rather than when the contract is formed<sup>180</sup>.

The permissive nature of the French law has helped to maintaining Paris as a world centre of international arbitration. The popularity of France is clearly evident with the number of ICC cases registered. As per the ICC statistics, in 2014, the ICC's dispute resolution services attracted 863 new cases involving almost 2,400 parties from 141 countries and independent territories<sup>181</sup>. Three principal advantages of Paris as an arbitration seat merit emphasis<sup>182</sup>. First, as noted above, France has a legal framework that is highly supportive of arbitration as a method of dispute resolution. Second, considerable expertise in the arbitration field exists at all levels in France, including among counsel, arbitrators and in the courts. Further, for arbitrations seated in Paris, a specialised chamber of the Paris Court of Appeal decides all applications to set aside arbitral awards and appeals from enforcement decisions. Finally, Paris offers a central location in Europe with infrastructure that is well-adapted to conducting international arbitration proceedings, including hearing facilities, competent translators, interpreters and court reporters.<sup>183</sup>

---

<sup>180</sup> Supra note 133.

<sup>181</sup> Further details can be viewed on the ICC website (last accessed on September 2016).

<sup>182</sup> Supra note 152.

<sup>183</sup> Supra note 152.

**(b) Lebanon:****(i) International Arbitration - Approach Adopted by Lebanon**

The Lebanese legislation on arbitration recognizes all well-established principles in international arbitration. In many respects, it is similar to the French law of arbitration.<sup>184</sup> The Lebanese Code of Civil Procedure (CCP), which was enacted by Decree Law 90/83, with amendments resulting from Law No. 440 dated 29 July 2002, devotes an entire chapter (chapter 2) to arbitration with a distinction being made between domestic arbitration (Articles 762 to 808 CCP) and international arbitration (Articles 809 to 821 CCP)<sup>185</sup>. The Lebanese legislator adopted the economic factor to distinguish between domestic and international arbitration. An examination of the Lebanese CCP in this part will help to understand the importance of having two separate laws for dealing with domestic and international arbitration.

Under Article 809 CCP, arbitration is deemed international *“when it involves the interests of international trade”*. The factor for determining if arbitration involves the interests of international trade is an “economic one” that involves the movement of goods or funds beyond the country’s borders. The Lebanese Court adopted the economic factor in defining “international arbitration”, as arbitration is involved in *“international trade involving an exchange of goods and transfer of money over the frontiers of two countries”*<sup>186</sup>.

Pursuant to Article 767 of CCP, if the parties to arbitration are Lebanese and agree to settle their disputes in a domestic arbitration to be governed by a foreign law, such arbitration will not be considered international arbitration, because the Lebanese legislators do not give any consideration to the legal factors. The courts in Lebanon, while differentiating between international and domestic arbitration, will examine only, if the relevant dispute is more linked to international perspective, i.e. if it involves the interests of international trade<sup>187</sup>. In addition, the Lebanese law is influenced by the French legislation and has adopted a broad definition of the term “trade” to include not only the commercial nature of the dispute but also disputes relating to construction, investment, exchange of goods and services or any transaction that is economic in nature. Consequently,

---

<sup>184</sup> Jana Karam, International Arbitration in Lebanon, published by Aceris Law LLC (2005) available online at <https://www.international-arbitration-attorney.com/arbitration-in-lebanon/>.

<sup>185</sup> Nayla Comair Obeid and Ziad Obaid, Chapter on Lebanon, Contributed to Global Arbitration Review, published on 7 July 2015, [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com).

<sup>186</sup> Beirut Court of Appeal 10<sup>th</sup> Civil Chamber, Decision No 492 of 2001 (dated 21 March 2001). Please also refer to Supra note 32, p 343.

<sup>187</sup> Article 809 of CCP.

arbitration can be termed “international” even if the parties are Lebanese, the governing law and seat are Lebanon, and if the nature of the dispute is linked in any way or to any extent to the interest of international trade<sup>188</sup>.

### 2.6.3.3 Dual Factors:

Dual factors determine the international nature of arbitration if the legal factors of arbitration, such as the place of signing the agreement, the subject matter of the dispute, the arbitral organization under which arbitration is conducted, the place of business, the obligations of the parties, etc., are connected to more than one foreign state. In addition the matter on which arbitration is conducted has to be linked with the interest of international trade.<sup>189</sup>

#### (i) International Arbitration - Approach Adopted by Egypt

The Egyptian legislators adopted a dual approach of factors to differentiate between domestic and international arbitration. The Egyptian legal system is largely influenced by the French legal system. Under the Egyptian Arbitration Law 27 of 1994 (Egyptian Arbitration Law), arbitration is considered to be international when it is linked to the interests of international trade (economic factor). However, the Egyptian legislators, unlike the French and Lebanese legislators, apply the legal factors in addition to the interests of international trade to determine the international nature of arbitration.

For example, Article III<sup>190</sup> of the Egyptian Arbitration Law states that an arbitration is international if the subject matter of a dispute is related to “international commerce” and sets out certain circumstances under which the subject matter of the arbitration is considered to be international in scope. Examples are cases in which the principal places of business of the two parties to the arbitration are situated in two different states when the arbitration agreement is signed, or if the

---

<sup>188</sup> Supra note 119, p 80.

<sup>189</sup> Supra note 119, p 79.

<sup>190</sup> Article III of the Egyptian Arbitration Law states that, “Within the context of this Law, the arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases:

- i) If the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement. If either party to the arbitration has more than one place of business, due consideration shall be given to the place of business which has the closest relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon.
- ii) If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.
- iii) If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country.
- iv) If the principal places of business of the two parties to the arbitration are situated in the same State at the time of the conclusion of the arbitration agreement, but one of the following places is located outside the said State.
  - a) The place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it;
  - b) The place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed; or
  - c) The place with which the subject matter of the dispute is most closely connected.

parties to the arbitration have agreed to resort to a permanent arbitral organization. Arbitration will also be considered international if an arbitration centre has its headquarters in Egypt or abroad; if the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country; or if the principal places of business of the two parties to the arbitration are situated in the same state when the arbitration agreement is signed, but one of the following places is located outside the State i.e. the place of arbitration as determined in the arbitration agreement or the place where substantial part of the obligations between the parties were performed or the place with which the subject matter of the dispute is most closely connected.

Egyptian legislators have been criticized for adopting a dual approach to determine the international nature of arbitration. The combination of the dual approach adopted in the Egyptian arbitration law misled the national courts of Egypt to distinguish explicitly between domestic and international arbitration, which is explained further below. Although Article III of the Egyptian Arbitration Law states that the arbitration is international whenever the subject matter of a dispute is related to international trade, clauses (ii) and (iii) of Article III apparently conflict with each other. To clarify, Article III(iii) of the Egyptian Arbitration Law sets out that arbitration is international if the dispute falling within the scope of the arbitration agreement is linked with more than one country. This explanation of the international nature of arbitration is not effective, as a dispute that is linked to more than one country is in the normal context considered international<sup>191</sup>.

In addition, Article III(ii) of the Egyptian Arbitration Law states that an arbitration that is conducted under an arbitration institute having its headquarters in the Arab Republic of Egypt or abroad will be considered international<sup>192</sup>. The consequence of such a definition is that an arbitration that is conducted by parties based in Egypt in relation to a dispute arising out of a contract performed and executed in Egypt, to which Egyptian law is applicable will also be considered international solely because the parties agreed to conduct the arbitration in accordance with the rules of an arbitral institute based in or outside of Egypt.

This contradicts the main idea emphasised in Article III that arbitration is international whenever the subject matter of a dispute is related to the interests of international trade. For example, the Cairo

---

<sup>191</sup> Supra note 119, p 105.

<sup>192</sup> Article III(ii) of the Egyptian Arbitration Act states that, "If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad".



Court of Appeal<sup>193</sup> held that, as per Article 3(ii) of the Egyptian Arbitration Law, if the parties conducted arbitration under an arbitration centre based in Egypt or abroad, it will be considered international arbitration despite the fact that all other elements of the dispute are linked solely to Egypt. In the above case, parties conducted arbitration in accordance with the Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCIAC) even though all other factors were linked to Egypt. This scenario is a clear manifest of an inappropriate distinction between the domestic and international arbitral awards<sup>194</sup>.

To conclude, the Egyptian Court adopted a combination of the predominant factors that determine the international nature of arbitration and held that the nature of the dispute should be linked to the interest of international trade in addition to the other factors contemplated in Article III of the Egyptian Arbitration Law to consider arbitration international.<sup>195</sup>

#### **2.6.3.4 Standard Adopted Under the New York Convention and the UNCITRAL Model Law:**

The lack of an internationally agreed definition of the term “international” in the context of international commercial arbitration is a serious issue. Each state has its own test for determining whether an arbitration award is domestic or foreign<sup>196</sup>.

The New York Convention in Article I defines “foreign” awards as “...awards which are made in the territory of a state other than the state in which recognition and enforcement is sought..” It is clear that the Convention has relied on the legal factors for determining if an award is foreign by emphasizing the territory of a state. If importance is given solely to the geographical aspect without examining any other legal factors, such as the seat, governing law, domicile of the parties etc., while determining the nature of the arbitral award as outlined in Article I of the Convention, then the approach adopted by the UAE national courts can be considered to be in line with the New York Convention, although such an approach will undoubtedly cause problems. The approach adopted by the UAE Courts and the consequential issues following that approach will be discussed in detail in part 2.7 of this chapter.

---

<sup>193</sup> Cairo Court of Appeal Circuit 7 Commercial, 6 September 2010 in Case No 10/27 of the Judicial year.

<sup>194</sup> Supra note 119, p 105.

<sup>195</sup> Cairo Court of Appeal, commercial circuit (62), decision rendered in the hearing dated 5/06/2002, cited in Dr. Mohamed Abdel Raouf, *dirasat tahliliya lil-Qada' elmasri fi da'awa boutlan ahkam*, 21 J. Arab Arb., 134 (2008).

<sup>196</sup> Supra note 107, p 16.

Further, such an approach which gives importance to the geographical factor in determining the nature of an arbitral award contradicts the rules of several arbitral institutions<sup>197</sup>. The most prominent among them include the International Chamber of Commerce (ICC) Rules. Articles 31(3) and 18(3) of the ICC Rules state that “the award shall be deemed to be made at the place of the arbitration and on the date stated therein”<sup>198</sup> and that “the arbitral tribunal may deliberate at any location it considers appropriate”<sup>199</sup>. The irrelevance of the notion of “arbitral award” as defined in Article I of the Convention is clearly reflected in adopting territory of a state as a factor, while there is a major difference between the legal seat of arbitration and the place where arbitration proceedings are conducted.

Article I of the Convention further adds to this definition that it will apply to awards that are “..not considered as domestic awards.” This definition of foreign awards results in multiple interpretations of arbitration awards. In other words, one country may consider an award to be “domestic”, because it involves parties who are nationals of that country, while the country in which enforcement is sought may consider the same award to *not be* domestic, because it involves the interest of international trade<sup>200</sup>. For example, as discussed above, Article 1 of the Egyptian Arbitration Law limits its application to arbitration proceedings conducted in Egypt and to any other international arbitration (not domestic) proceedings conducted within and outside Egypt to which the parties have expressly agreed to submit under the Egyptian Arbitration Law.

Article 1 of the Egyptian Arbitration law states:

*Subject to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of this Law shall apply to all arbitrations between public or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law.*

As explained above, Article I of the New York Convention leads to multiple interpretations. Although this article states that it shall be applicable to awards that are not considered domestic awards, this

---

<sup>197</sup>Dr Fathi Wali , Former Dean of Cairo University, “Arbitration in the Commercial Domestic and International Disputes”, published by Al Maarif (2014), p 632.

<sup>198</sup>Article 31(3) of the International Chamber of Commerce (ICC) Rules.

<sup>199</sup>Article 18(3) of the International Chamber of Commerce (ICC) Rules.

<sup>200</sup> Supra note 107, p 16.

provision of the New York Convention will not be applicable to non-domestic arbitration proceedings held in Egypt and to international arbitration proceedings conducted within Egypt or abroad, where the parties have agreed to submit to arbitration under the Egyptian Arbitration Law. This result occurs, because the New York Convention is silent on certain issues and leaves them to the discretion of the respective national courts or legislators of the Contracting States to interpret. One such example is found in the phrase “..awards not considered as domestic” as mentioned in Article 1 of the Convention. The legislators or national courts of the Contracting States are entitled to determine what constitutes the phrase “..awards not considered as domestic” and whether it can be interpreted as having links that support the interests of international trade, or whether it can satisfy any of the legal factors enumerated previously or adopt a combination of several factors.

Consequently, some of the Contracting States enacted arbitration legislation that contains a provision to determine the nature of arbitral award and to differentiate between domestic and foreign or international awards. Each Contracting State relies on various factors to determine the international nature of every arbitral award, which results in lack of having a set of uniform guidelines in effectively determining what constitutes an international award. As explained, such a deviance in the approach towards determining “non-domestic awards” can be attributed to the New York Convention.

UNICTRAL<sup>201</sup> developed the UNICTRAL Arbitration Rules to arbitrate international trade disputes between countries with different legal, social, and economic systems<sup>202</sup>. It is specifically designed to apply to international arbitration<sup>203</sup>. Currently, more than sixty national legislatures have adopted the UNCITRAL Model Law, and more states are contemplating the possibility of adopting this law as part of their arbitration legislation.

The approach adopted under UNCITRAL Model Law is a combination of several factors. It determines the international nature of arbitration depending upon the following criteria: (a) (objective/formal criterion) - the dispute has a foreign element of international character; (b)

---

<sup>201</sup>UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>202</sup>John D. Franchini, International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement, published by Fordham Law Review (1994), Volume 67, Issue 7, p 2223.

<sup>203</sup>Please note that the UNCITRAL Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration. The UNCITRAL Arbitration Rules, on the other hand, are selected by parties either as part of their contract, or after a dispute arises, to govern the conduct of an arbitration intended to resolve a dispute or disputes between themselves. For further details refer to [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration\\_faq.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html).

(subjective/material criterion) - the dispute involves parties with various nationalities/places of business; and (c) combined criteria - in cases of disputes having both types of characteristics<sup>204</sup>.

Article I(3) of the UNCITRAL Model Law states that:

*An arbitration is international if:*

*(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or*

*(b) one of the following is situated outside the State in which the parties have their places of business:*

*(i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;*

*(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or*

*(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.*

To determine the international nature of arbitration under the UNCITRAL Model Law, if a party has more than one place of business, the place of business will be considered to be the one that has the closest relationship to the arbitration agreement. Similarly, if a party does not have a place of business, the party's habitual residence will be considered.

Some scholars are of the view that the UNCITRAL Model Law has randomly selected some situations without legal justification to determine the international nature of an arbitral award. It is perfectly sensible to consider arbitration as international if a substantial part of the dispute is performed in another country. Nonetheless, it is not clear why the place of arbitration is located abroad, which is a choice made exclusively by the parties, should suffice to render the arbitration international<sup>205</sup>.

The same criticism applies to Clause 1(3)c of the UNCITRAL Model Law, which defines "internationality". It states that arbitration is international if the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country. This is entirely within the control of the parties and may therefore prove to be fictitious. It is up to the parties to agree that their arbitration "relates to more than one country", even though the dispute involved may actually not involve more than one country. Parties may agree to such an arrangement to ensure that the dispute will be governed by rules that are more liberal than those governing domestic arbitration<sup>206</sup>.

---

<sup>204</sup> Supra note 133.

<sup>205</sup> Supra note 107, p 52. Please also refer to Supra note 119, pp 104-105.

<sup>206</sup> Supra note 107, p 53. Please also refer to supra note 119, p 105.

## 2.7 Lack of the Concept of "International Arbitration" and its Effectiveness on the UAE:

As explained at the outset of this chapter, the UAE is a well-established state with a clear vision. It is one of the world's most popular business hubs with a strong economy. For the past two decades, the UAE has attracted a great number of foreign direct investments, and it acts as principal headquarters for several international corporations to run their commercial activities. These entities conclude contracts between themselves or with UAE individuals, companies, or on some occasions with the UAE governmental bodies. Mostly, they prefer to settle their disputes through arbitration as the mechanism for dispute resolution. But, due to the lack of clarity of the national law regulating arbitral provisions in the UAE, and particularly due to the lack of an "international arbitration" concept, they may be exposed to one of the problematic issues that will be explored in detail regarding the following points.

The lack of the notion of "international arbitration", in terms of defining international arbitration and its diverse interpretation by the UAE national courts, affected the position of UAE as the preferable seat for international arbitration. Parties preferring arbitration as a mechanism for dispute resolution are skeptical about the current legislation, as the UAE has adopted the geographical factor to determine whether arbitration is domestic or foreign. The criteria employed by a state in determining the nature of international arbitration are important, as the implications of enforcing an arbitral award in a particular jurisdiction may depend not only on compliance with all applicable local procedural laws but also on the support of local courts.

Whilst examining the effect of the lack of the concept of international arbitration, it is also pivotal to analyse the role of mandatory rules at the seat in the international arbitration and its effectiveness on the enforcement issue of arbitral awards.

With the ever-increasing popularity of arbitration, issues about mandatory rules are on the rise.<sup>207</sup> Mandatory rules can reflect states' internal or international public policy and generally protect economic, social or political interests<sup>208</sup>. The role of mandatory rules in international commercial arbitration is uniquely complicated, because these rules purport to apply irrespective of the law chosen by the parties to govern their contractual relations. This put the interests of the state and

<sup>207</sup> Andrew Barraclough and Jeff Waincymer, Mandatory Rules of Law In International Commercial Arbitration, Melbourne Journal of International Law, Volume 6 [2005] MelbJIntLaw 9.

<sup>208</sup> Marc Blessing, Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts (1999) 5 available at [http://www.baerkarrer.ch/Publications/1009/4\\_3\\_9.pdf](http://www.baerkarrer.ch/Publications/1009/4_3_9.pdf).

parties in direct conflict. In addition, conflicts between the state's interests can also arise, as states may have conflicting mandatory rules.<sup>209</sup>

In the context of international arbitral awards, the mandatory rules of several states may be involved. For example, the arbitration proceedings may be conducted in one country that needs to consider recognition, support and supervision issues of arbitration. Enforcement may be sought in a range of countries in which assets are held, bringing into question the mandatory rules and attitudes of those jurisdictions as well. The contract might be wholly or partly performed in an entirely different state or involve the interests of international trade. The potential for various and conflicting mandatory rules from these states may harm recognition and enforcement of foreign/international awards.

Another notable factor is the seat of arbitration. The selection of the seat determines the law governing the arbitration procedure and the process and rights relating to enforcement of the arbitration award. It also determines which courts can exercise jurisdiction.

This part covers some hypotheses, which will examine the results caused by the UAE's reliance on adhering to the geographical factors as the only factors for determining the nature of arbitration. Furthermore, this part will examine some possible implications on the enforcement of international arbitral awards in the UAE by following the geographical criteria. It will also examine whether enforceability concerns of international arbitral awards compel application of the mandatory rules of the seat of arbitration.

### **2.7.1 Seat of Arbitration**

The seat of the arbitration is significant, as it determines the law of the procedure that the arbitration will adopt. It will determine the extent to which the local court will involve itself in the arbitral process<sup>210</sup>. It also influences a number of other issues, such as the determination of the arbitrability of the dispute, the place of the annulment proceedings of the arbitral awards, etc. There is an important distinction between the legal place (the "seat") of any arbitration and the place (venue) where one or more of the hearings or other procedural steps physically takes place. Although the two often coincide in practice, the seat determines the legal framework within which the arbitration

---

<sup>209</sup> Supra note 207.

<sup>210</sup> Laura Warren, "The seat of arbitration - Why is it so important?", published in Mondaq, available online at <http://www.mondaq.com>.

takes place and not the location where the parties or the tribunal choose, as a matter of convenience, to meet for deliberation, examination of witnesses or signing the arbitral award.<sup>211</sup>.

One of the major issues owing to the absence of the concept of international arbitration in the UAE is the extent to which it can impact the enforcement process, especially if the arbitrating parties agreed to conduct their arbitration in the UAE, although the UAE is not the agreed seat. Another issue arises if the parties conduct their arbitration outside of the UAE and agree that the seat of arbitration is not the UAE, but the tribunal for some reasons signs the award in the UAE. Additionally, parties might face obstacles while seeking recognition and enforcement of an international arbitral award in relation to the UAE court's interpretation regarding the seat of arbitration and whether it has any connection to the venue (place) where arbitration was actually conducted. If so, which provisions under the UAE law apply to the enforcement procedures?

#### **2.7.1.1 Hypothetical Case Studies on International Arbitration**

To understand better the factual underlying problems connected with the phenomenon of international arbitration as applied in the UAE and to examine further the issues that the parties may likely face during the recognition and enforcement of such awards, some possible scenarios are examined below:

##### **(i) Scenario One:**

###### **Facts:**

Two foreign parties operating within the UAE enter into a sale agreement relating to the import of construction equipment from Turkey to the UAE. Their agreement contains a dispute resolution clause that provides for arbitration as the preferred mechanism for resolving disputes arising out of or in connection with the agreement. It provides that the arbitration must be conducted by a tribunal consisting of three arbitrators in the English language and under the ICC Rules. The agreement further specifies that the governing law is the English law and that the seat of arbitration is Paris.

---

<sup>211</sup> Latham Watkins - Guide to International Arbitration published in 2014 available online at <https://www.lw.com/.../guide-to-international-arbitration-2014>.

Assuming that a dispute arises between the parties and that both parties agree to conduct their arbitration in the UAE, as a matter of their convenience or for cost efficiency, even though the parties had no aim to select UAE as a seat and/or to choose UAE law as a governing law to apply to the dispute. The tribunal conducts the arbitration proceedings and issues the arbitration award in the UAE.

**Possible outcome:**

The above scenario might lead to a serious conflict. The award debtor can approach the UAE courts and argue that this is a domestic award, as the tribunal conducted the arbitration hearings, signed and issued the award within the UAE. The award debtor can argue that the provisions applicable to the domestic arbitration in the UAE CPL should apply to the enforcement procedures for the award instead of the provisions of the New York Convention notwithstanding the fact that the parties to the arbitration are foreigners or foreign entities, the governing law is not UAE law, and, more importantly, the seat of arbitration is not the UAE.

In this scenario, even if the award creditor's intention was to enforce the award outside of the UAE, the award debtor can nevertheless approach the UAE national court as part of the debtor's tactic to set aside the award and take advantage of the fact that the arbitration proceeding was conducted in the UAE as a pretext to prevent the award creditor from enforcing the award outside of the UAE and/or to enforce the award in the UAE in conformity with the New York Convention.

**(ii) Scenario 2:**

**Facts:**

Two parties based and conducting commercial activities in the UAE agree to include an arbitration clause in their agreement, which provides that all disputes between the parties arising out of or in connection with the agreement must be resolved through arbitration under the Rules of the Dubai International Arbitration Centre (DIAC) by a sole arbitrator. The applicable law will be the UAE law, and the seat of arbitration will be Dubai (UAE).

A dispute arises between the parties, and the claimant presents a Request for Arbitration to the DIAC. In accordance with the agreement, the DIAC nominates a sole arbitrator, who is based in the UK, to arbitrate the dispute. The arbitrator agrees with the parties that he will conduct the hearings



in the UK in accordance with Article 20(2)<sup>212</sup> of the DIAC Rules for cost efficiently purposes, as the parties' legal representatives (Attorneys) are based in the UK, and most of the witnesses to be examined are based in the UK and France. The arbitration proceedings are concluded, the arbitrator issues and signs the award in the UK, and the DIAC notifies the parties.

**Possible outcome:**

As per Article 212(4) of the UAE CPL: "The award of the arbitrator shall be issued in the United Arab Emirates, otherwise the rules laid down in respect of awards of arbitrators issued in a foreign country shall apply".

Article 216 of the UAE CPL lists the conditions under which the parties may apply for the award to be nullified before the court. One such condition under Article 216(1)(c) of the UAE CPL is: "If there is a nullity in the award or a nullity in the proceedings having an effect on the award".

In this scenario, the possible outcomes are that the UAE court will consider the award as a domestic award irrespective of the fact that the arbitration hearings were conducted outside of the UAE, as the UAE was the agreed seat of the parties, or the court will annul the award, since the seat of arbitration was the UAE, and the arbitrator failed to comply with the procedural law of the seat and issued the award abroad, as it directly contradicts with Articles 212(4) and 216(1)(c) of the UAE CPL stated above.

The possibilities are that the court will not give any due consideration to the parties' agreement with the arbitrator to conduct the hearing outside of the UAE. Similarly, the court will not give any due regard to the DIAC Rules, which grant that the parties and the tribunal may agree to conduct the arbitration proceedings outside of the UAE, which, according to DIAC Rules, shall still be deemed to have been made in the UAE. Notably, in practice, when the arbitrators appointed by the parties or the DIAC happen to be practitioners not well versed with the UAE procedures, the DIAC will normally recommend that the arbitrators ensure that they sign their awards in the UAE to avoid any inadvertent situations that might lead to the award being declared null and void by the court.

---

<sup>212</sup> Article 20(2) of the DIAC Rules states: "The Tribunal may, after consultation with the parties, conduct hearings or meetings at any place that it considers appropriate. The Tribunal may deliberate wherever it considers appropriate."

**(iii) Scenario 3:**

**Facts:**

Another possible scenario that could be raised while considering article 212(4) of the UAE CPL concerns the court's position on Article 212(4), if the parties agree that the seat of arbitration will be the UAE, but the arbitration proceedings are conducted by exchanging pleadings via email and without the tribunal or the parties meeting or conducting hearings, but the tribunal's deliberations are conducted by conference call outside of the UAE, and the award is signed outside of the UAE. Does it mean that the award issued can be viewed as a foreign arbitral award? Alternatively, can such an award be annulled by the court due to the apparent procedural error manifested in the arbitration proceedings?

Article 212(4) of the UAE CPL fails to answer these scenarios. Further, it misleads the UAE national courts, because it fails effectively to differentiate between the concept of the legal seat of arbitration and the place (venue) where the arbitration is conducted. In accordance with the interpretation of the UAE courts, this article sets out that the arbitration must be conducted in the UAE to be considered a domestic arbitration, even though it contains international elements discussed in scenario one. Nevertheless, it cannot be considered domestic, if the tribunal conducts the hearings and issues (signs) the award outside of the UAE, even though the other factors to which the parties agree are linked to the UAE, such as the domicile of the parties, the place of conducting business, the governing law and the legal seat of arbitration as discussed in scenarios two and three.

In light of these scenarios, some notable judgments issued by the UAE national courts, which provide further insight on such procedural irregularities, are explored further in the following part.

**(iv) Recent Case by Dubai Court of Cassation<sup>213</sup>:**

**(a) Summary of the Case:**

The claimant was a foreign entity with a branch based in the UAE, and the respondent was a UAE company. The dispute between the parties arose in connection with outstanding payments relating to the services that the claimant provided to the respondent. The agreement between the parties contained an arbitration clause that provided for disputes to be resolved by a sole arbitrator under the London Court of International Arbitration (LCIA) Rules and that the seat of arbitration was to be

---

<sup>213</sup> Dubai Court of Cassation Commercial Appeal No. 640/2013 dated 08/07/2014.

Dubai. The claimant obtained an award in its favor, which was rendered in London, although the seat of arbitration was Dubai. The claimant commenced the proceedings before the Dubai Court of First Instance seeking to ratify<sup>214</sup> the award.

The Dubai Court of First Instance in this case<sup>215</sup> applied the provisions of the UAE CPL, particularly Articles 203, 204, 212(5) and 213, and decided to dismiss the case based on the ground that the agreement which contained the arbitration clause was devoid of the respondent's signature, and, since the arbitration award relied on this agreement, the award was void. Accordingly, the case was dismissed.

The claimant appealed the decision of the First Instance Court to the Dubai Court of Appeal.<sup>216</sup> However, the Court of Appeal rejected the case and reconfirmed the First Instance Court's judgment by holding that Articles 212(4), 213(3), and 215(1) of the UAE CPL together set forth that the ratification process of arbitration award is required for domestic awards only, and, as the arbitration in question was conducted through the LCIA in London, the award was a foreign arbitral award. Consequently, the ratification application was not within the jurisdiction of the Court, which therefore dismissed the appeal.

**(b) Dubai Court of Cassation:**

The claimant thus filed this appeal<sup>217</sup> before the Court of Cassation, which upheld the judgment of the Court of Appeal and stated as follows:

*...the courts may only confirm arbitral awards issued in the State, and their jurisdiction does not extend to the confirmation of foreign arbitral awards, irrespective of whether or not the award can be confirmed in the country of issue.*

The Court of Cassation relied on Articles 235 and 236 of the UAE CPL and held:

*Articles 235 and 236 of the Law (under Book III, Chapter I, Section IV dealing with enforcement), which allow the enforcement of judgments, orders, and arbitral awards issued in a foreign jurisdiction under the terms set forth in those articles as their provisions are strictly concerned with the enforcement of such awards and do not deal with their*

---

<sup>214</sup> Supra note 16.

<sup>215</sup> Dubai Court of First Instance Commercial Case no. 192/2012 dated 26/03/2013.

<sup>216</sup> Dubai Court of Appeal Commercial Appeal no. 596/2013 dated 23/10/2013.

<sup>217</sup> Supra note 213.

*confirmation. Nothing in those provisions suggests that the UAE courts have jurisdiction to confirm or set aside such awards.*

The Court of Cassation considered the award a foreign award for the sole reason that it was issued under the LCIA Rules in London, notwithstanding the fact that the seat of arbitration, the governing law and the performance obligation of the agreement was in Dubai. The Court in its recitals stated:

*The award to be confirmed is an LCIA award issued in Case No. 101769 under its seal and bears the signature of Remy Gerbay, Deputy Registrar of the LCIA. As such, the award is a foreign award, which the Dubai Courts have no jurisdiction to confirm. The Court of Appeal reached this conclusion and upheld the Court of First Instance's dismissal of the action to confirm the award. The Court of Appeal did not err in law, and the exception taken to its decision is baseless.*

This explanation of the Dubai Cassation Court is not acceptable and is clearly not in line with the international concept of the seat of arbitration.

This judgment contradicts another decision in which the Court of Cassation explicitly differentiated between the seat and the venue of the arbitration and granted recognition of that foreign arbitral award. In this case<sup>218</sup>, the dispute arose out of and in connection with a distribution agreement concluded between the claimant (German Company) and the respondent (UAE Company). The agreement provided for arbitration under the ICC Rules, and the seat of arbitration was Germany. The claimant filed a claim before the Dubai Court of First Instance seeking recognition of the foreign arbitral award rendered. The Court of First Instance confirmed and recognized the arbitral award. The respondent subsequently appealed to the Dubai Court of Appeal, which upheld the decision of the Court of First Instance. The respondent challenged the Appeal Court's decision before the Dubai Court of Cassation, which recognized the award. The Court of Cassation clearly set out the difference between "venue" and the "seat of arbitration". In conformity with modern standards, the Court of Cassation held that convening the hearing in Paris did not change the legal seat of arbitration, which remained Germany<sup>219</sup>.

A close examination of these three scenarios respectively and the findings of the above Court of Cassation<sup>220</sup> judgment firmly supports the argument that the lack of a separate arbitration law in the UAE to differentiate between domestic and international awards on one hand and the inadequacy

---

<sup>218</sup> Dubai Court of Cassation Commercial Case No 434/ 2013 dated 23 November 2014.

<sup>219</sup> Hassan Arab and Dalal Al Houti, "Dubai Issues Judgment in Support of International Arbitration" published in Kluwer Arbitration on 13 April 2015.

<sup>220</sup> Supra note 213.

of the current UAE CPL to determine the international nature of an arbitral award has led to errant applications of law and has subsequently impacted the enforcement of arbitral awards in the UAE.

### **2.7.2 Mandatory Rules in International Arbitration:**

The role of mandatory rules in international arbitration remains a persistent source of debate. The basic problem is straightforward. Contractual arbitration arises as a matter of the consent of the parties, but the resolution of contractual disputes can implicate mandatory rules of law that are not waivable by the parties<sup>221</sup>. The domestic legal systems might prohibit arbitration of mandatory rules entirely, or alternatively they will require the courts to exercise strong scrutiny of the awards in relation to the merits of mandatory rule determinations at the enforcement stage. The national courts retain the ability to guard the application of their own mandatory rules to ensure that an arbitral tribunal will not produce an enforceable award that violates the state's public policy<sup>222</sup>.

One of the major challenges associated with the lack of the concept of international arbitration in the UAE, which consequently affects the enforcement of arbitral awards, is whether an arbitrator must comply with the mandatory rules of the seat, such as the UAE CPL or the Law of Evidence in Civil and Commercial Transactions<sup>223</sup>. For instance, witness testimony in arbitration proceedings under Article 211 of the UAE CPL must be taken under oath. Article 211 states: "The arbitrators must administer the oath to the witnesses, and any person who gives false testimony before the arbitrators shall be considered to have committed perjury".

In *International Bechtel Co Ltd v. Dubai Civil Aviation of the Government of Dubai (Bechtel case)*<sup>224</sup>, the Dubai Court of Cassation refused to enforce an international arbitral award issued in favor of the claimant on the ground that the arbitrator had failed to swear witness in the proceedings as prescribed by UAE law for the court proceedings. The inconsistency in the current laws governing arbitration proceedings has developed complex issues, which led the Dubai court of cassation to set aside an international arbitral award on the ground that the arbitrator failed to comply with the procedural rules of the seat, i.e witnesses to swear an oath.

---

<sup>221</sup> Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB . INT L 274 (1986).

<sup>222</sup> *Supra* note 221.

<sup>223</sup> *Supra* note 91.

<sup>224</sup> *Supra* note 11. The same result was reaffirmed by the Dubai Court of Cassation in Case No 322/2004 dated 11 April 2004.

### 2.7.2.1 The Ruling of the Dubai Court of Cassation in the *Bechtel Case*<sup>225</sup>:

#### (a) Summary of the Case:

Bechtel entered into an agreement with the Department of Civil Aviation of the Government of Dubai (DCA) to design and construct a theme park and adjacent commercial and residential space. The parties began arbitration to resolve a dispute in which Bechtel alleged failure to pay, and DCA counterclaimed that Bechtel had breached its contractual obligations. The arbitrator awarded approximately \$24.4 million in damages to Bechtel and dismissed DCA's counterclaims. When DCA failed to satisfy the award, Bechtel filed a petition in the Dubai Court of First Instance to ratify and enforce the award. The Court of First Instance ruled that the award was invalid, because the witnesses in the arbitration had not taken oaths in the form prescribed by UAE law. Bechtel appealed to the Dubai Court of Appeal, which court affirmed the lower court's judgment. Bechtel then appealed to the Dubai Court of Cassation, which decided to set aside the award on the ground that the arbitrator failed to swear witnesses in the arbitration proceedings as prescribed by UAE law.<sup>226</sup>

#### (b) Dubai Court of Cassation Judgement:

Article 41(2) of the UAE Evidence Law, which determined the form of the oath to be taken by a witness, states: "I swear by the Almighty to tell the truth and nothing but the truth". Bechtel pleaded before the Court of First Instance that the DCA had waived its objection to the form of the oaths by failing to object on that ground during the arbitration or by agreeing in advance that the arbitration award would be final and binding and that there would be no appeal to any court. But the court rejected this argument:

*The party who is originally required to comply with the procedures stipulated under the law, is the arbitrator, not the litigants. Administering the oath on witnesses is an imperative requirement under Article 211 of the Civil Procedures Law, which the arbitrator should comply with even if the litigants have agreed otherwise<sup>227</sup>.*

The *Bechtel* case involved the application of the UNCITRAL Model Law and the Dubai Chamber of Commerce Arbitration Rules.

<sup>225</sup> Supra note 11.

<sup>226</sup> Cameron L Schroeder, *International Bechtel Company, Ltd v Department of Civil Aviation of the Government of Dubai*, United States District Court for the District of Columbia, 03-0277, 5 February 2004, published in *Kluwer Arbitration*.

<sup>227</sup> Supra note 11.

*The Dubai Cassation Court held in this case that, in situations where the parties agree to apply the UNICITRAL rules, those rules should be applied to the extent to which they are not in conflict with the mandatory provisions application to local arbitration proceedings. The court held that in this case the arbitrator's failure to ask the witnesses to take an oath was an infringement of the mandatory provisions of Article 211 of the Code of Civil Procedure. The arbitration proceedings were accordingly regarded as void<sup>228</sup>.*

The Dubai Court's invalidation of the arbitral award solely on the ground that witness oaths were not properly administered, where neither party objected to the form of the oaths when given, is an instance of a case in which the appellate court applied the domestic mandatory provisions of law over a technicality in international arbitration.

#### **2.7.2.2 *Bechtel* Case Analysis:**

While examining the role of evidence taking in arbitration proceedings, the *Bechtel* case contains several international elements, even though the governing law was the law of the UAE, and the seat of arbitration was Dubai. The parties to the dispute belonged to different nationalities, as Bechtel is a foreign entity that provided services outside of the UAE's border. For instance, although the agreement between the parties was to design and construct a theme park in Dubai, the project involved bringing equipment from outside of the UAE. In return, the contract amount was supposed to be transferred from the UAE to Bechtel's bank account outside of the UAE.

Undoubtedly, this involves the "interest of international trade"; hence, an economic factor, which is an integral of the concept of international arbitration, was present in this case. It is contrary to the internationally accepted standards to consider it a domestic arbitration and thereby to apply the domestic procedural mandatory rules in this dispute. The *Bechtel* case presents several issues, such as how the relevant rules and procedures were interpreted and applied by the courts. Detailed analysis of judgments issued by the Dubai courts are required to reach a thorough understanding of these issues and how the lack of the international arbitration concept affects the enforcement of arbitral awards in the UAE. Some of the major issues are noted below:

- (a) Does Article 211 of CPL constitute a mandatory rule while conducting an international arbitration when the UAE is the seat? Does it lead to the invalidation of the arbitral award if the

---

<sup>228</sup> Dr Omar Eltom, *The Emirates Law in Practice*, p 386.

arbitrator fails to follow oath taking proceedings while examining witness as prescribed by law or other procedures mandated by local law?

- (b) Are the rules and procedures of evidence taking contained in the UAE evidence law solely applicable to the court proceedings or are they equally relevant to arbitration proceedings?

As discussed in part one of this chapter and part 3.4.2 of chapter three of this study, the aforesaid article is applicable solely to domestic arbitrations. A combined analysis of articles succeeding Article 211 of the UAE CPL (i.e., Articles 212-217 of the UAE CPL) reveals that these articles regulate the procedures in connection with ratification and nullification of domestic awards based on the grounds determined in Article 216 of the UAE CPL.

Article 211 of the UAE CPL is silent regarding the consequences of the failure of an arbitrator to administer the oath before taking witness testimony. A literal interpretation of this article provides that a person shall be guilty of the offence of perjury if he/she gives false testimony. At this stage, the question for consideration is whether a failure to abide by the above provisions leads to invalidating an arbitral award or whether it relates only to false testimony that renders the offender criminally liable for the offense of perjury.

Similarly, if the parties agree to adopt particular rules for determining the evidence in arbitration proceedings, such as the IBA Rules on Taking Evidence in International Arbitration<sup>229</sup>, that do not include any provisions that require that witnesses testify under oath, what will be the outcome if they do not? What if a witness refuses to submit his or her statement or testimony under oath? The Court's approach in invalidating an award on this basis, i.e the arbitrator failed to administer the oath before taking witness testimony, is against the party autonomy, especially when it concerns international arbitration, which should be free of any procedural burdens.

On the other hand, if Article 211 of the UAE CPL can be applied to both domestic and international arbitrations, the provisions of Articles 212(1) and 212(2) of the UAE CPL seem to contradict Article 211 with regard to the application of the procedural rule.

---

<sup>229</sup>Adopted by a resolution of the International Bar Association (IBA) Council 29 May 2010 International Bar Association.



Article 211 of the Civil Procedure Law states: "The arbitrators must administer the oath to the witnesses, and any person who gives false testimony before the arbitrators shall be considered to have committed perjury". Articles 212(1) and 212(2) state:

*1. The arbitrator shall issue his award without being bound by the procedural rules save as is provided for in this chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow.*

*2. The award of the arbitrator shall follow the rules of law unless he is authorized to effect a compromise, in which event he shall not be bound by such rules save in so far as they relate to public order.*

These articles demonstrate that administering the oath to the witnesses is a mandatory procedure, but the articles are silent about any possible consequences for the failure to comply with Article 211, such as whether such a failure must result in invalidating the arbitration award or in a criminal penalty for the offense of perjury. By way of contradiction, Article 212(1) states that the arbitrator shall issue his award without being bound by the procedural rules, and it permits parties to choose the particular procedure for their arbitration, provided that such agreement does not breach public order.

If the parties have agreed to conduct their arbitration under international rules, such as the ICC Rules or the IBA Rules on taking Evidence in International Arbitration, these rules do not mandate administering the oath during witness examinations. Party autonomy is vital in arbitration proceedings, and the parties in arbitration are free to nominate arbitrators who have expertise in the subject matter of the dispute and to choose the language and the seat for arbitration. The arbitration proceedings are also flexible, and parties may agree on various terms including the governing law. Thus, if an international award is denied enforcement due to the failure to administer the oath while taking witness testimony, and if such an instance is considered part of the public order, then there is a high risk that international awards may will not be enforceable in the UAE due to the broad meaning of the words in Article 212(2) that the arbitrator "shall not be bound by such rules save in so far as they relate to public order".

There are several bases for the Cassation Court judgment in *Bechtel*. That judgment cannot be considered an errant application of UAE law for the following reasons:

- (i) The UAE national court correctly applied the domestic law to this case as the seat of arbitration, and the governing law involved was UAE law.
- (ii) The current arbitral provisions contained in the UAE CPL fail to determine whether an award is international and only determine an award to be domestic or foreign award based on the geographical factors. Hence, the UAE national court in this matter applied the UAE law, including its mandatory rules, such as administering the oath before examining witnesses as prescribed in Article 211 of the UAE CPL and Article 41(2) of the UAE Evidence Law, which determine the form of the oath to be taken by a witness.
- (iii) Furthermore, Article I(l) of the New York Convention provides that “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.....  
...it shall also apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought”. In this context, the critical issue is that the UAE legislators failed to define the international nature of awards and made distinction only between domestic and foreign awards. Consequently the Dubai court in *Bechtel* case considered the award as domestic, notwithstanding the fact that the award had international elements, and applied the domestic procedural laws.

If viewed in the above perspective, the judgment issued by the Dubai Cassation Court in *Bechtel* constitutes the UAE Court's adherence to its procedural laws pursuant to the exercise of UAE's discretion permitted under the New York Convention. However, this decision was issued in 2004, before the UAE's accession to the New York Convention.

If the parties in the *Bechtel case* had agreed to rely on a separate rule for taking evidence, such as the IBA Rules for Taking Evidence, the ICC Rules or the LCIA Rules, which do not provide for administering the oath before examining witnesses, the UAE national courts would most likely still adopt the same position and refuse to enforce the award by applying the UAE's procedural laws as a violation of the mandatory rules of the domestic law and against the public order of the legal system.

Nonetheless, if *Bechtel* is viewed from an international perspective or from the standpoint of legal scholars in the field of international arbitration, the approach adopted by the UAE national courts was flawed by several defects. It is mainly due to the lack of the culture of international arbitration that the UAE national courts adopted a strict application of its domestic procedural laws to an international dispute. *Bechtel* judgment also points out to errors on the UAE courts' interpretation as well as the application of law as explained above.

## **2.8 Conclusion**

The UAE has made great progress towards its goal of becoming the center for dispute resolution in the Middle East by establishing specialized courts with internationally accepted standards and by enacting several laws and regulations. For instance, the DIFC Courts established in 2006 have a common law system and jurisdiction to govern civil and commercial disputes nationally, regionally and worldwide. Similarly, the ADGMC was established in 2015 in the ADGM, the international financial centre in Abu Dhabi, to oversee the jurisdiction of the ADGM. The ADGMC is also based on the common law framework to adjudicate civil and commercial disputes. The foundation of the civil and commercial law in the ADGM is provided by the Application of English Law Regulations 2015, as the result of which the UAE attracted more investors, and Dubai has become a hub of business in the MENA region.

Nevertheless, parties face several issues when they seek to enforce foreign and international arbitral awards in the UAE. In this context, the important question is whether UAE courts will continue their inconsistent treatment of the enforcement of foreign arbitral awards. The main reason behind the current instability in the decisions of the UAE national courts is due to the lack of having a separate law of international standards to deal with arbitration in general and particularly with the issue of enforcement.

The new law on arbitration should contain necessary provisions that govern the enforcement of domestic arbitral awards and the recognition of foreign arbitral awards separately. Such measures will aid the UAE national courts in applying the correct provision of law towards the recognition of foreign and international arbitral awards and thereby prevent the current obstacle of the misapplication of law when dealing with domestic and foreign and international arbitral awards.

Another notable challenge is in relation to the lack of the concept of international arbitration in the UAE, which has resulted in some adverse court judgments being issued by the UAE national courts and has adversely impacted the enforcement of arbitral awards. Examination of some possible scenarios discussed in part of 2.7.1.1 of this chapter together with the analysis of relevant case laws decided by the UAE courts clearly illustrates this point.

Yet another notable challenge is connected to the lengthy and complex proceedings before the UAE national courts when efforts are made to recognise and enforce arbitral awards. The impact of such lengthy and unpredictable court procedures has created a major barrier to the enforcement of arbitral awards, which is discussed in chapter three of this study.

Major obstacles to arbitration in the UAE are undoubtedly linked to the absence of the concept of “international arbitration”, in terms of defining the nature of arbitration and as applied by the UAE national courts. International arbitration has different rules than domestic arbitration. The need to enact a modern law that will determine the international nature of arbitration is inevitable for the UAE to become a preferred venue for conducting arbitration by parties worldwide. The new law should contain provisions to differentiate between domestic, foreign and international arbitrations. Additionally, in cases where the UAE court finds nexus to international arbitration it must ignore its parochial approach, as seen in Bechtel case, and be inclined to apply the international practice. To clarify, *Westacres Investments Inc v Jugoimport SDPR Holding Co & Others*<sup>230</sup>, is an important case in England and Wales regarding the effect of the illegality of the enforcement of foreign awards<sup>231</sup>. In this case, the Court of Appeal enforced the foreign award although the award was based on a contract for the purchase of the personal influence, which was contrary to English public policy as well as illegal in the place of performance. In this case the court reasoned that the tribunal had considered the issue of illegality and held that the contract was not illegal under the applicable law or the law of the seat of arbitration (in both cases Swiss law) and enforced the award.<sup>232</sup> The English enforcing court expressed confidence in the ability of the property constituted arbitral tribunal which had rendered a foreign award to assess the evidence regarding the alleged

---

<sup>230</sup> [1998] 4 ALL ER570

<sup>231</sup> Peter Ashford, Handbook on International Commercial Arbitration (Second Edition), Jurisnet LLC (2014), p 189.

<sup>232</sup> Supra note 231.

illegality.<sup>233</sup> Such an approach towards foreign and international awards is important for the UAE to overcome the current legal obstacles on the enforcement regime.

As far as the elements for determining the international arbitral award are concerned, one of the important questions is whether the UAE legislators must consider the concepts followed by France, Switzerland, the United States, Egypt and Lebanon for distinguishing between domestic and international arbitrations. If so, which of the factors discussed in this chapter i.e economic factor, legal factors or a combination these factors, is suitable to resolve the issue of the “international arbitration” concept in the UAE?

Lastly, if any of the above factors are adopted by the UAE legislators, can it serve to provide a better solution to the enforcement of foreign/international arbitral awards? The concept of the international award in the above mentioned countries should be examined not to narrow the scope of this research or to limit the options but because of the several common factors between these countries and the UAE. For instance, the majority of them follow the same legal system i.e civil law jurisdiction (apart from the United States). Additionally, the UAE laws and regulations are broadly derived from Egyptian law, which is in turn influenced by French law. Therefore, exploring the practice in these countries will remarkably assist in drafting a modern arbitration law that will be in line with the best international practices.

In this context, it is not recommendable to follow similar methodologies that are employed in other jurisdictions, such as in France or Egypt, as every system has their own advantages and disadvantages. For example, although Egypt has adopted a broad definition for determining the nature of an international arbitral award, Egypt has been criticized for taking a dual approach as explained previously, which misled the national courts of Egypt to distinguish explicitly between domestic and international arbitration. In addition, the UNCITRAL Model Law attempts to have a broad scope of application and provides an expansive definition for the term “international”, which is a combination of the legal and economic factors (the nature of the dispute and the nationality of the parties) plus a reference to the chosen place of arbitration. Consequently, if the UAE attempts to adopt the UNCITRAL Model Law for defining international awards, this will likely lead the UAE

---

<sup>233</sup> A. J. van den Berg, *International Commercial Arbitration: Important Contemporary Questions*, Kluwer Law International (2003), p 221.

national courts to be in a situation similar to the Egyptian Courts, which are often misled from correctly applying the elements in determining the international nature of arbitral awards.

Therefore, the application of the legal, economic or dual factors has its own implications on any legal order. However, the economic factor is comparatively less ambiguous, as it relates only to the interest of international trade while determining international arbitral awards. For this reason, to some extent, the application of the economic factor seems to be suitable for the UAE jurisdiction. Nevertheless, the effective application of any criterion will largely depend on how the judiciary of each legal system applies these factors to cases.

In practice, for an accurate determination of the nature of an award, there must be specialized courts, and judges should be familiar with the international concepts and must have experience in handling commercial arbitration.

To conclude, the UAE Government must expedite the process of enacting a new law that complies with the best arbitration practices, which will promote the perception of the UAE as a desired venue in which to engage in arbitration.

Chapter Three  
**INCORRECT APPLICATION OF DOMESTIC ARBITRATION PROVISIONS TO  
 THE ENFORCEMENT OF FOREIGN AWARDS CAUSES LENGTHY COURT  
 PROCEDURES BEFORE NATIONAL COURTS OF THE UAE**

### 3.1 Introduction

*To expect Court enforcement of arbitration agreements and awards without any encroachments of national legal particulars would be a logical impossibility, like both having and eating the proverbial cake.<sup>1</sup>*

An integral aspect of arbitration is an arbitral award and its enforceability is a radical axis of the arbitration system. An award will have no legal or practical value and will remain as mere written phrases, if it is unable to be enforced. Therefore, it is not farfetched to argue that the effectiveness of arbitration as a dispute resolution mechanism can be determined to the extent to which an arbitral award can be enforced<sup>2</sup>. A key argument to this research is the argument that the lack of a proper enforcement mechanism for the arbitration awards in some countries raises many problems and has adversely effected international arbitration<sup>3</sup>.

Current international commercial arbitration cannot function without the assistance of the national courts. The manner in which the national courts interprets and applies the New York Convention is the main source of its effectiveness<sup>4</sup>. An award creditor may approach national courts of various contracting states of the New York Convention to seek enforcement of foreign award. However, if one examines the recognition and enforcement process of foreign awards from the perspective of various Contracting States, one can find that there are several problems associated with the enforcement process. There is a lack of uniform laws to enforce arbitral awards in different jurisdictions and absence of the concept of “supranational awards”, the concern of not enforcing arbitral awards internationally will remain as a major barrier to improve the arbitration system<sup>5</sup>.

In the UAE, arbitration is increasingly becoming the favorable method of Alternative Dispute Resolution (ADR) for solving both international and domestic disputes<sup>6</sup>. For instance, in 2003, the

---

<sup>1</sup>William W Park, "National Law and Commercial Justice," 63 Tulane L. Rev. 647 (1989); reprinted as "Judicial Controls in the Arbitration Process", 5 Arb. Int'l 230(1989) P251.

<sup>2</sup> Dr Essam El Deen Al Qasabi, Head of International Private Law School - Al Mansoor University- Egypt, "International Enforcement of the Arbitration Award", published by Dar Al Nahda Al Arabia (1998), p 64.

<sup>3</sup> Supra note 2, p 64

<sup>4</sup> A.J Van Den Berg, The New York Arbitration Convention of 1958 (1981), available online (last viewed in September 2016)

<sup>5</sup> Supra note 2 pp 64-65

<sup>6</sup> Mark Beswetherick and Keith Hutchison, "Enforcement of Arbitral Awards Moving in the right Direction", (2012) available online (last viewed in October 2016).

Dubai International Arbitration Centre (DIAC) registered 15 cases. This figure reached 100 in 2008, and by 2010, the DIAC registered 431 new disputes seated in Dubai, which includes international disputes in addition to domestic disputes.

Statistics now illustrates that more than 500 arbitrations<sup>7</sup> take place per year in the three main arbitration centers in the UAE. Therefore, it is of great importance to both the UAE and specifically Dubai, as a commercial hub in the region to guarantee smooth recognition and enforcement proceedings in the enforcement and execution of arbitral awards.<sup>8</sup>

Table<sup>9</sup> Two below illustrates the development of new cases registered per year for international arbitration centers in Paris, Switzerland, France, Singapore and UAE etc.

<b>Arbitration Institutions</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>
International Chamber of Commerce	759	767	791	801
German Institution of Arbitration	121	121	132	134
Stockholm Chamber of Commerce	177	203	183	181
Vienna International Arbitration Center	70	56	56	40
Swiss Chamber's Arbitration Institution	92	68	105	100
London Court of International Arbitration	277	301	296	326
International Centre for Dispute Resolution	996	1165	1052	1063
Singapore International Arbitration Centre	235	259	222	271
China International Economic and Trade Arbitration Commission	1060	1256	1610	1968
Hong Kong International Arbitration Centre	293	260	252	271
International Centre for Settlement of Investment Disputes	50	40	38	52
Dubai International Arbitration Center (DIAC)	379	310	151 <sup>10</sup>	-
<b>Total</b>	<b>4130</b>	<b>4496</b>	<b>4737</b>	<b>5207</b>

### 3.2 Scope and Structure of this Chapter:

This Chapter consists of the following:

- (i) Part one examines the relevant articles contemplated under the UAE CPL and the current procedures concerning the enforcement of foreign arbitral awards in the UAE. The main objective of examining the relevant articles of the UAE CPL<sup>11</sup> that governs recognition and enforcement of foreign arbitral awards is to discern whether the underlying articles namely

<sup>7</sup> Mark Bezzant, James Nicholson and Howard Rosen, FTI Consulting, "Trends in International Arbitration in the New World", published in Global Arbitration Review (overview), 2015 available online on [www.ftijournal.com](http://www.ftijournal.com)

<sup>8</sup> Alec Emmerson, Sapna Jhangiani and Keith Hutchison, "Developments in enforcement of awards", International Bar Association (IBA) Arbitration Committee Newsletter, Volume 2, September 2011, p 123 available online on (last viewed on September 2016).

<sup>9</sup> Dr. Markus Altenkirch and Jan Frohloff, Global Arbitration Cases Still Rise - Arbitral Institutions' Caseload Statistics for 2015, available online (last viewed on September 2016).

<sup>10</sup> This is the number of cases registered until 31 October 2014. This includes international disputes in addition to domestic arbitration.

<sup>11</sup> Articles 235, 236, 237 and 238 of the UAE CPL.



Articles 235 and 236 of the UAE CPL constitute problems against such enforcement and whether such articles should consequently be repealed. In addition, the author will closely evaluate the conflicts in the interpretations of the higher courts in the UAE with respect to the rules applicable for the recognition and enforcement of foreign arbitral awards by examining some case laws by the national courts in the UAE.

- (ii) Part two evaluates critically the impediments in relation to the recognition and enforcement process in the UAE and compares it with the practice in pro-arbitration jurisdictions such as France, and Switzerland. It also includes a close analysis of the recognition and enforcement process followed in Egypt in order to examine whether the Egyptian Arbitration Act (1994) has contributed to the recognition and enforcement of foreign arbitral award. The study of the above jurisdictions will shed light on how to approach the reforms of the UAE law.
- (iii) Part three includes the researcher's recommendations arising out of the research and which, if followed, should improve the current procedures available for the recognition and enforcement of foreign arbitral awards in the UAE. Such practical measures should safeguard creditors of foreign arbitral awards from having to submit to lengthy court procedures before UAE courts.

## PART ONE

### 3.3 Consequences of the Lack of the Concept of International Arbitration from UAE

#### Perspective:

As noted in chapter two of this study, there is a major impact on the enforcement of foreign and international arbitral awards in the UAE, due to the absence of the concept of international arbitration in the current arbitration legislation contained in the UAE CPL. The national courts in other arbitration friendly jurisdictions follow a more favorable procedural approach to recognition and enforcement of foreign arbitral awards, as opposed to domestic ones<sup>12</sup>. But the UAE courts follow a rather lengthy enforcement procedure due to the lack of the concept of international arbitration.

As noted in part two section 2.7 of chapter two of this thesis, the UAE legislator relies on geographic criterion as the basis to distinguish between domestic and foreign arbitration to determine the nature of arbitral award. To elaborate, the UAE legislator considers an arbitral award as domestic arbitration if arbitration has taken place and signed in the UAE regardless of the parties' agreement to submit the dispute to another foreign law or nationalities of the parties and/or connection of the dispute with any other States. Additionally, the UAE legislator considers any arbitration taking place outside the UAE as foreign arbitration even when all the elements are closely connected to the UAE for example when the parties to a dispute are UAE nationals and the dispute is relating to a transaction that was concluded in the UAE. This shall remain the same even if the applicable law is the UAE law and the award was issued outside the UAE.

The absence of the concept and application of international arbitration has further resulted in an increasing confusion between the concept of the seat of arbitration and the place where the arbitration hearings take place as detailed in chapter two of this study<sup>13</sup>. By restricting their selves to the geographical criterion in determining whether an arbitration award is national or foreign and owing to the absence of the concept of international arbitration, the UAE national courts are accustomed to applying the rules of law promulgated for domestic arbitrations to foreign arbitrations. This is particularly so in relation to the mandatory rules which are set forth in the UAE

---

<sup>12</sup> Part two of this study explains the procedural approach adopted by other leading arbitration friendly jurisdictions.

<sup>13</sup> Part two section 2.7.1 of Chapter two of this thesis details about how the UAE national courts interprets the seat and venue of arbitration and apply law.

CPL such as Article 41(2) of the UAE Law of Evidence no. 10 of 1992 (as amended) mandating that witnesses be sworn the oath in the form prescribed for court hearings<sup>14</sup>. This is particularly in relation to the mandatory rules set forth in the UAE CPL dealing with domestic arbitrations such as Article 41(2) of the UAE Law of Evidence no. 10 of 1992 (as amended) mandating that witnesses be sworn the oath in the form prescribed for court hearings. The absence of the concept of international arbitration has led the national courts to categorize all international awards issued and heard in the UAE as domestic arbitrations that make them subject to the same rules stipulated for domestic arbitrations. This aspect is clearly manifested in the *Bechtel case* which is discussed in the second chapter of this study. In contrast, most of the internationally accepted best practice arbitration jurisdictions has developed separate legislations to deal with arbitration and has enacted more specific and flexible rules for foreign and international arbitrations compared to the rules applicable to domestic arbitrations<sup>15</sup>. These rules particularly deal with the fees and execution proceedings for recognition and enforcement of awards as well as the competent court that has the jurisdiction to deal with this issue.

In the current chapter, the researcher will examine an important procedural issue that constitutes a material obstacle, which hurdles the evolution of arbitration in the UAE. This procedural issue in the UAE is a direct consequence of not having a definitive concept for international arbitration. To clarify, in order to enforce an arbitral award in the UAE, a successful party must initiate a claim following the same procedures stipulated for issuing a fresh litigation claim before the court and must follow the same hierarchy of three tier of proceedings namely (First Instance, Court of Appeal and Court of Cassation).

To explain further for a party to ratify an arbitral award issued in the UAE (domestic award), the UAE legislator requires such party to initiate a claim at the court originally competent to hear the dispute in order for the court to ensure that the award conforms with the procedural requirements of Article 215 of the UAE CPL<sup>16</sup>.

---

<sup>14</sup> In chapter two, part one section 2.7.2.1 and 2.7.2.2 of this study discusses about the judgment issued by the Dubai Court of Cassation in *Bechtel case* where the court refused to enforce a foreign arbitral award since the arbitrator failed to follow the mandatory provision required under the UAE CPL.

<sup>15</sup> Arbitration legislations of internationally best-accepted arbitration jurisdictions will be discussed further in part two section 3.5 of Chapter three of this study.

<sup>16</sup> Article 215(1) of the UAE CPL reads "an award of the arbitrators shall not be enforced unless it is ratified by the court with whose clerk the award has been deposited, [such ratification to be made] after perusal of the award and the arbitration instrument and an ascertainment that there is no obstacle to enforcement thereof and the court shall have jurisdiction to

A judgment granting ratification issued from the Court of First Instance is subject to a two tier appeal system (Court of Appeal and Court of Cassation). In addition, the award debtor may in accordance with the UAE CPL, initiate a counterclaim to seeking annulment of the award. The court decision in a claim for annulment is subject to the same appeal system applicable for ratification. In this regard, paragraph 217 (2) of the UAE CPL states that “a judgment passed ratifying or annulling the award of an arbitrator may be appealed against by the appropriate avenues of appeal<sup>17</sup>.”

In fact, the UAE legislator promulgated specific rules to deal with the subject of the enforcement of foreign judgments, orders and awards i.e. Articles 235 and 236 of the UAE CPL, which regulates the recognition, and enforcement of foreign awards in the UAE. The UAE legislators, as per Article 235(2) of the UAE CPL required that for the recognition of a foreign judgment, order or award the award creditor/claimant must file a claim at the court of first instance where enforcement is sought in order for the court to scrutinize whether the award conforms with the required conditions. However, it is notable that the UAE legislators did not stipulate that a judgment issued by the court of first instance, in this regards, should be subject to the same appeal procedures applicable to that of the claims relating to the ratification of domestic arbitral awards. The direction of the UAE legislators in Article 235(2) of the UAE CPL is to submit the confirmation and enforcement procedures to one phase litigation, rather than two tier appeal proceedings before Court of Appeal and Cassation Court conforms as followed in the international best practices such as France<sup>18</sup>.

Notwithstanding the direction of the UAE legislators under the UAE CPL as noted above, due to the absence of the concept of international arbitration, the established practice followed by the UAE national courts is to apply the same procedures governing the ratification of the domestic arbitral awards to the recognition and enforcement process of foreign arbitral awards. As a result, the arbitral awards seeking recognition remains under the consideration of the court for more than three years and will be subject to complex and lengthy court proceedings until the successful party is able to enforce the award. It is clear that such negative practices strip the concept of arbitration from one of its prominent advantages which is the expedited proceedings. Consequently, a primary focus of this chapter is to investigate what is the actual benefit of obtaining a successful arbitral award if the

---

rectify any material errors in the award of the arbitrators on the application of the persons concerned by the same means laid down for the rectification of judgments.”

<sup>17</sup> Article 217(2) of the UAE CPL refers only to filing appeal against a decision of the First Instance Court to ratify or annul the award. It does not provide for any appeal provision in case for counterclaim filed by an award debtor.

<sup>18</sup> The position set out under the French law on the appeal procedures for foreign and international arbitral awards is examined in part two section 2.6.3.2 of chapter two of this study.

decision of the court recognizing the foreign award is subject to appeal at the Court of Appeals and finally before the Cassation Court.

### 3.4 Major Obstacles Facing the Enforcement of Arbitral Awards in the UAE

The New York Convention was successful in harmonizing key aspects relating to the validity of the arbitration agreement, and enforcement of foreign arbitral awards. However, it failed to prescribe a uniform procedure to be followed for recognition and enforcement of the arbitral award<sup>19</sup>. The Convention did not specify which court has the jurisdiction to issue the enforcement order nor specified the nature of such order, its res judicata effect or how to challenge it. The Convention left these issues relating to procedures for the national courts of the Contracting States where recognition and enforcement is sought<sup>20</sup>.

Although the Convention did not prescribe a uniform mechanism for the enforcement procedures of foreign arbitral awards, the Convention however granted the arbitrating parties' autonomy to choose a particular statute, that grants procedures less onerous than those contained in the Convention itself, under Article (VII-1).<sup>21</sup> This article allows for the application of any other international or multilateral conventions where they are more favourable to recognition<sup>22</sup>. The Convention on the Settlement of Investment Disputes between States and the Nationals of Other States is an example of such multilateral treaty, which provides for automatic recognition and enforcement of awards from the International Settlement of Investment Disputes<sup>23</sup>.

Therefore, the New York Convention seeks to facilitate the procedures for the recognition and enforcement of foreign arbitral awards. Upon acceding to the New York Convention, the provisions of the Convention become national legislation for the member states and it shall have priority of application over the national laws of these member states<sup>24</sup>. The convention is considered to have

<sup>19</sup> The New York Convention does not prescribe a uniform enforcement procedure and instead under Article III provides that, 'the rules of procedure of the territory where the award is relied upon'.

<sup>20</sup> Article III of the Convention states that, "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

<sup>21</sup> Article VII (1) of the Convention states that, "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by contracting states nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

<sup>22</sup> Matthias Schere, Sam Moss, Resisting Enforcement of a Foreign Arbitral Award under the New York Convention, published in the IPBA Journal (2008), available online (last accessed on September 2016).

<sup>23</sup> Supra note 22.

<sup>24</sup> The UAE acceded to New York Convention on 19<sup>th</sup> November 2006 and the Convention became a part of the UAE legislation by way of the Federal Decree No. 43 of 2006.

a pro-enforcement bias and sets out only a minimum standard for the recognition and enforcement of foreign awards<sup>25</sup>. Despite this many member states such as the UAE is not attempting to utilize the provisions of the Convention in a form that conforms with the aim of the Convention which is to eliminate obstacles facing enforcement of foreign arbitral awards. Since UAE's accession to the Convention in 2006, the UAE national courts has demonstrated some progress in terms of applying the Convention conditions in the recognition and enforcement of foreign arbitral awards. Chapter four of this study conducts detailed examination of cases where the UAE national courts positively affirmed foreign arbitral awards by applying the conditions of the Convention. However, the recognition procedures remain the same as prior to accession to the Convention i.e. lengthy and complex procedures which could take years until an award creditor is able to enforce an award<sup>26</sup>.

Although the UAE legislators has explicitly clarified in the UAE CPL in terms of Article 235(2) that enforcement application shall be filed with the competent court of first instance and did not specify whether such decision of the first instance court is subject to appeal. Nevertheless, in practice the UAE national courts deal with the foreign awards in the similar way as domestic arbitral awards where an enforcement order is subject to challenge before the Court of Appeal and the Cassation Court. This raises the question of whether such application of law is the result of a legislation crisis or a judicial misinterpretation of the law as which will be addressed in the following part.

#### **3.4.1 Recognition and Enforcement Procedures before the UAE National Courts**

At the outset, it is imperative to set out the difference between recognition and enforcement. Recognition is the judicial process that an arbitral award must undergo until the issuance of an exequatur/a writ of execution, whereas enforcement is the process following the issuance of the exequatur, which is the actual enforcement of the mandate of the award.<sup>27</sup> Ratification of an award is generally speaking a condition precedent for its enforcement and normally refers to domestic awards. It is a process of obtaining a writ of execution to enforce an arbitral award i.e. a signed and dated stamp affixed on the arbitration award confirming that such award may be enforced in the same manner as a local court judgment<sup>28</sup>.

---

<sup>25</sup> Supra note 22.

<sup>26</sup> Ian Clarke, Anna Gee, Charles Lilley and Polly Lockhart, United Arab Emirates, The European, Middle Eastern and African Arbitration Review 2016 available online (last accessed on October 2016).

<sup>27</sup> Report prepared by Yasuhei Taniguchi on "Enforcement in Action: Theoretical and Practical Problems," P 589. Published by ICCA Congress Series 1998.

<sup>28</sup> The term "ratification" is normally used to refer the process of obtaining a writ of execution for domestic arbitral awards and the term "recognition" refers to the process of obtaining a writ of execution for foreign arbitral awards. Please also

It is one of the fundamental principles in international arbitration that the interference by the courts in arbitral proceedings should be kept to a bare minimum. This is further illustrated in Article 5 of the UNCITRAL Model Law.<sup>29</sup> The interference by the court in principle is particularly relevant in the context of recognition and enforcement of foreign arbitral awards. It is generally accepted that a court may only refuse to enforce an award in certain limited circumstances as those stipulated in Article V of the New York Convention and that a court may not re-open the merits of the case<sup>30</sup>.

The New York Convention does not determine the rules of jurisdiction and procedure under which an award is recognized or enforced rather it indicates that the contracting states shall recognize arbitral awards as binding and enforce them in accordance with the rules of the procedures of the territory where the award is sought to be enforced<sup>31</sup>. One of the many aspects that a contracting party considers before entering into an arbitration agreement is the extent to which the court in the country of enforcement will interfere by examining an arbitral award or in the overall arbitration process or both.

According to some legal writers, "court scrutiny of arbitration's integrity promotes a more efficient arbitral process by enhancing fidelity of the parties' shared pre-contract expectations. In some instances, review also furthers the development of commercial norms to guide business managers in planning future transactions".<sup>32</sup> However, a closer examination of this statement calls for consideration of the scope within which the national courts can exercise review over foreign arbitral awards to ensure their finality and fairness, without imposing radical onerous conditions on enforcement of the awards. A more desirable approach as quoted by William Park will be "although no system will perfectly reconcile these rival goals of finality and fairness, a middle ground provides judicial review for the grosser forms of procedural injustice. To this end, legislators and courts must engage in a process of legal fine tuning that seeks a reasonable counterpoise between arbitral autonomy and judicial control mechanisms."<sup>33</sup>

---

refer to Section 3.4.3.2 of this Chapter which covers the Dubai Court of Cassation judgment 218/2004 dated 15/5/2005 which discuss this point further.

<sup>29</sup> Article 5 of the UNCITRAL Model Law on International Commercial Arbitration provides "In matters governed by this Law, no court shall intervene except where so provided in this Law."

<sup>30</sup> Samuel Sharp, *India reins in the courts: Bharat Aluminium v. Kaiser Aluminium Technical Services*, available online (last view on August 2016)

<sup>31</sup> Fouchard, Gaillard, *Goldman on International Commercial Arbitration*, edited by Emmanuel Gaillard and John Savage, published by Kluwer Law International (1999) pp125-131.

<sup>32</sup> William W. Park, "Why Courts Review Arbitral Awards," reprinted in 16 *Int'l Arb. Rep.* 27 (Nov. 2001) available online (last view in September 2016).

<sup>33</sup> *Supra* note 32

### 3.4.2 Enforcement Procedures in the UAE at a Glance

Most of the jurisdictions have an independent arbitration law to govern arbitration proceedings. For example, in Egypt the Law No 27 of 1994 on Arbitration in Civil and Commercial matters governs the arbitration framework. However, in the UAE, there is no separate law that governs the arbitration framework, but there are few provisions contained in the UAE CPL (Articles 203 to 218) that deal with the arbitration provisions. These articles specifically concern the appointment and disqualification of arbitrators, jurisdiction of arbitral tribunal, the arbitration procedure, validity of the arbitration award, procedures to ratify an arbitral award and the conditions to annul an arbitral award. In addition, Articles 235 and 236 of the UAE CPL deal with the execution of foreign judgments, awards and orders.<sup>34</sup>

The award debtor may challenge the award or request for its nullification based on a number of grounds set out under the UAE CPL, while an application for recognition and enforcement is being considered by the court. Articles 203 to 218 of the UAE CPL, which govern the arbitration proceedings, also provide the award debtor with the opportunity to challenge the award. This is also a contributing factor for the lengthy and complex court proceedings during the enforcement request of an award. In this regards, it may be noted that the UAE CPL does not adequately limit parties from challenging arbitral awards. Challenge proceedings before the UAE courts can take anywhere from several months to two or three years, depending on whether parties file an appeal against the decision to recognize or ratify an award to the Courts of Appeal and finally to the Cassation Court.<sup>35</sup>

Article 216 of the UAE CPL, in particular provides the circumstances under which an award shall be nullified. Although Article 216 do not explicitly provide that it is applicable to foreign awards, the UAE national courts, in some instances applies the provision of Article 216 to foreign awards. Subsequent to UAE's accession to the New York Convention, circumstances to invalidate an award contained in the UAE CPL should be made applicable only for domestic awards and foreign awards should be subject to the provisions and conditions set forth under the Convention<sup>36</sup>. The framework of the current arbitration provisions of the UAE are examined in further detail in part one section 2.4 of Chapter two of this study.

---

<sup>34</sup> Dr Hosni Abdul Wahid and Morqus Beshoy Kamal, *International Arbitration Journal*, (Issue 21) 2014 p 332.

<sup>35</sup>Supra note 8

<sup>36</sup> Abu Dhabi Court of Cassation Case No 679/2010 dated 6 June 2011



### 3.4.2.1 Provisions Related to the Ratification and Enforcement of Domestic awards in the UAE

Articles 203 - 218 of the UAE CPL regulate the framework of arbitration in the UAE, but majority of this provision points out that they are essentially intended to govern legal proceedings in relation to domestic arbitral awards. To elaborate, a combined analysis of Articles 212 - 217 of the UAE CPL reveals that these articles regulate the procedures in connection with ratification and nullification of awards based on the grounds determined in Article 216<sup>37</sup> of the UAE CPL.

In accordance with Article 212(4)<sup>38</sup> of the UAE CPL, the award must be issued in the UAE, otherwise it will be considered foreign and the rules applicable to judgments, orders and awards issued in a foreign country shall apply instead.<sup>39</sup> Pursuant to Article 215(1) of the UAE CPL, an award of the arbitrator shall not be enforced unless it is ratified by the court and the court shall consider the award and ascertainment that there are no legal obstacles to enforce the award<sup>40</sup>. The UAE CPL sets out under Article 217(2) that the decision of the UAE national courts' in relation to ratification of arbitral award and/or its annulment are amiable to appeal proceedings.<sup>41</sup>

As noted above, although Article 216 of the UAE CPL stipulates the conditions under which parties can challenge the validity of the arbitral award, these conditions apply to domestic awards. However, in several cases - which will be examined in the subsequent portions of this chapter - national courts applied the same factors to foreign awards though Article 212(4) of the UAE CPL making particular reference to different conditions for foreign awards before the UAE acceded to the New York Convention. But subsequent to the UAE's accession to the New York Convention, the courts continue to follow the same provisions as evidenced in a recent ruling<sup>42</sup> issued by the Dubai Court of First Instance. In the aforementioned case, the Court annulled a foreign arbitral

---

<sup>37</sup> Article 216(1) of the UAE CPL reads "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 conditions.

c - If a nullity in the decision or a nullity in the procedures which has affected the decision has occurred.

<sup>38</sup> Article 214 (2) of the UAE CPL reads, "The arbitrator's decision 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."

<sup>39</sup> Robert Karrar-Lewsley and Dalal Al Houti, "A checklist for what you need for an enforceable UAE Arbitral Award", published in *Al Tamimi Law Updated*, August 2015.

<sup>40</sup> Article 215(1) of the UAE CPL reads, "The arbitrators' decision shall not be executed unless the court in which clerk's office the decision was deposited has authenticated it, and 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 arbitrations".

<sup>41</sup> Article 217(2) states "As for the decision delivered for the authentication of the arbitrator's decision or by its nullity, it shall be possible to appeal against it by the appropriate appeal proceedings."

<sup>42</sup> Dubai Court of First Instance Case (Commercial) No 688/2014 dated 17 September 2014

award rendered under the ICC Rules and seated outside of the UAE, based on a counterclaim filed by the award debtor requesting to annul the award based on Article 216(a), (b) and (c). In this case, it is clearly evident that the First Instance Court misapplied the provisions of domestic arbitration of the UAE CPL to the recognition and enforcement of a foreign arbitral award.

In the researcher's view, Article 217(2) of the UAE CPL refers to the possibility of appeal against the ruling of the Court of First Instance in relation to ratifying or nullifying a domestic award, however this article shall not be applicable to foreign arbitral awards for the following reasons:

- (i) Article 212(4) expressly excluded foreign arbitral awards from being included in the provisions and rules applicable to the domestic arbitration, and therefore the appeal provisions referred in Article 217 are solely applicable to the ratification of domestic arbitral awards.
- (ii) Article 217(2) deals with the possibility of nullifying an arbitral award by the national courts. It is generally recognized based on the practice followed in international jurisdictions, that a foreign arbitral award cannot be nullified in the country where the enforcement is sought, but only the national court of the seat of arbitration has the jurisdiction to do so<sup>43</sup>. It is also the underlying premise of Article V(1)(e) of the New York Convention<sup>44</sup>. Accordingly, the US Court of Appeals for the Fifth Circuit, in one of the cases<sup>45</sup>, declined to accept that the award had been set aside by a competent authority of the country in which it was made (the award was made in Geneva, Switzerland but had been set aside by an Indonesian court). There are numerous other case laws from international perspective, which confirms this position <sup>46</sup>. Thus, in the researcher's view, Article 217 of the UAE CPL deals with the jurisdiction of the UAE national courts to ratify or nullify the domestic awards only and not foreign awards.

---

<sup>43</sup> Supra note 22

<sup>44</sup> Albert Jan van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished? Available online (last accessed in September 2016).

<sup>45</sup> Gulf Petro Trading Co Inc v Nigerian National Petroleum Corp. F3d, 2008 WL 62546 (US Court of Appeals for the 5<sup>th</sup> Circuit, 2008), Int Arb LR (2008), n 17, p17; Supra note 44.

<sup>46</sup> Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT Pln (Perseo), 364 F3d 274, 308-10 (5th Cir 2004). Similarly, the US Court of Appeals for the Third Circuit declined to accept that the award had been set aside by a competent authority of the country in which it was made, where the award was made in Singapore, but had been set aside by a Philippine court. Steel Corp of Philippines v Intl Steel Servs, Inc, 354 F Appx 689, 692-4 (3rd Cir 2009); Please refer to supra note 44 for further details.

- (iii) Article 235(2) deals with the process of issuing an execution order which is applicable to the enforcement of foreign judgment, orders and arbitral awards.

The erroneous application of the UAE Courts' of article 217(2) of the UAE CPL by failing to distinguish between domestic and foreign arbitral awards has compromised on the effectiveness of the enforcement regime of foreign arbitral awards. The application of the above provisions has meant that the court proceedings to recognize and enforce a foreign award has become too burdensome and time inefficient, which runs in conflict with one of the objectives of the New York Convention which is to facilitate the recognition and enforcement of foreign arbitral awards. The litigation proceedings before the Court of First Instance seeking recognition of foreign award may take between six to eighteen months. Further, since the parties have automatic rights of appeal before the Court of Appeal and thereafter the Court of Cassation<sup>47</sup>, the party that is seeking an enforcement of its arbitral award can be compelled to spend an inordinate amount of time in litigation.<sup>48</sup>

However, taking note of the applicable provisions and based on the above discussions, the researcher is of the view that the avenues of appeal against the judgment issued by the UAE court ratifying or annulling the arbitral award as stipulated under Article 217(2) of the UAE CPL must be interpreted as applicable only to domestic arbitral awards.

#### 3.4.2.2 Case Laws from International Perspectives

The Supreme Court of India, in *Bhatia International v Bulk Trading SA*<sup>49</sup> (was later overruled) held that Part I of the Indian Arbitration Act - Indian Arbitration and Conciliation Act, 1996 ("Indian Arbitration Act") - applied even to arbitrations seated outside of India, unless the parties had expressly or impliedly agreed to exclude Part I of the Act<sup>50</sup>. This finding posed a serious issue as this meant particularly that the Indian Courts are able to refuse enforcement of a foreign award, could also order interim measures in foreign arbitration proceedings as well as and set aside foreign arbitral awards on the petition of the losing party. In *ONCG v Saw Pipes*<sup>51</sup>, the Indian court further held that an arbitral award could be set aside by the Indian court where it has found that the

<sup>47</sup> The researcher disagrees with the party's right to appeal before the Court of Appeal and the Court of Cassation for recognition and enforcement of foreign arbitral awards.

<sup>48</sup>Supra note 8

<sup>49</sup> *Bhatia International v Bulk Trading SA* (2002) 4 Supreme Court Cases 105.

<sup>50</sup> Richard Gubbins, Legal View: Enforcement of foreign arbitral awards in India, published by the Indian Investment Journal, 11 June 2014, <http://indiaincorporated.com>.

<sup>51</sup> 2003 (2) Arb.LR 5 (SC)

award's finding on the law and/or the facts was so unfair and unreasonable that it was "patently illegal" and against Indian public policy. The subsequent case of *Venture Global Engineering v Satyam Computer Services Ltd*<sup>52</sup> confirmed that this principle could apply to foreign awards as well as Indian ones.

However, this controversial decision of the Indian Supreme Court in *Bhatia International case* has been overruled by a panel of five judges of the Indian Supreme Court in the case of *Bharat Aluminium v Kaiser Aluminium*<sup>53</sup>, which put an end to the intervention by the Indian courts in arbitrations seated outside India<sup>54</sup>. It may be noted that the decision in *Bharat Aluminium case* rejected the previous approach adopted by *Bhatia case* and the Indian Supreme Court confirmed that Part I of the Indian Arbitration Act does not apply to arbitrations seated outside India. The finding of the Indian Supreme Court's in *Bharat Aluminium case* was based on the importance of the seat of arbitration. To elaborate, the court held that the relevant distinction under the Indian Arbitration Act was between domestic arbitration (arbitration seated in India) and foreign arbitration (arbitration seated outside India) and that Part I of the Indian Arbitration Act applies to exclusively to domestic arbitration even if both parties are Indian nationals<sup>55</sup>. In the same case, the Court confirmed that awards issued in foreign arbitrations will be subject to the jurisdiction of Indian Courts only when they are sought to be enforced in India under Part II of the Indian Arbitration Act. It is worthwhile to note that, a 'seat- centric approach' adopted by the Indian Supreme Court in this case has two particular implications. Firstly, the Indian Courts will not be empowered to set aside foreign awards even if the law applicable to the subjective aspect of the dispute was Indian law and secondly, Indian Courts will not be empowered to order interim relief in support of foreign seated arbitrations<sup>56</sup>. In *Bharat Aluminium case*, the Court note that such an approach of, lack of authority to set aside a foreign award, is in line with the Article (V) (1) (e) of the New York Convention which states that "the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made'. In this regard, the court noted that under the New York Convention, only the courts at the seat of arbitration are empowered to set aside a foreign arbitral award and not the courts of the country whose laws

---

<sup>52</sup> (2008) 4 Supreme Court Cases (SCC) 190

<sup>53</sup> The Supreme Court of India in *Bharat Aluminium v Kaiser Aluminum*, Civil Appeal No. 7019 of 2005

<sup>54</sup> Herbert Smith Arbitration e-bulletin published in 18 September 2012, available on [www.herbertsmithfreehills.com](http://www.herbertsmithfreehills.com) (last viewed in September 2016).

<sup>55</sup> Supra note 54.

<sup>56</sup> Supra note 54

govern the procedure of arbitration. It also noted the distinction between the seat and the venue of arbitration and held that parties to arbitration and tribunals may choose a venue for the conduct of hearing different from the seat of arbitration, however such a choice shall not alter the seat of arbitration or the law governing the arbitration<sup>57</sup>. Recently the Supreme Court of India addressed the subject matter of the dispute in *Bharat Aluminium case* and made its decision in line with the earlier decision in the same case i.e. seat- centric approach and held that any reference to a seat or a specific law governing the arbitration results in impliedly excluding the application of Part 1 of the Indian Arbitration Act<sup>58</sup>.

In this context, it is notable that the UAE national Courts also, in some of its rulings, held that it has no jurisdiction to ratify or annul foreign awards which is explained further in part one 3.4.3 of this Chapter. Based on the above discussions, one of the key findings of this research is that the avenues of appeal against the judgment issued by the UAE court ratifying or annulling the arbitral award as stipulated under Article 217(2) of the UAE CPL must be interpreted as applicable only to domestic arbitral awards.

### **3.4.2.3 Provisions Related to Recognition and Enforcement of Foreign Arbitral Awards in the UAE**

A careful analysis of Article 235(2) of the UAE CPL contemplates that to enforce a foreign arbitral award in the UAE, the award creditor should bring an action before the competent Court of First Instance, as a normal claim, requesting to recognize and declare the enforceability of the arbitral award<sup>59</sup>, following which the award creditor must file an application before the execution judge to seize assets and recover the awarded amounts. Before presenting the application before the Court of First Instance, the award creditor must pay the court fees and submit a statement of claim which evidences that the arbitral award fulfills all of the requirements pursuant to Articles 235 and 236 of the UAE CPL<sup>60</sup> and all supporting documents, upon the filing of which the Court will schedule a hearing date and notify the defendant. Once the notification process is completed, the defendant is

---

<sup>57</sup> Nishit Desai, "What finally happened in Bharat Aluminum Co. [Balco] v Kaiser Technical Services? available online (last viewed in September 2016).

<sup>58</sup> Supra note 57

<sup>59</sup> Supra note 34, p 333

<sup>60</sup> After UAE's accession to the New York Convention on 2006, in theory, Articles 235 and 236 of the UAE CPL should be replaced by the provisions of the New York Convention and some of the national courts absorbed this principle very well. Nonetheless, in practice some other courts continue to apply Articles 235 and 236 of the UAE CPL even after acceding to the New York Convention.

permitted to ask the Court for an adjournment to prepare the defense. Adjournments may be sought on various grounds, including, but not limited to, the following:

- a. To appoint a counsel to represent the award debtor;
- b. To present defense, including submitting documents that may not be relevant to the enforcement application, as part of tactics intended to delay the recognition and enforcement process; or
- c. If the defendant's lawyer appears, he can request an adjournment to submit a power of attorney (POA) on behalf of the defendant. Under UAE law, the lawyer representing the party should submit a duly executed and legalized POA to the court.

The most offending practice used to delay recognition and enforcement of the arbitral award emerges when the award debtor attempts to resist recognition and enforcement by filing an application for counterclaim to set aside the award. Articles 235 - 238 of the UAE CPL do not address the procedure applicable for setting aside a foreign award namely awards issued outside the UAE and intended to be enforced within the UAE.

Consequently, it is unclear whether such an action should be commenced through the normal course of filing a claim and/or counterclaim before the Court of First Instance. Alternatively, the law does not clarify if the award debtor should request the court to set aside the award in the form of a defense in the main action (i.e. in the recognition and enforcement application request) filed by the award creditor on grounds that the award does not fulfill the conditions contemplated under articles 235<sup>61</sup> and 236<sup>62</sup> of the UAE CPL. Furthermore, Articles 235 and 236 of the UAE CPL do not address the scope of filing an appeal from the judgment of the Court of First Instance, which may decide to recognize or refuse to recognize an award. This is a significant issue, as the aforementioned articles

---

<sup>61</sup> Article 235 of the UAE CPL reads as follows: "An order may be made for the enforcement in the UAE of judgments and orders made in a foreign country on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE."

2 - An order for execution shall be applied for before the court of first instance within the jurisdiction of which it is sought to enforce, under the usual procedures for bringing a claim, and an execution order may not be made until after the following matters have been verified:

- a - that the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made, and that the foreign courts which issued it did have jurisdiction thereover in accordance with the rules governing international judicial jurisdiction laid down in their law,
- b - that the judgment or order was issued by a court having jurisdiction in accordance with the law of the country in which it was issued,
- c - that the parties to the action in which the foreign judgment was issued were summoned to attend, and were correctly represented,
- d - that the judgment or order has acquired the force of res judicata in accordance with the law of the court that issued it, and
- e - that it does not conflict with a judgment or order already made by a court in the UAE, and contains nothing that conflicts with morals or public order in the UAE".

<sup>62</sup> Article 236 of the UAE CPL reads as follows "The provisions of the foregoing article shall apply to the awards of arbitrators made in a foreign country; the award of the arbitrators must have been made on an issue which is arbitrable under the law of the UAE, and capable of enforcement in the country in which it was issued".

do not stipulate any provisions for appeal before the Court of Appeal or the Court of Cassation, unlike the procedures that relate to enforcement or annulment of domestic arbitral awards.

However, in practice, it is normal for an award debtor to file an appeal to the Court of Appeal against a decision challenging recognition of a foreign award. Such proceedings shall take approximately two to three years to obtain the final judgment either recognizing or refusing recognition of foreign award<sup>63</sup>. This is despite the fact that the UAE legislators did not explicitly provide for such an appeal provision under Article 235 of the UAE CPL. However, the court's approach in permitting to file such appeal by award debtors and considering it as part of a normal litigation action, is due to the lack of the concept of international arbitration. In addition, the lengthy court procedure, which is the generally followed practice for enforcing awards in the UAE, remained unchanged even after the accession to the NYC. To sum up, the issue of intermixing the provisions that are related to domestic and foreign awards by the UAE national courts in one hand and the lack of substantive experience in handling international arbitration matters on the other hand led to a complex and lengthy procedures towards enforcing a foreign arbitral awards in the UAE.

As noted previously, Chapter III of the UAE CPL (Articles 203 - 218) is the relevant source of legislation that regulates arbitration, including the ratification of arbitral awards and matter relating to the conduct of arbitral proceedings. This thesis demonstrates that the foregoing provisions should be applicable only to domestic arbitral awards i.e. domestic arbitrations seated in the UAE. The UAE CPL does not provide an express definition to "international arbitration" or fail to set forth the relevant criteria used when determining if an arbitral award is international in nature.<sup>64</sup> Under the UAE CPL there are two categories of arbitral awards namely, domestic awards (seated in the UAE) and foreign arbitral awards (seated outside the UAE). Consequently, there is a gap in regulating a different recourse for enforcement of international awards. There are instances where an arbitral tribunal is seated in the UAE, however, the subject matter of dispute is 'international' when considering its nexus with transactions with other States. But under the UAE law, there is no provision, which distinguish such arbitration. The UAE courts shall also apply domestic arbitration provisions to the enforcement of such awards, in spite of the international elements present in the award. This is one of the major pitfalls leading to the lack of the concept of international arbitration.

---

<sup>63</sup> Henry Quinlan, Sam Stevens and Natalie Roberts, "Enforcing arbitral awards in the UAE", published by Practical Law Company (PLC), available online (last viewed on September 2016).

<sup>64</sup> Please refer to Part one section 2.6.3 of Chapter two of this study.

Articles 203 to 208 of the UAE CPL provides for procedural rules for conducting arbitration varying from the requirements of the arbitration agreement, the qualifications of the arbitrator, the commencement of arbitration, time limits for issuing the award, requirements on the content of the award, mandatory rules and requirements etc. Thus, it leads to a general conclusion that these articles apply to the conduct arbitration proceedings in the UAE.

Further whilst considering an application for ratification of the award under Article 214 of the CPL, it empowers national courts to refer the award back to the arbitrators to reconsider any issues which they have not considered and accordingly to make a determination for it to be enforceable. This demonstrates the UAE legislators aim was to make these provisions solely applicable for domestic arbitral awards. To elaborate further, pursuant to Article 212(4) of the UAE CPL, if the arbitrator's award is issued outside of the UAE the provisions relating to awards of arbitrators issued in a foreign country shall be applicable, i.e. Article 212(4) refers to the provisions contained in Articles 235 and 236 of the UAE CPL.

All the foregoing factors support the point that these articles - articles 203 to 218 - of the UAE CPL are applicable exclusively to domestic arbitral awards. The phrase in article 212(4) of the UAE CPL "...otherwise the rules laid down in respect of awards of arbitrators issued in a foreign country shall apply" should be read together with articles 235 and 236 of the UAE CPL which govern the enforcement of foreign judgments, orders and awards. Problem arises when the UAE national courts apply these domestic arbitration provisions to international awards<sup>65</sup>. This is mainly due to the lack of the concept of international arbitration as the UAE law does not have any provision which explicitly determine if arbitration is international. This issue is explained in Part one section 2.7.1.1 of Chapter two of this study where the researcher examined various scenarios where some UAE national courts applied mandatory rules which are ought to be applied for domestic arbitration to international arbitration. One of such instance is the *Bechtel*<sup>66</sup>case.

The problem discussed in this chapter has wider implications because the national courts not only apply the mandatory domestic provision to international arbitration but also treats international awards as domestic awards and accordingly applies the same enforcement mechanisms for

---

<sup>65</sup> Please refer to Part one section 3.4.4 of this chapter. Also refer to Dubai Court of First Instance Case (Commercial) No 688/2014 dated 17 September 2014 where the court annulled a foreign award based on Article 216 (a), (b) and (c) of the UAE CPL.

<sup>66</sup> Dubai Court of Cassation Case No 503/2003 dated 15/5/2004. This case is discussed in section 2.7.2.1 of Chapter two.



international awards. In addition, the national courts fail to distinguish between the seat and venue of arbitration and as a result erroneously determine an international award as domestic. As noted previously in this chapter, lengthy and complex court proceedings for enforcing foreign awards are yet another problem which is being experienced by the award creditors in the UAE. To elaborate on these issues, it is imperative to consider the UAE law dealing with the enforcement of judgment, orders and awards.

In the researcher's view, Article 235 deals with the rules and conditions required to enforce a foreign judgment or foreign award in the UAE. The article named this procedure "an order for execution", which is an *exequatur*<sup>67</sup> that can be obtained by way of an application to the competent Court of First Instance. Article 235 does not state whether the First Instance Court's decision in relation to the application for executing a foreign judgment or award is subject to appeal in contrast with Article 217(2), which deals with the ratification or annulment of domestic awards.

While theoretically speaking, the UAE national courts no longer apply conditions set forth in Article 235 on enforcement of foreign arbitral awards pursuant to UAE's accession to the New York Convention in 2006<sup>68</sup>. Nonetheless, the courts continue to apply the normal procedures of ratification of domestic awards. For instance, the decision made by the Court of First Instance recognizing and enforcing a foreign arbitral award may be appealed to the Court of Appeal and further to the Court of Cassation. Meanwhile, an award debtor has the option of approaching the UAE national courts by filing a counterclaim requesting to annul a foreign arbitral award, although the national court does not have jurisdiction to annul a foreign arbitral award as only the national courts of the State where the arbitration proceedings were conducted has the jurisdiction to annul a foreign award<sup>69</sup>. The award debtor can file an appeal before the Court of Appeal and to the Court of Cassation in relation to the counterclaim, which subsequently leads to lengthy and complex litigation proceedings that in turn adversely affect the advantages of recourse to arbitration as a method of resolving commercial disputes. The procedures and conditions to enforce a foreign arbitral award, as stated in Articles 235 and 236 of the UAE CPL, are clearly different than those contained in the domestic arbitration provisions in the UAE CPL i.e. Articles 203 -218 of the UAE

---

<sup>67</sup> The term *exequatur* refers to the procedure by which a party requests the court to recognize and give the enforcement to a foreign legal decision such as a judgment, ruling or an arbitral award, in order for it to be enforced in the court where enforcement is sought.

<sup>68</sup> Gordon Blanke and Soraya Corm Bakhos, *Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure*, published in BCDR, Issue -1, September 2014, pp3-19.

<sup>69</sup> *Supra* note 22

CPL. Article 235 states the procedure an execution order and does not comment on whether parties can appeal the decision of the Court of First Instance.

A further analysis of the above articles 235 and 236 of the UAE CPL necessitates answering the following questions:

What is the rationale behind granting the parties the right to appeal a successful recognition decision? If that right is abused, would it not result in further prolonging the proceedings thereby preventing the winning party from enforcing a successful award? What are the major reasons for applying different interpretations by national courts on the exact provisions applicable to the procedures for enforcing foreign arbitral awards? What is the use of arbitration if the normal process of litigation is required prior to the enforcement stage? One of the main factors responsible for the above issues is attributed to the lack of the notion of international arbitration in the UAE, in terms of defining international arbitration and with respect to its implementation by the UAE national courts.

The questions raised above will be analyzed in the following part of this Chapter in light of various judgments issued by the UAE national courts. This part will closely examine the framework of enforcement procedures pursued in various jurisdictions following international best practices to verify the apparent issues underlying the current recognition and enforcement process in the UAE.

### 3.4.3. Conflicting Interpretations of Higher Courts<sup>70</sup> on the Relevant Provisions of the UAE CPL Applicable to Domestic and Foreign Arbitral Awards

#### 3.4.3.1 Federal Supreme Court<sup>71</sup> decision in Civil Appeal No. 202 of the Judicial Year 25 Dated 14/5/2006.

Article 213<sup>72</sup> of the UAE CPL clearly differentiates between two kinds of domestic arbitral awards, that is, arbitral proceedings which are conducted through the court as explained in Article 213(1)<sup>73</sup> and the arbitral proceedings that are conducted outside the court, such as an *ad hoc* and/or institutional arbitration.

Nonetheless, in the above case, the Federal Supreme Court held that the generality of the provisions of Article 213(3) of the UAE CPL provides for its applicability to both domestic and foreign arbitral awards.

#### **Facts of the Case:**

An award creditor filed an application before the Abu Dhabi Federal Court of First Instance seeking to recognize an arbitral award seated in Zurich issued under the International Chamber of Commerce Rules (ICC) and to render the award as *exequatur*.

The Abu Dhabi Federal Court of First Instance issued its decision recognizing the award. The award debtor appealed the ruling of the Court of First Instance to the Appeal Court, which upheld the lower Court's ruling. The award debtor then challenged the Appeal Court's decision before the Federal Supreme Court.

---

<sup>70</sup> UAE High Courts are: 1) Federal Supreme Court, 2) Abu Dhabi Cassation Court, 3) Dubai Cassation Court, and the 4) Ras Al Khaima Cassation Court as explained in chapter one.

<sup>71</sup> Federal Supreme Courts is the highest Court in the UAE. Please also refer to Chapter one of this thesis which refers to the Court Structure in the UAE.

<sup>72</sup> Article 213 of the UAE CPL reads as follows:

(1) In case of the arbitration proceeded 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, and that shall be within the fifteen days following the decision's delivery, and they should deposit a copy of the decision in the clerk's office of the court to deliver them to each party side and that within fifteen days from depositing the original, and the clerk's office of the court shall compile a report with that deposit to manifest it to the judge or the division manager, according to the circumstances, in order to appoint a session within fifteen days to authenticate the decision and the two parties shall be notified therewith.

(2) If the arbitration were incoming in an appellate case, the deposit shall be in the clerk's office of the court authorized principally to examine the appeal.

(3) As for the arbitration which takes place 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 to each party within five days from the delivery of the arbitration decision, and the court shall examine the authentication or the nullity of the decision according to the request of one of the litigant parties through the usual procedures of the action prosecution."

<sup>73</sup> Supra note 72

Before the Supreme Court, the award debtor asserted that the applicable provision of the law in Article 235 of the CPL provided that, since the underlying award that was the subject of the application for enforcement was a foreign arbitral award, the Court of Substance should have ensured the realization of the conditions provided in Article 235. Furthermore, the award debtor claimed that there was a clear misapplication of law, as the Court of Substance erroneously applied Articles 212 and 216 of the CPL, despite the fact that the award in question was a foreign arbitral award seated in a foreign country. The award debtor argued that the scope of applying the aforementioned provisions was limited to the application to domestic awards.

In this context, Article 213(3) of the CPL provides that for disputes where arbitration is conducted outside the court, the arbitrator must deliver a copy of the award to each party within five days from the date of the award. The article further adds that, in such event, the Court shall determine whether to ratify or annul the award<sup>74</sup>.

The court held that Article 213 (3) provides that an arbitration award issued outside the Court may be ratified by the competent court whether such an award is issued inside or outside the State. This is due to the generic wording of the concerned article, and there was no legislative evidence to specify otherwise. The court, however, noted that following the ratification of an arbitral award issued outside the State, such an award must be subject to application of conditions set forth in Article 235 and Article 236 of the UAE CPL. As such, provisions related to enforcement are only applied following the ratification and rendering of the award as an *exequatur*.

In light of the above, the court held that in entertaining an application for ratification of an arbitral award, the competent Court may accept or reject such application in light of conditions set forth in Article 216<sup>75</sup> of the CPL as well as the general principles enumerated in the preceding articles.<sup>76</sup> Accordingly, it was held that the lower Courts did not err in the application of the law when they did not consider the conditions set forth in Article 235 of UAE CPL, since such conditions are directed to the execution judge to apply on any dispute in respect of the execution of the judgment or decision issued by a foreign entity after such decision was recognized and issued as *exequatur*. Accordingly, the Court dismissed the appeal.

---

<sup>74</sup> Supra note 72.

<sup>75</sup> Supra note 37

<sup>76</sup> Articles 211 and 212 of the UAE CPL including the violation of public policy

Article 212(4) of the UAE PCL states that “the award of the arbitrator shall be issued in the United Arab Emirates, otherwise the rules laid down in respect of awards of arbitrators issued in a foreign country shall apply”. However, despite the explicit language in the article regarding the applicable rules, the Supreme Court erred in its application of Article 213, which is somewhat surprising when considering the explicit and dispositive norm contained in the above provision.

The Court Misinterpreted Article 213(3) of the UAE CPL which reads “an arbitral award issued outside court must be enforced by the competent court whether issued inside or outside the court...” The Court justified this interpretation stating that the “wording of the subject article alluded in general and did not specify whether the Article applies to foreign or domestic awards<sup>77</sup>”, which in turn constitutes a clear inconsistency in the law and other courts’ interpretations of the same article. In addition, the Federal Supreme Court in the above case upheld the lower court’s interpretation that, subsequent to the ratification of an award and obtaining an exequatur, the execution judge will examine whether the ratified award fulfills the conditions contemplated under Article 235 of the UAE CPL. Such an interpretation for Article 213(3) of the UAE CPL by the Court will lead to a complex procedure.

According to the interpretation offered by the court in the above case an award creditor files an application for ratifying the award before the Court of First Instance and as this process involves two tiers of appeal, before the Court of Appeal and Court of Cassation, prior to which an award creditor can commence the execution procedures. If the execution judge- as envisaged by the Federal Supreme Court - is to examine whether the award fulfils the condition in accordance with Article 235 of the UAE CPL, this will remarkably delay the enforcement procedures for arbitral awards and will open the door for the matter to be re-litigated by the parties. By this interpretation, the Court laid down that an award creditor must ratify his award by filing a normal action before the Court of First Instance, and, after obtaining a final decision - after following the two tiers of appeal as explained previously in this chapter- the award creditor should file another claim before the competent Court of First Instance where the execution need to be sought to comply with the conditions set out in Articles 235 and 236 of the UAE CPL.

---

<sup>77</sup> Translation of the Article as obtained from West Law Gulf.

The national courts interpreted the term “outside the court” in a broad manner, which established a complicated procedure by which conditions stipulated under the UAE CPL relating to ratifying domestic arbitral awards were made applicable to foreign arbitral awards.

This case illustrates that the judge who adjudicated the request for enforcement did not follow the explicit meaning of the terms “ratification” and “recognition”<sup>78</sup> but instead inter-mixed these concepts and erroneously applied the conditions applicable for domestic awards to foreign arbitral awards. It is clearly evident that, in issuing judgment in the present case, the Court considered only the terms “outside the court” and failed to examine the rest of the wording in this Article, which states that “ .....the arbitrators must deliver a copy of the award to each party within five days from the issue of the decision in the arbitration, and the court shall determine whether it shall be ratified or annulled upon the application of one of the parties through the normal procedures for bringing actions”.

By specifying that the arbitrator must deliver a copy of the award to each party within five days of the issuance of award and presuming that this provision is applicable to a foreign arbitration seated outside the UAE, it is a significant question whether it is possible for the UAE national courts to stipulate conditions on procedural aspects -such as the delivery of an award- for the arbitration proceedings conducted/seated outside the UAE as a prerequisite to having a foreign arbitral award enforced in the UAE. Moreover, article 213(3) also provides for annulment of the award. In this regards, it may be particularly noted that the national court of the country where recognition is requested is not empowered to annul a foreign award. Therefore, by specifying about annulment article 213(3) makes it clear that it refers exclusively to domestic arbitration that are conducted in the UAE, whether through the court or outside the court.

Besides the outcome of this case and the misapplication of the law by the UAE national courts, another predominant factor is the timescale involved in this proceedings. The award creditor initially filed this case before the First Instance Court in 2001 and the Federal Supreme Court issued the final judgment in 2006. All of these factors together demonstrate that length and complexity of the court proceedings in enforcing arbitral awards has undoubtedly hindered the effective enforcement

---

<sup>78</sup> Supra note 28

of awards, which points out to the lack of the concept of international arbitration and its applicability by the UAE courts.

Internationally accepted best practice arbitration jurisdictions do not support such time consuming and complex proceedings to recognize and enforce foreign awards and further set out procedures to be followed for recognition and enforcement of foreign awards separately from domestic awards. Most of the arbitration friendly jurisdictions such as France<sup>79</sup>, Switzerland<sup>80</sup> and Australia<sup>81</sup> have separate laws to govern domestic and international arbitration. Thus, it is an indispensable requirement for the UAE to have a clearer legislative framework to proceed, subsequent to the issuance of an award separately for domestic and international awards to achieve the advantages of arbitration over litigation.

#### **3.4.3.2 Dubai Court of Cassation<sup>82</sup> decision in Civil Appeal No. 218/2004, 15 May 2005:**

##### **Facts of the Case:**

An award creditor filed an application before the Dubai Court of First Instance for ratification and enforcement of a foreign arbitral award issued in London by a sole arbitrator. The Court of First Instance recognized the foreign arbitral award, and the decision was appealed by the award debtor. The Dubai Court of Appeal overturned the First Instance Court's decision and dismissed the case; consequently, the award creditor challenged the Appeal Court's decision before the Dubai Court of Cassation.

The award creditor argued that Article 235 of the UAE CPL provides for the enforcement of foreign judgments and awards. The charter concluded between the parties in this case provided for arbitration in London, although it did not include any provision that granted to the British courts

---

<sup>79</sup> France adopted a modern arbitration statute two arbitration regimes ie. one for domestic arbitration and the other for international arbitration in 1980 and 1981. On January 13, 2011 France adopted Decree 2011-48, which redrafted set of 85 articles divided into Title I (Domestic Arbitration: Articles 1442 to 1503 of the code) and Title II (International Arbitration: Articles 1504 to 1527 of the code). Please refer to "A comparative guide to arbitration laws in 25+ different jurisdictions", published in Lexology (last viewed in September 2016). Details on French arbitration law and application arbitration procedures will be discussed in further details in part two section 3.5.1.1 of this Chapter.

<sup>80</sup> Swiss law distinguishes between international and domestic arbitration. Chapter 12 of the Federal Statute on Private International Law applies to international arbitration (ie, where at least one of the parties has its domicile or regular place of residence outside of Switzerland at the time it enters into the arbitration agreement). The rules of the Swiss Civil Procedure Code - in particular, Part 3 (Articles 353 and following) - apply to domestic arbitration. Please refer to "A comparative guide to arbitration laws in 25+ different jurisdictions", published in Lexology (last viewed in September 2016).

<sup>81</sup> The International Arbitration Act 1974 governs international arbitration (eg, where one party is foreign) in Australia. Each state has its own commercial arbitration act which applies to domestic arbitration.

<sup>82</sup> The Dubai Court of Cassation is the superior court of litigation in the Judicial System in Emirate of Dubai. The jurisdiction of this Court is stipulated by the Articles from 173 to 188 of the UAE CPL and the Courts Formation Law in the Emirate of Dubai Law No 3 of 1992 and the Law No 3 of 2005. The circuit of Cassation Court is formed by minimum one Superior and four judges, and these circuits would look the challenges on criminal, personal and civil rights verdicts and suits; please also refer to Chapter one of this thesis.

exclusive jurisdiction to ratify the award. The arbitral award in question had become final and was authenticated by the British Consulate in both Bombay and the UAE. The award creditor, therefore, contended that national laws of both the UK and the UAE did not prohibit enforcement of foreign arbitral awards issued in each other's state. Paragraph one of Article 235 provides only for reciprocal treatment as one of the conditions to recognize a foreign judgment or an arbitral award, but it does not require a bilateral treaty between the UAE and the country in which the foreign judgment or arbitral award was issued. In the absence of a bilateral treaty or convention, conditions for enforcement of foreign arbitral awards<sup>83</sup>, as required by Article 235, are applicable, and, as such, in the case at hand, all required conditions were fulfilled.

In this case, the Court referred to Article 212(4), 213(3) and 215(1) of the UAE CPL. Referring to these articles, the court held that the UAE courts are empowered to ratify awards passed only within the UAE. It was held that UAE's court jurisdiction shall not be extended to an award passed in a foreign country, irrespective of whether such an award was ratified in such foreign country<sup>84</sup>. The court held that the above finding is not be altered by the provisions of Articles 235 and 236 of Chapter V of the Code regarding the enforcement of court rulings, orders and arbitration awards passed in a foreign country. The court noted that the UAE legislators permitted the UAE courts to order the enforcement of such foreign awards in the state after duly verifying that the award in question fulfils the conditions stipulated under Article 235 of the Code. The above-mentioned provisions relate only to the enforcement of such awards and make no reference to the jurisdiction of the UAE's national courts over the ratification or nullification of such awards. On this basis, the Court considered the Petitioner's argument based on Article 235 to be futile<sup>85</sup> and accordingly the court dismissed the petition to Cassation.

In the researcher's view, the aforementioned decision presents another apparent inconsistency in the conflict of interpretation between provisions of the law that relate to domestic arbitration and those that relate to foreign arbitral awards. This ruling is a direct result of a lack of appropriate legislation in the UAE to govern the enforcement of foreign or international arbitral awards. In this decision, the Court established several important principles. For instance, the Court confirmed that

---

<sup>83</sup> This decision was issued in 2005 before the UAE acceded to the New York Convention.

<sup>84</sup> Hassan Arab, Lara Hammoud and Graham Lovett, "Summaries of UAE Courts' Decisions on Arbitration", published by the International Chamber of Commerce (2013) pp 51-52

<sup>85</sup> Supra note 84



arbitration provisions contained in the CPL, including Articles 212, 213 and 215, are exclusively applicable to domestic arbitration, unlike the findings of the Federal Supreme Court discussed in Part one, section 3.4.3.1 above, in which the Court inter-mixed the provisions and applied them equally to both domestic and foreign awards.

It is evident that the inconsistent juridical approach of the UAE national courts on recognition and enforcement of foreign awards is due to the lack of appropriate arbitration legislation that shall resolve conflicting precedents issued by higher courts concerning the application and interpretation of the law. It also highlights lack of proper understanding of the principles of international arbitration by some of the UAE judges which preclude them from differentiating between domestic and international arbitrations and thereby apply the correct rules and procedures for enforcement. Additionally, the Courts have a wide discretion when applying the law and sometimes they are influenced by similar criterias that are applicable to court judgments<sup>86</sup>.

Although the Dubai Court of Cassation, in this case, correctly concluded that UAE national courts do not have jurisdiction to ratify or annul a foreign arbitral award, a major reason for the court's dismissal of the award creditor's application was its reliance on incorrect legal provisions. To clarify, the award creditor should have presented his application based on conditions stipulated in Articles 235 and 236 of the UAE CPL instead of seeking ratification of the foreign award. However, the lack of appropriate guidance in the UAE's legislation on arbitration might have been one of the reasons why the award creditor filed such an application. In this context, however it is notable that the Court of Appeal has wider discretionary powers and is also empowered to classify the party's application. On that basis, the Court of Appeal, instead of dismissing the case, could have rightly clarified and rectified the legal principles erroneously applied by the award creditor.

Following the examination of the relevant articles of the arbitration legislation in the UAE and the current execution proceedings of foreign arbitral awards before the UAE courts, it is essential to have a comparative overview of the enforcement mechanism of foreign arbitral awards in other arbitration-friendly jurisdictions that are considered internationally accepted best standards. As noted in Chapter one of this study, the term 'international accepted best practices' refers to efficient and effective standards for conducting arbitral proceedings whereby arbitrators and counsels apply

---

<sup>86</sup> Supra note 34

to provide users of arbitration with the highest possible level of efficiency and fairness in the resolution of their disputes<sup>87</sup>. Countries that adopted best practices in relation to enforcing foreign arbitral awards ensures that its procedural law supports the enforcement process of arbitral awards<sup>88</sup>. Some examples for arbitration jurisdictions that offers internationally best accepted practice includes Switzerland and France as they have a long tradition of hosting foreign and domestic arbitration. Additionally, these jurisdictions are known as arbitration friendly forums and have laws favouring the enforcement of awards. The national court of Switzerland and France generally endeavor to uphold arbitral awards<sup>89</sup>.

As the focus of this chapter is to verify if the enforcement procedures in the UAE are in line with internationally accepted standards, part two of this study examines the arbitration proceedings and enforcement aspects for some of the leading arbitration friendly jurisdictions such as France and Switzerland. Furthermore, the below part will address the arbitration provisions and enforcement of foreign awards in Egypt. The problems in enforcement of arbitral awards in Egypt was similarly placed to the UAE before Egypt enacted its Arbitration Act in 1994. Thus this study will evaluate if the system of enforcement of award in Egypt has benefitted from the enactment of the Arbitration Act in 1994.

---

<sup>87</sup> Irene Welser/Giovanni De Berti, "Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices, pp 79-80 available online (last viewed on July 2016).

<sup>88</sup> Irene Welser/Giovanni De Berti, "Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices, pp-79-80 available online (last viewed on July 2016).

<sup>89</sup> Sarah Francios Poncet, Brenda Horrigan and Lara Karam, "Enforcement of Arbitral Awards against Sovereign States or State Entities - France", published by Jurisnet LLC (2009) p 355-379.

## PART TWO

### 3.5 Arbitration Proceedings in Other Jurisdictions:

#### 3.5.1 Arbitration Proceedings in France

France is well-known as a favorable venue for international arbitration. There are several factors which have jointly contributed to France being acknowledged as one of the most attractive places to conduct arbitration. Those factors include modernized and liberal arbitration laws, arbitration friendly judiciary and the existence of the International Chamber of Commerce (ICC) in Paris<sup>90</sup>. Some of the prominent factors of French law on international arbitration include autonomy of the arbitration agreement, policies supporting enforcement of international awards, very limited court interference and party autonomy in arbitration proceedings<sup>91</sup>.

##### 3.5.1.1 Arbitration Laws in France

Arbitration provisions in France are primarily found in the Code of the Civil Procedure (CCP) supplemented by general provisions contained in the Civil Code and the Code of Judicial Organizations. There is no doctrine of precedent under French law; lower courts generally rely on decisions of higher courts similar to the system followed in the UAE<sup>92</sup>. Progressive arbitration provisions were introduced in France through the passing two revolutionary decrees: Decree No 80-354 (of 14 May 1980) and Decree No 81- 500 (of 12 May 1981). These decrees differentiated between domestic and international arbitration<sup>93</sup>. The major objectives of these decrees were to provide autonomy of the parties and to limit judicial interference in arbitral proceedings<sup>94</sup>. They also granted arbitrators authority to rule on the validity of the arbitration agreement and on their own jurisdiction<sup>95</sup>. French courts further developed these provisions by favoring the autonomy of international arbitration<sup>96</sup> in order to support international arbitration in France, to make the legal framework more accessible and to codify the existing case laws, Decree 2011<sup>97</sup> was ratified. This Decree enhanced France's pro-arbitration policy and broadened the scope of the party's freedom

<sup>90</sup> Nicolas Bouchardie and Celine Tran, White & Case LLP, Paris, "Arbitration in France", published in 2013, Practical Law available online on [www.whitecase.com](http://www.whitecase.com)

<sup>91</sup> Jean de la Hosserraye, Stephanie de Giovanni and Juliette Huard Bourois, CMS Guide on "Arbitration in France", available online on [www.cmslegal.com](http://www.cmslegal.com)

<sup>92</sup> Alexis Mourre, Arbitration Guide - France, IBA Arbitration Committee (Published in March 2012).

<sup>93</sup> Yves Derains and Laurence Kiffer, National Report for France (2013), International Handbook on Commercial Arbitration, published in Kluwerlaw, May 2013, pp3-5

<sup>94</sup> Supra note 91

<sup>95</sup> Supra note 90

<sup>96</sup> Supra note 91

<sup>97</sup> Decree No 2011-48 of 13 January 2011.

with respect to the arbitral process and provided the support of a French judge either where the arbitration proceedings take place in France or where the parties have chosen French law to govern the proceedings. Case law in France plays an important role in making arbitration judgments of the French Supreme Court and the Paris Court of Appeal strong contributors towards building an arbitration-friendly regime<sup>98</sup>.

### 3.5.1.2 Domestic and International Arbitration - Rules and Mandatory Provisions

The legislative provisions governing arbitration are mostly contained in Book IV of the CCP, emanating from the 2011 Decree<sup>99</sup>. French law clearly distinguishes between domestic arbitration (Articles 1442-1503 of the CCP) and international arbitration (Articles 1504-1527 of the CCP).

Article 1504 of the CCP states that “arbitration is international when international trade interests are at stake”, i.e. the underlying distinction between domestic and international arbitration is economics and depends on the nature of the transaction.

Many provisions are applicable to both types of arbitration. Although the CCP is the main source of French law on international and domestic arbitration, providing detailed description of the legal procedures applicable to both arbitrations, some aspects of French arbitration can be found in the civil code (Articles 2059, 2060 and 2061)<sup>100</sup>. French courts have stated that the domestic or international nature of arbitration does not depend on the applicable law, the seat of the arbitration, the parties' intentions, or their nationalities but on the nature of the underlying economic transaction or relation, which must involve more than one state and must involve the tangible or intangible cross-border transfer of goods, services or funds.<sup>101</sup> The concept of international arbitration and jurisdictional approach of various national courts are explained in Part two section 2.6.3 of Chapter two of this study.

---

<sup>98</sup> Supra note 92

<sup>99</sup> Supra note 92.

<sup>100</sup> Supra note 90

<sup>101</sup> Supra note 90 ; Paris Court of Appeal, SARL Carthago Films V SARL Babel Productions (29 March 2001), *Revue de l' Arbitrage* 2001 at page 543; Paris Court of Appeal, Agence Transcongolaise des Communications-Chemin de fer Congo (ATC-CFCO) V Compagnie Minière de l'Ogooué-Comilog S.A, Case No 95/80282 ( 1 July 1997).

### 3.5.1.3 Recognition and Enforcement of Foreign Arbitral Awards

France is signatory to the New York Convention. The Convention entered into force in France on 24 September 1959<sup>102</sup>. France has made a reciprocity reservation. However, French legal provisions on recognition and enforcement of foreign awards apply to awards rendered abroad whether or not they are rendered in a New York Convention contracting State<sup>103</sup>. France made a reservation for commercial relationships, which it withdrew on 27 November 1989<sup>104</sup>.

In practice, the transposition of the New York Convention into French law was more permissive to enforcement than the provisions of the New York Convention to the extent that reference to the New York Convention is rarely made.<sup>105</sup>

Before seeking the enforcement of an award in France, the law requires that such an award be granted an *exequatur*, confirming that such award may be enforced in the same manner as a local court judgment<sup>106</sup>. As per article 1477 of the CCP, applications to enforce awards rendered in France must be filed with the Tribunal de Grande Instance (Court of First Instance) in the place where the award was made. This territorial jurisdiction is inapplicable with respect to awards rendered outside France, in which case French courts consider the jurisdiction of the President of the Court of First Instance of Paris to be appropriate<sup>107</sup>. Enforcement orders are obtained *ex-parte*, and decisions are rendered by a single judge. As per Article IV of the New York Convention and as stipulated under Article 1515 of the CCP, an application to enforce a foreign arbitral award must be supported by:

- an authenticated copy of the arbitral award;
- a copy of the arbitral award and;
- a translation of these documents

The presence of assets in France is not a pre-requisite for the court to grant *exequatur*.<sup>108</sup> However, awards should not be manifestly contrary to the international public policy<sup>109</sup>. As stated within the

---

<sup>102</sup> Supra note 90; Arbitration agreements in international arbitration are not subject to any formal requirements (Article 1507, CCP).

<sup>103</sup> New York Convention Guide, 1958 (last viewed on September 2016).

<sup>104</sup> The reciprocity reservation of France was withdrawn by way of Decree No. 90-170 of 17 November 1989.

<sup>105</sup> Supra note 91

<sup>106</sup> Supra note 91

<sup>107</sup> Supra note 91; Please also refer to Article 1516 of CCP

<sup>108</sup> Squire Sanders. International Arbitration News published in November 2013 available online on [www.squirepattonboggs.com](http://www.squirepattonboggs.com) publications (2013)

<sup>109</sup> Article 1514 of the CCP.

Decree 2011, it is not required to present an original copy of the award to obtain an enforcement order. Its existence can be evidenced by submitting duly authenticated copies of such documents.

The award creditor requesting for enforcement is not required to disclose enforcement proceedings to award debtor, as it is *ex parte*. In fact, the other party only becomes aware of the fact that enforcement is sought when the decision granting or refusing the *exequatur* is notified.<sup>110</sup> Upon obtaining the enforcement order (*exequatur*), the award creditor must notify the award debtor in the country where it is based, as it provides award debtor the right to appeal the decision. The enforcement order will become final at the end of the timeframe made available for setting aside the enforcement order. The award creditor can then enforce the order in France as a French judgment is enforced. In relation to foreign international awards, the recourse available to the award debtor to resist enforcement of such awards is to file an appeal with the Court of Appeal in Paris within one month of the service of the enforcement order, after which the court can deny recognition only on the grounds listed under Article 1520 of the CCP which will be discussed in the following paragraphs.

#### **3.5.1.4 Approach of French Courts Towards Enforcement**

France is well known as a favorable venue for arbitration. French courts have, in a series of judgments, shown great preference towards arbitral awards, which are rarely set aside.<sup>111</sup> Case law plays an important role in the making of arbitration law in France. Both the Cour de Cassation (French Supreme Court) and the Paris Court of Appeal have, for many decades strongly contributed to building a supportive and arbitration-friendly regime.<sup>112</sup>

The Court of Appeal may deny enforcement only on one of the five grounds set out in the Article 1520 CCP namely<sup>113</sup> (i) the arbitral tribunal wrongly upheld or declined jurisdiction (ii) the arbitral tribunal was not properly constituted (iii) the arbitral tribunal ruled without complying with the mandate conferred upon it (iv) due process was violated and (v) recognition or enforcement of the award would be contrary to French international public policy<sup>114</sup>.

---

<sup>110</sup> Supra note 92.

<sup>111</sup> Supra note 108

<sup>112</sup> Supra note 91

<sup>113</sup> Article 1520 CCP is in line with Article V of the New York Convention.

<sup>114</sup> Elizabeth Oger-Gross and Anaïs Harlé, White & Case LLP, Arbitration procedures and practice in France: overview, published by Practical Law Compant (PLC) available online (last viewed on September 2016).

The French Courts has reiterated that an appeal against an order granting enforcement is only permitted under certain limited grounds, which are specified in Article 1520 of the CCP<sup>115</sup>. An order denying enforcement of an award can be appealed within one month following service of the order for both domestic arbitration (Article 1500, CCP) and international arbitration (Article 1523 CCP). This time limit is extended by two months when the party served is located abroad (Article 643, CCP). However, a party can still bring a setting aside action for both domestic (Article 1499, CCP) arbitration and international arbitration (Article 1524, CCP). In addition, an appeal of an enforcement action is still possible where the parties have waived their right to bring a setting aside action, but this is only possible in respect of five grounds set out under Article 1520 of CCP<sup>116</sup>.

French courts have maintained this pro-enforcement approach of the CCP. Prominent cases such as *Hilmarton*<sup>117</sup> and *Putrabali*,<sup>118</sup> are examples of this. Although most jurisdictions are likely to refuse enforcement of an award that has been set aside in another country (as envisaged under Article V(1)(e) of the New York Convention), French courts have enforced awards set aside at the seat of arbitration, based on Article VII of the New York Convention. In *Hilmarton* case, the Cour de cassation held that "... the award rendered in Switzerland is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy ...."<sup>119</sup> The rationale behind this decision is that an arbitral award is not integrated into the legal system of the country where the seat of arbitration is located, and that its annulment at the seat therefore has no impact on its existence outside that particular legal system<sup>120</sup>.

In *Putrabali* case, the Cour de cassation confirmed this solution, further stating that an international award is not associated with any national legal order "... an international arbitral award, which is not anchored in any national legal order, is a decision of international justice, the validity of which must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought ...."<sup>121</sup>

---

<sup>115</sup> Laurence Franc-Menget, Vincent Bouvard, and Peter Archer, "Appeal against order granting enforcement only permitted under limited grounds relating to arbitral award (French Supreme Court)", published online (last viewed on September 2016).

<sup>116</sup> Supra note 114

<sup>117</sup> *Hilmarton* (France Cour de Cassation 23 March 1994) Rev Arb 1994. 327; available at [www.kluwerarbitration.com](http://www.kluwerarbitration.com)

<sup>118</sup> *Putrabali*, (France, Cour de cassation 29 June 2007) Rev Arb 2007.507; available in [www.kluwerarbitration.com](http://www.kluwerarbitration.com) .

<sup>119</sup> Supra note 114

<sup>120</sup> Supra note 115.

<sup>121</sup> Supra note 114

### 3.5.1.5 Jurisdictional Comparison - the UAE and France

France offers an arbitration-friendly legal environment necessary for an efficient and successful arbitral process in addition to highly qualified specialized local courts. French courts are prohibited from intervening in any dispute where an arbitration clause may apply<sup>122</sup>. The Paris civil court (Tribunal de Grande Instance) includes a specialized judge who, in the rare event judicial intervention in support of arbitration is required, hears all applications relating to the appointment of arbitrators and the implementation of the arbitral proceedings and supports the arbitral process.<sup>123</sup> Unlike the UAE, an outstanding feature of French law is that an application to set aside an award or an appeal filed against an enforcement order shall not suspend the enforcement of an award, unless the enforcement of the award severely prejudices the rights of one of the parties. This prevents the unsuccessful parties from filing incommodious actions that may prolong the enforcement

It is also the normal practice followed in France that, if an award is challenged, French courts will not review the merits of the case limiting them to verification of the existence of a valid arbitration agreement and ensuring that the arbitral proceedings have complied with the principles of due process.<sup>124</sup> Law relating to arbitration proceedings in France has long been at the forefront of the development of international arbitration<sup>125</sup>. By updating the legal framework for arbitration in January 2011, France made way for more progressive arbitration legislation. Courts and arbitration laws in many other countries have followed the French courts and have adopted similar principles to those established in France<sup>126</sup>.

In this context, it is important to note that the approach adopted by the UAE national courts is that the courts will apply the mandatory provisions of the UAE CPL intended for the domestic arbitration on all arbitrations irrespective of the fact whether the arbitration is deemed to be foreign or international in nature. The UAE national courts more often compromise on the principle of party autonomy, which is an integral aspect in international arbitration however the French Courts give predominance to party autonomy.

---

<sup>122</sup> Report on Paris, the Home of International Arbitration, available online (last access on September 2016)

<sup>123</sup> Supra note 122

<sup>124</sup> Redfern and Hunter, "Law and Practice of International Commercial Arbitration", pp 443-489, (3<sup>rd</sup> Edition, 1999)

<sup>125</sup> Tim Portwood, Jérôme Richardot, Patricia Peterson, Arbitration In France, Talking Point, Financierworldwide.com

<sup>126</sup> Supra note 125.



The above discussion demonstrates that the structure of having distinguished provisions for domestic and international arbitration is a well-constructed way to achieve the benefits of resorting to arbitration as an alternative dispute resolution mechanism by the parties. Several reasons attributes to France being a leading arbitration jurisdiction. Out of which a pivotal position is for the French laws which is clear and well established, further it codified a number of solutions developed by French courts over the previous 30 years<sup>127</sup>. French laws provide the parties with legal certainty that their agreement to arbitrate will be enforced.<sup>128</sup> Such a framework of rules is highly recommendable for the UAE to consider while enacting separate legislation for arbitration. Lack of the concept of international arbitration is a major problem faced by the parties while seeking recognition and enforcement of arbitral awards in the UAE. With a view to facilitate recognition and enforcement of foreign awards, it is important to define the concept of international arbitration and means to implement such awards in the arbitration legislation in the UAE.

### **3.5.2 Arbitration proceedings in Switzerland**

Switzerland has a significant long standing history of offering effective and efficient arbitration services and is one of the world's leading venues for hosting arbitration proceedings<sup>129</sup>. Switzerland is a preferred location for several reasons, including: its political neutrality, the existence of several international organizations or dispute settlement institutions, such as the United Nations, the World Trade Organization (WTO), a well-developed legal system, excellent infrastructure and geographically convenient location<sup>130</sup>.

#### **3.5.2.1 Arbitration Laws in Switzerland**

Rules on international arbitration in Switzerland can be found in Chapter 12 of its Federal Code on Private International Law of 1987 (Swiss Code) in Articles 176-194. Chapter 12 contains a set of provisions that guarantee the proper constitution and functioning of the arbitration tribunals and simultaneously grants parties necessary flexibility to conduct the arbitral proceedings in accordance with their choice<sup>131</sup>.

---

<sup>127</sup> Supra note 114

<sup>128</sup> Supra note 122

<sup>129</sup> Manuel Arroyo, "Chapter 3, Part I: Introduction to the Swiss Rules of International Arbitration-Arbitration in Switzerland: The Practitioner's Guide, Kluwer Law International: Kluwer Law International 2013 pp.327-337.

<sup>130</sup> Swiss Arbitration Association, available online <http://www.arbitration-ch.org/pages/en/asa/index.html>

<sup>131</sup> Matthias Scherer and Martin Dawidowicz, Arbitration Guide (Country Report) - IBA Arbitration Committee, published in March 2012

In accordance with Article 176(1) of the Swiss Code, this law is applicable to all arbitral proceedings, with the seat of arbitration in Switzerland, and if, at the time of conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

### **3.5.2.2 Domestic Arbitration**

Since 1<sup>st</sup> January, 2011, domestic arbitration has been governed by Chapter 3, Articles 353-399 of the Federal Civil Procedure Code (CPC), unless the parties agreed to submit their dispute in accordance with Chapter 12 of the Swiss Code<sup>132</sup>. The CPC is applicable in all civil proceedings throughout Switzerland. The third chapter of the CPC, which deals with domestic arbitration, adopts a number of provisions from the Swiss Code that provides predominance to party autonomy<sup>133</sup>.

### **3.5.2.3 Recognition and Enforcement of Foreign Arbitral Awards**

Switzerland is a contracting state to the New York Convention, which entered into force on 30<sup>th</sup> August, 1965. The recognition and enforcement of a foreign arbitral award in Switzerland is governed by the New York Convention (Article 194 of the Swiss Code). Article 194 of the Swiss Code applies directly to any arbitral awards rendered by an arbitral tribunal seated in a country other than Switzerland, even if that country is not a contracting state to the New York Convention. It is not necessary for the party seeking to enforce the award to have obtained a declaration of enforceability from the court at the seat of the arbitration.<sup>134</sup>

Enforcement of foreign arbitral awards in Switzerland is subject to the following factors:

- (a) Whether the award debtor is domiciled in Switzerland; and
- (b) On the nature of the relief awarded such as whether it is a monetary claim or an order for specific performance (non-monetary claim).

Monetary awards are enforced through summary court proceedings under the Federal Debt Enforcement and Bankruptcy Act 1889 (DCB Act). The party seeking to enforce the award can commence debt collection proceedings by issuing a summons to pay from the competent debt

---

<sup>132</sup> CMS Guide to Arbitration in Switzerland, Vol I available online on <https://eguides.cmslegal.com>

<sup>133</sup> Getting the deal through Arbitration 2014 -Chapter on Switzerland published on 27 November 2014 available online <https://gettingthedealthrough.com/area/60/jurisdiction/29/investment-treaty-arbitration-switzerland/>

<sup>134</sup> Dispute Resolution Around the World - Switzerland, published by Baker Mackenzie available online [www.bakermckenzie.com](http://www.bakermckenzie.com)

collection office against the award debtor. The debtor can either pay the requested amount within 20 days or file an objection within 10 days of receipt of the summons. If the debtor files an objection, the party requesting enforcement must file a claim before the competent Cantonal State Court<sup>135</sup> requesting to reject the objection be set aside and to recognize and enforce the award in Switzerland.<sup>136</sup>As a rule, enforcement proceedings are conducted by a single judge or by the president of a district court<sup>137</sup>.

In practice, the cantonal state court will set aside the objection and recognize the monetary arbitral award as enforceable on the following grounds:

- (a) the debtor fails to invoke the statute of limitations successfully or to prove that the debt has been discharged subsequent to the issuance of the arbitral award;
- (b) the requesting party proves that the requirements stipulated under Article IV of the New York Convention are satisfactorily fulfilled;
- (c) the debtor fails to substantiate the grounds of refusal listed in Article V(1) of the New York Convention regarding the concerned award; or
- (d) There is no ground to refuse pursuant to Article V (2) of the New York Convention.

A party can file an appeal before the upper state court of the canton against the judgment rendered by the cantonal state court and a final appeal to the Swiss Federal Supreme Court<sup>138</sup>. The requesting party can proceed to enforce the debt once the objection is set aside by the court.

If the debtor is not domiciled but has assets in Switzerland, the procedure remains the same, although, as a preliminary step, the party requesting enforcement must first obtain an attachment or a freezing order pursuant to the DCB Act from the court where the assets are located. During such procedure, whether ex parte only or followed by contested proceedings, the judge will review only the compliance of the arbitral award with the New York Convention on a prima facie basis. Once the creditor obtains the freezing order, the award may be enforced against those assets

---

<sup>135</sup> Please note that the actual title of the competent court may vary from canton to canton.

<sup>136</sup> Kurt Blickenstorfer & Silvia Renninger, Bratschi Wiederkehr & Boub "Recognition and Enforcement of Foreign Arbitral Awards Requirements Pursuant to the New York Convention", IBA Arbitration Newsletter (Vol 2) August 2014.

<sup>137</sup> "Switzerland: Enforcement Of Foreign Judgments In Switzerland", published in Mondaq (updated 30 October 2012) available online on [www.mondaq.com](http://www.mondaq.com)

<sup>138</sup> Supra note 136.

through the normal debt collection procedure under the DCB Act as if the debtor were domiciled in Switzerland<sup>139</sup>.

In relation to the recognition and enforcement of non-monetary foreign arbitral awards, provisions of the CPC are applicable, and the requesting party should file an application for enforcement before a Cantonal State Court (Articles 335-346 of the CPC are applicable) and ensure that all requirements stipulated under the New York Convention are fulfilled.

#### **3.5.2.4 Jurisdictional Comparison - The UAE and Switzerland**

To facilitate a smooth arbitration process, Switzerland has established a flexible *lex arbitri* for international arbitrations and unified institutional rules for various Swiss Chambers of Commerce<sup>140</sup>.

In relation to the recognition and enforcement of domestic and foreign arbitral awards, the UAE Courts have generally adopted a supportive approach. They recognize the importance of enforcing arbitral awards and are developing their experience in recognizing and enforcing awards. Since the UAE courts' experience is relatively limited, there have been certain instances when a court has ruled against enforcement of foreign arbitral awards. However, the Swiss judiciary may annul an award only if one of the stringent statutory grounds under the New York Convention is met; hence set-aside actions are rarely successful and foreign arbitral awards are enforced in line with the New York Convention.

Another notable factor is the duration of the enforcement procedures in these jurisdictions. There are usually three levels of courts in Switzerland: First Instance and Appeal Court at the Cantonal level and the Federal Supreme Court, where the appeal is more limited and based only on the parties' submissions. Although both jurisdictions provide a three tier appeal structure for enforcement, in the UAE, the parties first approach the Court of First Instance and then progress to the Appeal Court and finally to the Court of Cassation. The timeframe in the Swiss courts is reasonable and may typically last for a few months at each level. In contrast, the proceedings in the UAE courts may take up to three years and more to obtain a final judgment depending on the nature of the dispute, its complexity and whether the opposing party files any objections. Although the time

---

<sup>139</sup> Domitille Baizeau, "Litigation, Arbitration & Dispute Resolution Guide", published in 2010 available online on [www.lalive.ch/data/publications/DAB .pdf](http://www.lalive.ch/data/publications/DAB.pdf) (edited by Oliver Hargreaves).

<sup>140</sup> Please refer to Forum: Comparing regional arbitration process published in Oct 2013, Financial worldwide magazine (Special Report: International Dispute Resolution, available online on [www.financierworldwide.com/forum-comparing-regional-arbitration-processes](http://www.financierworldwide.com/forum-comparing-regional-arbitration-processes)).

frame for enforcement proceedings before Swiss Courts is reasonable, the three tiers of appeal structure for enforcement is not helpful in serving the best interests of parties resorting to arbitration, as this results in additional time and resources for parties while approaching courts and obtaining recognition and enforcement of foreign arbitral awards.

In general, Swiss Courts are in favor of enforcing foreign arbitral awards. An empirical study conducted over the years in relation to the number of cases filed to challenge Swiss arbitral awards confirmed that the Swiss judiciary employs a very “arbitration friendly” approach<sup>141</sup>. Switzerland offers a modern and liberal statutory framework for international and domestic arbitration. In addition, it has gained the trust of parties globally in terms of its efficient legal system<sup>142</sup>. All of these factors have made a positive contribution towards Switzerland being acclaimed as a leading location for international commercial arbitration.

The above study demonstrates that the Swiss courts decide the issues efficiently, despite having a three-tier appeal system. It establishes that the existence of the concept of international arbitration makes courts less likely to refuse recognition and enforcement of foreign arbitral awards, and also discourages parties to resist enforcement in the first place. On the other hand, the UAE court’s attitude and failure to acknowledge the concept of international commercial arbitration leads to lengthy court proceedings, which is time consuming and encourages parties to resist enforcement.

### **3.5.3 Arbitration Proceedings in Egypt**

Egypt is a state which adopts that civil law legal culture, which is the same legal culture as that of the Arab countries<sup>143</sup>. Most of the legislation in the UAE have common roots with the Egyptian legal code which in turn is influenced by the French legal code. Being a civil law jurisdiction and because of the close resemblance in the legal systems of the UAE and Egypt, this study examines the Egyptian arbitration system and investigates if the newly enacted Arbitration law in the Egypt has contributed to strengthening the recognition and enforcement of foreign arbitral awards in the Egypt. This will help to assess whether and how the UAE could follow suit and adopt a separate and independent law dealing with arbitration.

---

<sup>141</sup> See ICC 2010 Statistical Report, ICC Arb. Bull.2011/1, p. 13.

<sup>142</sup> Simone Hofbauer (edited by Manuel Arroyo) “Chapter-1, Part1: History of Arbitration in Switzerland: The Practitioners Guide, Published in Kluwer Law International 2013, pp 3-16.

<sup>143</sup> Dr Mohamed A.M. Ismail, International Investment Arbitration: Lessons from Developments in the MENA, published by Routledge Taylor and Francis Group ( 2013)p,72.

Arbitration has become an important and effective means of dispute resolution in Egypt since the introduction of the Egyptian Arbitration Law<sup>144</sup> and parties have increasingly resorted to arbitration in commercial disputes. This law has established a framework that authorizes and regulates arbitration as the main alternative dispute resolution mechanism in Egypt. Egypt has also acceded to several international conventions governing the arbitral process, which have now been incorporated into the country's national legal system.<sup>145</sup>

### 3.5.3.1 Arbitration Laws in Egypt

Egypt's Arbitration Law provides a relatively simple and straightforward arbitration framework that conforms to a large extent with the prevailing international standards contained in the UNICITRAL Model Law of International Commercial Arbitration. The Arbitration Law applies to all arbitrations conducted within Egypt and to international commercial arbitrations conducted abroad or in Egypt, if the parties agree to subject their proceedings to Egyptian law as the applicable *lex arbitri*. However, the validity of an arbitration clause in a government contract requires the express approval of the minister concerned or the head of the government agency pursuant to an amendment of the Arbitration Law in 1997<sup>146</sup>.

Arbitration law varies slightly between domestic and international arbitration in Egypt. The provisions relating to domestic arbitration are applicable when both parties are based in Egypt, whereas arbitration is considered international if either of the two parties is based abroad or headquartered in different states. In addition, if the arbitration agreement provides for arbitration under the rules of the arbitration institutions, whether based within or outside of Egypt, it is also deemed to be international arbitration. If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration center having its headquarters in the Arab Republic of Egypt or abroad, such arbitration shall be considered as international arbitration. Furthermore, if the subject matter of the disputes transcends more than one state, it is also deemed as international arbitration.<sup>147</sup>

<sup>144</sup> Egypt Law No. 27 of 1994 on Arbitration in Civil and Commercial matters dated 18 April 1994.

<sup>145</sup> Mohamed OweisTaha, "Egypt; Legal Frame Work for Arbitration", The Law Library of Congress Legal Research Centre, published in August 2014 available online on <http://www.loc.gov/law/help/arbitration/egypt-legal-arbitration.pdf>

<sup>146</sup> Egypt Law No. 9 of 1997 (Amending some provisions of the Egyptian Arbitration Law).

<sup>147</sup> Article 3 of Egyptian Law No. 9 of 1997 reads, "within the context of this Law, the arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases:

First: If the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement. If either party to the arbitration has more than one place of business, due

### 3.5.3.2 Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards have been enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Egypt since its accession to the Convention on February 1959. The Egyptian Constitution provides for international conventions to bear the force of law upon ratification by the Parliament<sup>148</sup>. As a result, the substantive provisions of the New York Convention are directly binding on Egyptian courts<sup>149</sup>.

A request to enforce arbitral awards becomes admissible only after the expiration of the period required for lodging a plea to annul the award<sup>150</sup>. The requesting party must wait for ninety days before submitting the request for enforcement before a competent court, which is the Cairo Court of Appeal. A request for enforcement should be accompanied by the following:

- (a) Original text of the award or a signed copy thereof;
- (b) A copy of the arbitration agreement and an Arabic translation of the award ratified by an authorized entity if the award is rendered in a foreign language; and
- (c) A copy of the minutes verifying submission of the award in the registry of the competent court<sup>151</sup>.

An application for enforcement shall not be granted except after having ascertained the following<sup>152</sup>:

- (a) the inexistence of a prior Egyptian award on the same issue;
- (b) the absence of any contravention to Egyptian public policy considerations; and
- (c) valid notification of the arbitral award<sup>153</sup>.

---

consideration shall be given to the place of business which has the closest relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon. Second: If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.

Third: If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country. Fourth: If the principal places of business of the two parties to the arbitration are situated in the same State at the time of the conclusion of the arbitration agreement, but one of the following places is located outside the said State:

- a) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it;
- b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed; or
- c) the place with which the subject matter of the dispute is most closely connected".

<sup>148</sup> Article 151 of the Egyptian Constitution.

<sup>149</sup> Petitions to Egyptian Cassations no. 10350/65 Judicial Year dated 1/3/1999 and 2994/57 Judicial Year dated 16/7/1990 and 2010/64 Judicial Year dated 22/1/2008. Please refer to Part 4.7 of Chapter Four of this thesis for further details.

<sup>150</sup> Article 54 (1) of the Egyptian Arbitration Act which states that "...The action for annulment of the arbitral award must be brought within ninety days of the date of the notification of the arbitral award to the party against whom it was made..."

<sup>151</sup> Mohamed Abdel Wahab, "UPDATE: An Overview of the Egyptian Legal System and Legal Research, published in Global Lex (October 2012) available online on <http://www.nyulawglobal.org/globalex/Egypt1.htm>

<sup>152</sup> Article 58(2) of the Egyptian Arbitration Act

<sup>153</sup> Ahmed Abdul Sadeq, "Egypt Arbitration Award between Theory and Practice", published in GCC Arbitration Magazine, Issued on 23 June 2014.

If award debtor wishes to oppose the enforcement, they must submit an action to set aside the award before the competent court. Such an application set aside the enforcement must be submitted before 90 days have elapsed from the date of the award creditor's official notification of the award<sup>154</sup>. Challenges do not stay the enforcement of an award unless a stay of enforcement is granted by the court reviewing the challenge. In practice, the proceedings to set aside foreign arbitral awards may take between nine to eighteen months to complete.

The Egyptian Courts do not have the jurisdiction to nullify a foreign arbitral award and the option available for an award debtor is to file an objection against the application seeking recognition and enforcement of award under Article 58 of the Egyptian Arbitration law. In addition, the award debtor has to prove that the one of the conditions stipulated under the New York Convention to refuse recognition and enforcement is applicable on the matter<sup>155</sup>.

Following the granting of an exequatur, the requesting party may enforce the award through attachment proceedings by court bailiffs. At this stage, the award debtor may still initiate objections to execution proceedings, and objection to execution may take from twelve to eighteen months depending upon the nature and complexity of the issue<sup>156</sup>.

By virtue of the Minister of Justice Decree No. 8310/2008<sup>157</sup>, in 2008, the Ministry of Justice imposed new regulations regarding the deposit of awards for enforcement. These regulations potentially make the process of enforcing arbitration awards cumbersome in terms of substance and (more importantly) internal procedure<sup>158</sup>. As per this Decree, the government has taken a drastic step of controlling the enforcement of arbitration awards by creating an administrative review process that would block the first step in enforcement that is, the simple deposit of an arbitration award before the local courts<sup>159</sup>. The review is undertaken by a Technical Bureau set up at the Ministry of Justice. Its decisions are not made public, and there is no right to appear before this Office. The Decree, and the way it has been implemented, is in clear conflict with the Egyptian Arbitration Law. The

---

<sup>154</sup>Supra note 151

<sup>155</sup> Supra note 145; Please also refer to Cairo Appeal Court Circuit 91- Commercial case No 4 of 114 Judgment dated 29.01.2003

<sup>156</sup> Khaled El Shalakany, "Arbitration procedures and practice in Egypt: overview", Practical Law published in 1 Jun 2014 available online, <http://uk.practicallaw.com/3-501-7485>

<sup>157</sup> As amended by Minister of Justice Decree No. 6570/2009.

<sup>158</sup> Essam Al Tamimi, Enforcement of Foreign Arbitration Awards in the Middle East, published in Al Tamimi Law Update, September 2014.

<sup>159</sup> Khaled Al Shalakany, "Arbitration in Egypt: the need for a systemic review- by - Africa and the Middle East Arbitration Newsletter- Country Development section- March 2010, p 65.



Decree is currently subject to a number of challenges before the Egyptian Courts. The regrettable result is that, until this Decree is overturned and adjudged invalid, the whole arbitration process in Egypt, and the gains realized over the past 15 years, are severely undermined.<sup>160</sup> This extra level of review delays and possibly impedes the enforcement proceedings<sup>161</sup>.

### 3.5.3.3 Approach of Egyptian Courts Towards Enforcement

Recent enforcement decisions have shown that the trend with respect to international arbitration (in non-administrative contracts) favors enforcement. Whilst the procedure for recognition and enforcement appears to be a long process, Egyptian courts are considered enforcement friendly with respect to international arbitration<sup>162</sup>, and the public policy ground is normally narrowly construed.<sup>163</sup> Despite this favorable approach to the enforcement of foreign arbitral awards, the decree issued by the Ministry of Justice in 2008, may cause unnecessary delay in the enforcement proceedings.

The Egyptian Court of Cassation confirmed that the substantive provisions of the New York Convention would be incorporated into the Egyptian legal system even if they contradict other domestic legislative provisions<sup>164</sup>. Some of the important judgments issued by the Egyptian Courts in support of enforcement of arbitral awards include the *Silver Night Case*<sup>165</sup>, in which the Court of Appeal confirmed the award and ruled that, disputes arising out of administrative contracts, may be settled under the Arbitration law. In that case, the Egyptian Antiquities Organization requested the annulment of a domestic award in favour of an English contractor on the ground that the construction contract at issue was a non-arbitrable administrative contract. The Court of Appeal confirmed the award, ruling that disputes arising from administrative contracts may be settled by arbitration under the Arbitration Law of Egypt. So in this case the Egyptian Courts applied the internationally accepted best practice standards in enforcing foreign arbitral award.

---

<sup>160</sup>Supra note 156

<sup>161</sup> Thomas Childs, "Egypt, Syria and Saudi Arabia: Enforcement of foreign arbitral awards in Egypt, Syria and Saudi Arabia", available online on <http://www.kslaw.com/imageserver/kspublic/library/publication/9-10arbitrationcommitteeneewsletterchilds.pdf>

<sup>162</sup>Supra note 159.

<sup>163</sup>Mohamed Abdel Wahab, Chapter on Egypt, Published in Global Arbitration Review (January 2012), last verified in August 2013.

<sup>164</sup> Egyptian Court of Cassation in Case No 2994 (1990), dated 16 July 1990; Please refer to supra 26 for more details.

<sup>165</sup> Cairo Court of Appeal, 19 March 1997; Organisme des Antiquites v. G. Silver Night Company, 1997 REV. ARB. 283; please refer to supra note 161

In addition, in the *John Brown Engineering*<sup>166</sup> case, the Egyptian Court of Cassation held that a party seeking to enforce a foreign arbitral award can follow Article 56 of the Arbitration Law, which provides for expedited procedures whereby a party can file an *ex parte* application for enforcement with the President of the Cairo Court of Appeal. In its decision, the Court ruled that requiring a party seeking to enforce a foreign award to bring an ordinary action in the Court of First Instance, as stipulated under Article 297 of the Egyptian Code of Civil Procedure, would violate Article III of the Convention, which states that “there should not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards....”.

As can be seen from the foregoing, the Egyptian courts have adopted a favorable approach towards recognition and enforcement of foreign/international awards particularly because the Egyptian Arbitration Law set forth a distinction between domestic and international awards. This is one of the basic factors, which is lacking in the UAE and has affected the UAE court’s interpretation regarding the seat of arbitration vs. venue of arbitration, applicability of the mandatory provisions of the UAE CPL and misapplication of the domestic arbitration provisions to foreign arbitral awards.

Furthermore, although the UAE is a Member of the New York Convention, the UAE national courts continue to apply the procedures of the UAE CPL for recognizing and enforcing foreign arbitral awards even though these provisions are intended to be applied for domestic arbitration. Such an approach is regardless of the fact that Article III of the New York Convention provides the Contracting States not to impose substantially more onerous conditions than the rules of procedures of the Contracting States while recognizing foreign arbitral awards<sup>167</sup>. However, as the practice followed before the UAE national courts, the parties challenging enforcement of an award can appeal before the Court of Appeal as well as the Cassation Court which leads to complex and lengthy court procedures as discussed in part one of this study.

This study demonstrates that it is not the procedures involved i.e having two or three tiers of appeal systems in relation to the recognition and enforcement of foreign awards that primarily causes legal obstacles. But more importantly it is the legal culture in terms of not having a clear definition to

---

<sup>166</sup> Egyptian Court of Cassation, Case Number 966/73 dated 10 January 2005; El Nasr Company for Fertilizers & Chemical Industries (SEMADCO) v. John Brown Deutsche Engineering; Further details can be viewed on [[http://www.newyorkconvention1958.org/index.php?lvl=author\\_see&id=98#](http://www.newyorkconvention1958.org/index.php?lvl=author_see&id=98#)]

<sup>167</sup> This point will be discussed further in part two, section 4.4.2 of Chapter Four of this study.

international arbitration and its application by the national courts that is fundamentally affecting the enforcement of process of foreign awards in the UAE.

#### **3.5.3.4 Jurisdictional Comparison - The UAE and Egypt**

While comparing the general arbitration proceedings in the jurisdictions of the UAE and Egypt, a notable factor is the arbitration legislation. In contrast to the UAE, Egypt has a separate law that governs arbitration proceedings, which provides a straightforward framework that is in harmony, to a large extent, with the prevailing international standards contained in the UNICITRAL Model Law. Arbitration legislation in the UAE, however, is limited to articles (203 - 218) as set out in the UAE CPL, which are generally not in line with international standards and mostly do not reflect the requirements of modern times.

Further the procedures for enforcing domestic and international or foreign arbitral awards in Egypt are clearly defined. In other words, the basic difference between enforcement of domestic and international arbitration (including foreign awards) lies in the procedures to be taken i.e. Cairo Court of Appeal will have the jurisdiction to hear matters relating to international commercial arbitrations, whereas for other matters (that are not international commercial arbitrations), competent courts will have the jurisdiction to hear the underlying dispute relating to arbitration procedures<sup>168</sup>. Egyptian arbitration law stipulates particular time frames to be followed by the parties in an enforcement action. In contrast, in the UAE, a major problem with an enforcement action is the lack of clarity within the enforcement procedures. For example, in a recent judgment<sup>169</sup>, the Dubai Court of First Instance refused to grant enforcement of a foreign arbitral award seated outside of the UAE and erroneously applied provisions of the UAE CPL rather than the provisions of the New York Convention<sup>170</sup>. The Court then annulled the award even though it had no jurisdiction to do so. The above factors point out to the lack of the notion of international arbitration and absence of a separate arbitration law, which would enable the courts to distinguish between domestic and international arbitration.

In spite of the fact that Egypt has a separate arbitration law to deal with domestic and international or foreign arbitral award, the court proceedings before the Egyptian Courts remains lengthy. The

---

<sup>168</sup> Khaled El Shalakany and Adam El Shalakany, "Arbitration Guide- IBA Arbitration Committee", published in August 2013, available online <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64>

<sup>169</sup>Supra note 42.

<sup>170</sup> This issue will be discussed further in Part three of Section 4.5 of Chapter Four of this Study.

time frame for obtaining a final decision for a claim in relation to recognition and enforcement of a foreign arbitral award may range between twelve to eighteen months before the Egyptian Courts. This points out that in spite of having a separate arbitration law, itself cannot effectively contribute towards the development of arbitration but it must also be coincided with a favorable judicial approach.

In the overall comparative examination of these jurisdictions namely, France, Switzerland and Egypt with that of the approach adopted by the UAE national courts, it is clearly evident that the UAE lacks a strong arbitration law such as France which has fewer grounds for challenging foreign awards. In addition, the French courts offer efficient support to the arbitration proceedings and parties autonomy. This is evidenced by the approach adopted by the French courts in *Hilmarton*, *Putrabali cases* which is explained in part two section 3.5.1.4 of Chapter three of this study. In relation to the Swiss Court, they offer strong support to arbitration and is recognized as one of the world's most preferred place for conducting arbitration and has an independent law on arbitration in line with the international accepted best practice. Egypt has also enacted an independent law to govern the framework for arbitration and has developed itself to an arbitration friendly jurisdiction, nonetheless there are some discrepancies that still exist in Egypt which hinders the efficient enforcement of foreign arbitration award such as the establishment of the Technical Bureau at the Ministry of Justice and the time scale taken by the court in issuing a final decision on enforcement of award as noted above.

In light of the above analysis, the following part outlines possible remedial measures to enhance the recognition and enforcement of arbitral awards in the UAE.

### **3.6 Obstacles for Enforcement and Possible Remedies**

The provisions of the UAE CPL regulating the enforcement of arbitral awards (whether foreign or domestic) grant the national courts an absolute power of review over an arbitration award. Further, despite the explicit limitations provided under Article 216 for parties to challenge an award, the courts continue to expand their authority to set aside arbitral awards on grounds that are not remotely relevant to those provided in Article 216 or by the New York Convention. Review by the judiciary over arbitral awards is of utmost importance to ensure that fairness and rule of law have been realized by an arbitral tribunal. However, it is of greater importance to ensure that such review is legislated and limited to certain borders to eliminate any unpredictability which would

compromises parties' trust in the UAE's commitment to the enforcement regime of the of New York Convention.

In a survey conducted to identify the most fundamental challenge to the enforcement of foreign arbitral awards in the Middle Eastern States indicates that complex judicial process and its misuse by parties as a tactic to delay enforcement is the greatest challenge<sup>171</sup>. Review by the judiciary must not extend beyond the five internationally recognized conditions for review, which is set out under Article V of the New York Convention.

### 3.7 Conclusion

This thesis demonstrates that it has become crucial to make substantial changes to improve the UAE judicial system's approach to arbitration. These changes should be reflected at all levels of the judicial system irrespective of whether an application is filed to object to enforcement or to enforce a foreign arbitral award pursuant to UAE's obligation under the New York Convention<sup>172</sup>.

The UAE's existing law on arbitration does not provide international scope and the provisions relating to arbitration are concise<sup>173</sup>. In line with most of the leading arbitration jurisdictions such as France, it is necessary for the UAE to enact a separate arbitration law governing the ratification of domestic awards and recognition and enforcement of foreign and international arbitration awards. For example, provision to present an application to the head of the competent court to decide the issue of recognition and enforcement after the expiration of a particular period, 90 days for instance, for notifying the award debtor to submit his objection if any, on the enforcement application and then proceed with the recognition and enforcement by the award creditor. Alternatively, give the award creditor and the award debtor one final chance for appeal through the proceeding either by filling an appeal before the competent Court of Appeal to consider a lawsuit of recognition and enforcement as well as any objection to be heard together by the competent appeal court so that this judgment of the competent appeal court permanently rules on the award and make sure that it complies with the requirements of Articles IV and V of the Convention. By this way, recognition and

---

<sup>171</sup> Survey conducted by Essam Al Tamimi, Senior Partner of Al Tamimi & Company in preparation for his article published in BCDR International Volume No 1(2014) on Enforcement of Foreign Arbitral Awards in the Middle East.

<sup>172</sup>Essam Al Tamimi, Enforcement of Foreign Arbitral Awards in the Middle East, published in BCDR International Volume No 1(2014)

<sup>173</sup> This is discussed in part one section 3.4 of Chapter three of this Study.

enforcement of foreign/international awards in the UAE can be implemented effectively and within a lesser time frame; thereby achieve the advantages of arbitration.

The UAE judiciary must have a strong system to implement recognition and enforcement of arbitral awards and judges dealing with arbitration matters must possess excellent knowledge on the principles underlying international arbitration such as party autonomy and must be able to discern the nature of dispute and determine if it is international in nature. These are some of the vital factors, which are lacking in the UAE judicial system that consequently lead to complex and lengthy court proceedings for enforcement of arbitral awards.

Further, in accordance to the rules related to ratification of the domestic awards as provided in Article 217(2) of the UAE CPL, it stipulates for the possibility of filing appeal against the decision of Court of First Instance. In practice, national courts of the UAE apply these rules and procedures related to domestic arbitration to foreign arbitrations. This incorrect application of the law by the UAE courts has resulted in prolonged and complex judicial proceedings that take considerable amount of time for the parties to reach final outcome. As such to achieve harmony between the speed of proceedings on the one hand and the necessity of its finality and fairness on the other, review by judiciary prior to its enforcement is a necessity; however, regulating procedures and time limits for such reviews is undeniably crucial.<sup>174</sup>

Different regimes have contrasting views of the above conception: some legislation has prohibited objection to arbitral awards to avoid unnecessary dragging of procedures and costs, as in Article 1481 of the French Civil Procedures Law. Modern legislative reforms have taken giant leaps under the guidance of the Model Law and have reduced the review by judiciary over arbitral awards and set limited grounds to challenge enforcement before the Appeal Court or for the annulment of an award.<sup>175</sup>

The rules and procedures applied by the UAE national courts while considering an application for recognition and enforcement of foreign arbitral awards is another major legal obstacle. It has to be re-considered whether the rules and procedures for the enforcement of foreign judgments (Articles 235 and 236 of the UAE CPL) is the correct applicable law governing recognition of awards in the

---

<sup>174</sup>Albert Jan van den Berg, Should the Setting Aside of the Arbitral Award be Abolished? Available online (last view on September 2016).

<sup>175</sup>This is discussed in part two section 3.5.1 of this chapter.

UAE. Additionally, it must be reviewed whether it is permissible for the parties to appeal the decision of Court of First Instance although Article 235(2) of the UAE CPL (which deals with the enforcement of foreign judgments and awards) directs parties to submit the execution order before the Court of First Instance and does not mention the possibility of filing an appeal against the decision of Court of First Instance.

Establishing a competent court to consider exclusively matters arising out of arbitration proceedings and entrust the court with the task of considering application for the recognition and enforcement of foreign/international arbitration awards, as followed by the French legal system is an ideal solution to strengthen the process of recognition and enforcement of foreign awards. Additionally, this court should have specialized judges who have substantive experience on international arbitration. The review of the Court should be limited to the internationally recognized conditions as contemplated under Article V of the New York Convention instead of the conditions set forth in the UAE CPL.

This study demonstrates that due to the absence of the concept of international arbitration in the UAE law, the UAE courts lack appreciation for the international character of arbitral awards, which adversely affected the recognition and enforcement of foreign and international awards in the UAE. Additionally, not having a separate law governing the arbitration framework in the UAE has further contributed towards the present legal obstacles in the enforcement regime of arbitral awards in the UAE.

Chapter Four  
**The Impact of the New York Convention on The UAE Courts'  
Approach Towards Recognition and Enforcement of Foreign Awards**

*“The New York Convention is nothing without judges: arbitrators write mere words on paper. They have no imperium, no bailiffs and no tipstiffs; but judges exercise the full legal powers of the state to give those mere words the force of law. It is judges who make the New York Convention work”<sup>1</sup>.*

#### **4.1 Introduction**

Albert Jan van den Berg has pointed out that “the effectiveness of international arbitration depends ultimately on the question whether the arbitral award can be enforced against the losing party”<sup>2</sup>. The question raised at this point is what happens if the Contracting States to the New York Convention fail to comply effectively with the objectives set out under the Convention due to the lack of a clear definition and application of the concept of international arbitration.

The major issue underlying this research is whether the absence of the concept of international arbitration has affected the approach of the UAE courts in the context of interpreting the New York Convention, particularly Article III of the Convention, which grants the Contracting States to recognise the arbitral awards as binding and enforce them in accordance with the procedural rules of the court seised with the enforcement request.

In the context of this thesis, the concept of international arbitration must be understood in two different ways. Firstly, it relates to the absence of a clear definition under UAE law which determines the international character of an arbitral award. In modern times, owing to the increase of global markets and international commercial disputes, there is a need to recognize and understand the importance of international arbitration in the business disputes, and the arbitration laws of states should specify rules that define arbitration and that are international in scope<sup>3</sup>. Secondly, it refers to the lack of substantial international arbitration experience and a proper understanding of the

---

<sup>1</sup> A commentary of the International Council for Commercial Arbitration (ICCA) 2012 Congress in Singapore Judicial Debate on the General Theme “State Courts & Intl. Arbitration: The Future”, Introduction by V.V. Veeder, (available online and last accessed in August 2016).

<sup>2</sup> Albert Jan van den Berg, Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions, 2 ICSID Rev. Foreign Investment L.J 349 (1987)

<sup>3</sup> A. Redfern, M. Hunter, N. Blackaby and C. Partasides, Law and Practice of International Commercial Arbitration, (2004) p1.



principles of international arbitration by the UAE national courts when applying the provisions of the New York Convention. This legal obstacle is connected to the arbitration practice in the UAE, which has achieved only minor progress since joining the New York Convention. The enforcement procedures in relation to the recognition and enforcement of foreign/international awards remains the same irrespective of joining the Convention, since the national courts have misinterpreted and acted beyond the provisions of the Convention and refused to enforce numerous foreign arbitral awards.

This chapter provides an overview and shall review whether the UAE national courts have interpreted the New York Convention in a way that complies with its major objective, which is to facilitate the enforcement procedures of foreign arbitral awards. Moreover, as noted in chapter three of this research, lengthy judicial proceedings are required by the UAE legislators before granting the enforcement of a foreign arbitral award. The present chapter investigates whether such complex and lengthy court proceedings have, in effect, resulted in retaining the position of the pre-New York Convention status in the UAE. This is all important in the context of this research, because, as will be seen, the absence of the concept of international arbitration in the UAE has compromised the UAE's ability to take full benefit of the Convention's pro-enforcement regime.

Before the UAE became a signatory to the New York Convention, the UAE national courts' approach towards recognition and enforcement of foreign arbitral awards was not at all positive, as they never granted recognition and enforcement of foreign arbitral awards as will be examined in this chapter. Nonetheless, following the UAE's accession to the New York Convention, there has been some changes in the national courts' approach towards favoring enforcement of foreign arbitral awards, however the current approach of the national courts' is not consistent and cannot be not considered as progressive enough, while considering the approach adopted by other Contracting States to the New York Convention.

#### **4.2 Scope and Structure of this Chapter:**

This chapter is structured as follows:

- (i) Part one analyzes the objectives of the Convention, particularly its scope and application. Further, it examines the term "arbitral award" as defined under the Convention and discusses various articles that deal with the conditions that must be fulfilled when applying for the recognition and enforcement of foreign awards. In addition, it outlines the grounds

under which the recognition and enforcement of foreign awards may be refused by national courts of the Contracting States.

- (ii) Part two describes the UAE courts' positions on recognition and enforcement of foreign arbitral awards before and after the UAE acceded to the Convention. In addition, this section provides insight regarding recent decisions issued by the national courts of the UAE in relation to the recognition and enforcement of foreign awards.
- (iii) Part three examines a recent decision by the Dubai Court of Cassation in *Construction Company International (CCI) v. Ministry of Irrigation of the Government of Sudan (MOI)*, in Case Number 156/2013 (civil), in which the Court refused to enforce a foreign arbitral award on the ground of lack of jurisdiction. This section includes commentaries by learned jurists and international arbitration scholars about the pitfalls and strategies of this decision of the Dubai Court of Cassation.
- (iv) The conclusion analyses the problem of the lack of the concept international arbitration in the UAE and how it has caused a regressive impact on the application of the New York Convention by the UAE national courts.

## PART ONE

### 4.3 Overview of the New York Convention:

The ICC produced the first draft Convention on the Recognition and Enforcement of International Arbitral Awards to the United Nations Economic and Social Council in 1953 as a proposed replacement for the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) of 1927. The Council submitted the draft convention with slight variations to the international conference in the spring of 1958.

On 10<sup>th</sup> June 1958, the United Nations diplomatic conference adopted the New York Convention (“New York Convention” or “the Convention”) on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention urges courts of contracting states to allow operative private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. It applies only to arbitrations that are not considered domestic awards in the state in which recognition and enforcement is sought<sup>4</sup>. The Convention entered into force on 7<sup>th</sup> June 1959.

It is widely agreed that the New York Convention has played a critical role in the growth of arbitration over the last half a century<sup>5</sup>. By providing a multilateral framework that recognizes the validity of commercial arbitration agreements and by enabling effective enforcement mechanisms in contracting states, the Convention has made arbitration one of the leading forms of dispute resolution for international disputes<sup>6</sup>.

One of the Convention’s major objectives was to eliminate the complex procedures under the Geneva Convention that required a party seeking to enforce an award first to prove that the award was “final”. The Convention streamlines enforcement procedures by requiring an award to be “binding” instead of “final” and by shifting the burden of proof on the party against whom enforcement is sought<sup>7</sup>. As per the introductory provisions of Article V(1) of the New York Convention, the burden of proof in an enforcement proceeding, is on the party resisting the

---

<sup>4</sup> Albert Jan Van Den Berg, “The New York Convention of 1958: An Overview” available online (accessed last in August 2016).

<sup>5</sup> Beth Trent, “Important Trends in International Dispute Resolution”, published in Lexology (2015).

<sup>6</sup> Supra note 5.

<sup>7</sup> Stephanie Cohen, “The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards, available online [www.whitecase.com](http://www.whitecase.com) (last viewed on January 2016).

enforcement both under Article V(1)(a) and otherwise to prove that grounds for refusing the enforcement exists<sup>8</sup>.

As of June 2015, 156 State parties<sup>9</sup> have adopted the New York Convention and have agreed to recognize and enforce non-domestic arbitral awards. Such a large number of Contracting States facilitates nearly worldwide enforcement of non-domestic arbitral awards with only a limited number of defenses against enforcement available to the party that was unsuccessful in the arbitration<sup>10</sup>.

A recent survey<sup>11</sup> shows that approximately 40 percent of arbitral awards subsequently led to a negotiated settlement rather than the spontaneous compliance of the unsuccessful party. Further, 20 percent of these settlements involved a discount of 25 percent or more on the amount awarded in the arbitration. It also appears that, in 20 percent of the cases, arbitral awards require enforcement measures.

Under the Convention, the contracting states may apply either one or both of two types of reservations:

- (i) The reciprocal reservation contained in Article I(3)<sup>12</sup> of the Convention applies allowing countries to enforce arbitration awards only if the prevailing party is from a Convention member state.<sup>13</sup>
- (ii) The commercial reservation also contained in Article I(3)<sup>14</sup> of the Convention applies allowing countries to enforce only arbitration awards that are related to commercial

<sup>8</sup> Gary Born, *Dallah and the New York Convention*, Kluwer Arbitration, April (2011),

<sup>9</sup> Please see the list of contracting states as of June 2015, available online on [www.wikipedia.org/wiki/Convention\\_on\\_the\\_Recognition\\_and\\_Enforcement\\_of\\_Foreign\\_Arbitral\\_Award](http://www.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Award)

<sup>10</sup> Christopher Style QC and Stephan Balthasar, "Enforcing International Arbitral Awards: Pitfalls and Strategies", published in the *Journal of the Dispute Resolution Section of the International Bar Association (IBA)* in May 2012 vol 6, p 3.

<sup>11</sup> Loukas Mistelis and Crina Baltag, "Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices" [2008] *Am Rev Int Arb* 319 at 340.

<sup>12</sup> Reciprocal reservation is contained in Article 1(3) of the New York Convention, which states: "When signing, ratifying or acceding to the Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."

<sup>13</sup> The Convention on the Recognition and Enforcement of International Arbitral Awards is available online at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf). (last viewed in August 2016).

<sup>14</sup> The commercial reservation is contained in Article 1(3) of the New York Convention, which states that "...any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State making such declaration."

transactions; in other words, the Convention can be applied only to differences arising out of legal transactions that are considered commercial under a state's own national law<sup>15</sup>.

According to some legal writers, these two reservations have generally posed few problems for national courts of the Contracting States and have not impeded the consistency and effectiveness with which the Convention applies to the recognition and enforcement of arbitral awards.<sup>16</sup> Although national courts face difficult questions concerning such issues as the retroactivity of the Convention, the role of Article XIV<sup>17</sup>, and identifying where the award is made, these issues generally arise in few cases. Furthermore, lawyers responsible for drafting arbitration clauses ensure that the seat of arbitration is the place where the Convention is in force, as the result of which reciprocal reservation is becoming less relevant<sup>18</sup>. Similarly, national courts are applying commercial reservations in a liberal fashion<sup>19</sup>. All of these factors have positively contributed towards the success of the Convention.

The following part provides an overview of the New York Convention and examines some important legal principles encompassed in the Convention. One of the main objectives of discussing these legal principles is to analyse closely the extent to which these principles are applied in the UAE and how the lack of the concept of international arbitration impacts the approach of the UAE national courts when considering applications by parties seeking recognition and enforcement of foreign arbitral awards.

As discussed in chapter three of this study and as noted in the introduction section of the present chapter, the recognition and enforcement procedures in the UAE remain lengthy and complex notwithstanding the UAE's accession to the New York Convention. Albeit, some improvements were made in the enforcement process. For example, the applicable conditions as envisaged in the New York Convention are applied to enforce the foreign awards. In addition, the UAE national courts started to apply Articles IV and V of the New York Convention rather than the conditions mentioned in Articles 235 and 236 of the UAE CPL. Nonetheless, the procedures for the recognition and enforcement of foreign arbitral awards remains the same. It is similar to initiating a normal claim,

---

<sup>15</sup> Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitration Awards-The New York Convention in Practice*, published by Cameron May (2008), p 161.

<sup>16</sup> *Supra* note 15, p. 184.

<sup>17</sup> Article XIV of the New York Convention states: "A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the convention".

<sup>18</sup> *Supra* note 15, pp 184-185.

<sup>19</sup> *Supra* note 15, p.184.

which consists of two tiers of appellate proceedings, despite the fact that Article 235 of the UAE CPL clearly states that the application requesting for execution of an award should be submitted to the competent court of first instance only without any further reference to any possible appeal proceedings. This issue was examined in detail in chapter three of this study. No distinction is made by the UAE national courts with regard to the enforcement procedures for foreign or international awards in terms of the ratification process of domestic awards, and both awards are subject to similar lengthy and complex procedures, which is not in line with internationally accepted best practices.

This is mainly due to the lack of the notion of international arbitration in the UAE, which led the UAE national courts to misconstrue the provisions of the New York Convention. This is also the result of the lack of experience and understanding of the basic objective of the New York Convention, which is to facilitate the contracting states to provide a smooth and efficient mechanism to enforce foreign arbitral awards. Moreover, there is no specialised court in the UAE to handle arbitration matters. In some cases, the judges assigned to consider the application for recognition and enforcement of foreign awards lack adequate knowledge about the principles of international arbitration.

The following part evaluates the accession to the Convention has positively impacted the recognition and enforcement procedures in the UAE.

#### **4.3.1 New York Convention - A Comprehensive Observational Study**

The New York Convention presents a substantial rationale to opt for arbitration as an effective mechanism of international dispute resolution and eliminates some of the uncertainties of transnational business by providing a uniform legal framework for the enforcement and recognition of foreign arbitration agreements and arbitral awards<sup>20</sup>.

Since its inception in 1958, the number of Contracting States to the Convention has been steadily growing, which demonstrates that it is one of the most successful international enforcement

---

<sup>20</sup> Supra note 1.

instruments in the world<sup>21</sup>. It “could lay claim to being the most effective instance of international legislation in the history of commercial law”<sup>22</sup>.

Its current 156 Contracting States represent all parts of the world and many different levels of commerce and development. Almost all of the major international trading nations are parties to the Convention, which includes 153 of the 193 United Nations member states plus the Cook Islands, the Holy See, and the State of Palestine<sup>23</sup>.

One of the main objectives of the Convention is to implement an effective and coherent system for enforcing foreign arbitral awards and to accomplish an identical treatment for the enforcement process amongst the contracting states of the Convention. It also aims to prevent national courts from re-examining the merits of a dispute by presenting an exhaustive list of grounds on which they may refuse recognition and enforcement of foreign awards<sup>24</sup>.

Theoretically, parties to arbitration rely heavily on provisions of the Convention to obtain recognition and enforcement by national courts. However, in countries other than the place in which the arbitral award was issued, the legal effect of recognition and enforcement of an award is limited to the state over which the granting court has jurisdiction<sup>25</sup>.

#### **4.3.1.1 Scope of Application of the New York Convention:**

The scope of application in relation to recognition and enforcement is defined in Article I of the New York Convention. It provides the foundation for the rest of the Convention.

Article 1(1) of the Convention states:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

---

<sup>21</sup> Gordon Blanke, Soraya Corm Bakhos Baker and McKenzie Habib Al Mulla, “United Arab Emirates: Enforcement of New York Convention Awards; Are the UAE Courts Coming of Age” available online [www.mondaq.com](http://www.mondaq.com) (last viewed on January 2016).

<sup>22</sup> Alan Redfern, “Having Confidence in International Arbitration”, published in the *Dispute Resolution Journal* (2003), vol 57, pp 60-61.

<sup>23</sup> *Supra* note 9.

<sup>24</sup> Reza Mohtashami and Merryl Lawry-White, “The (Non)-Application of the New York Convention by the Qatar Courts: *ITIIC v. Dyncorp*”, *Journal of International Arbitration (Kluwer Law International)*, vol 29 (2012) issue 4, p 429.

<sup>25</sup> Request for Recognition and Enforcement of an Arbitral Award: ICCA’s Guide to the Interpretation of the 1958 New York Convention ; A Handbook for Judges International Council for Commercial Arbitration 2011 Kluwer Law International, pp 68-111.

It specifies in the first sentence that arbitral awards fall within its field of application if they are made in the territory of a State other than the State in which recognition and enforcement are sought. Generally speaking, the Convention applies to all foreign awards as defined in Article 1(2).<sup>26</sup>

**(i) Arbitral Award:**

The term “arbitral award” is not defined in the Convention but refers only to the decisions of a tribunal that determine finally a specific issue and have *res judicata* effect that may be enforced. The Convention does not specifically refer to interim awards or orders, however the power to grant interim relief is granted by several institutional rules to arbitrators, although these decisions are rarely final awards<sup>27</sup>.

Article I(2) of the Convention states:

The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted<sup>28</sup>.

**(ii) Procedure for Recognition and Enforcement of Arbitral Awards:**

In principle, recognition and enforcement of arbitral awards may be granted by courts everywhere. The legal effect of the recognition and enforcement of an award is in practice limited to the territory over which the granting court has jurisdiction<sup>29</sup>. Pursuant to Article III of the New York Convention, national courts are required to recognize and enforce foreign awards in accordance with the rules of procedure of the territory in which the application for recognition and enforcement is made and in accordance with the conditions set out in the Convention<sup>30</sup>. Article III affirmatively obliges Contracting States to recognize awards as binding, unless they fall under one of the grounds for refusal defined in Article V.

---

<sup>26</sup> Julian D M Lew, Loukas A. Mistelis and Stefan Micheal Kroll, “Recognition and Enforcement of Foreign Arbitral Awards, Comparative International Commercial Arbitration” (Kluwer Law International 2003), pp. 687-732.

<sup>27</sup> Supra note 15, p 140. Please also refer to Loukas A Mistelis and Julian D M Lew Q.C “Pervasive Problems in International Arbitration”, published by Kluwer Law International (2006), p 175.

<sup>28</sup> Supra note 15.

<sup>29</sup> Supra note 25, pp. 68-111.

<sup>30</sup> Supra note 25 pp. 68-111.



The general rule to be followed by the courts is that the grounds for refusal defined in Article V are to be construed narrowly and that objection to enforcement is to be accepted in exceptional cases only<sup>31</sup>.

Article III<sup>32</sup> of the New York Convention has two parts. First, it requires Contracting States to recognize and enforce arbitral awards under the enforcing country's rules of procedure. Secondly, it provides that the Contracting States cannot discriminate against foreign awards by imposing substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards<sup>33</sup>.

To this effect, the rules of procedures referred to in the New York Convention are limited to such questions as the form of the request and the competent authority for which the New York Convention defers to national law. The conditions for the enforcement, however, are those set out in the Convention itself and are exclusively governed by the Convention<sup>34</sup>.

The Convention stipulates a clear distinction between the conditions for enforcement with respect to which the Convention alone is controlling; however, the procedure for enforcing foreign awards is in accordance with the procedural law of the forum. To elaborate further, in the UAE, due to the lack of a concept of international arbitration, the procedures for ratifying the domestic awards are also applied to the recognition and enforcement of foreign awards by UAE courts. As noted in chapter three of this thesis, this occurs despite the fact that the procedures that should apply to the enforcement of foreign awards must be different than the procedures for initiating a fresh litigation, which involves a two-tier appeal proceeding. Generally, in line with most of the internationally accepted best practices, for the enforcement of a foreign award, a competent court should review and determine if a foreign award complies with the conditions mentioned under Articles IV and V of

---

<sup>31</sup> *Supra* note 25.

<sup>32</sup> Article III of the Convention states: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

<sup>33</sup> Hebert Kronke, Patricia Nacimiento, Article III - Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Kluwer Law International (2010), pp 115-412.

<sup>34</sup> *Supra* note 22, p 56.

the New York Convention. It must not impose substantially more onerous conditions than are imposed on the ratification of domestic awards.

Instead, the practice followed in the UAE is that the UAE national courts do not take into account the major objective of the New York Convention, which is to provide common legislative standards for the enforcement of award. In some instances, a UAE national court will review a foreign award to determine if the award fulfills the conditions mentioned in Articles 235 and 236 of the UAE CPL. This occurs despite the fact that the New York Convention has limited the national courts of the Contracting States to verifying whether the conditions of the recognition of a foreign award are those mentioned in Articles IV and V of the Convention.

A brief examination of some of the judgments of the UAE national courts shows that there is no consistency in the approach adopted by the courts in relation to the recognition and enforcement of foreign awards. For instance, the Abu Dhabi Court of Cassation in the *Explosivos Alaveses SA* case<sup>35</sup>, granted recognition and enforcement of a foreign award and held that the provisions of the New York Convention or any other international convention on the enforcement of foreign arbitral awards must be implemented, even if these provisions are in conflict with the provisions of the UAE procedural law. However, the Dubai Court of Appeal in the *Petrixo* case<sup>36</sup> refused to recognize a foreign award on the grounds that the Court was not satisfied that the United Kingdom is a signatory to the New York Convention. It is evident that the UAE national courts in some cases have imposed substantially more onerous conditions than are mentioned in the New York Convention.

Generally, three possibilities exist in the Contracting States for regulating the procedure for the enforcement of a Convention award:

- (a) Enforcement procedure according to specific provisions laid down in a special act;
- (b) Enforcement procedure for a foreign award in general; and
- (c) Enforcement procedure for a domestic award<sup>37</sup>.

---

<sup>35</sup> Abu Dhabi Court of Cassation Commercial Appeal No 679/2010 dated 16 June 2011. This case is discussed further in part two of this study.

<sup>36</sup> Dubai Court of Appeal Commercial Case No 52/2016 dated 30/03/2016.

<sup>37</sup> Supra note 4.

A party who wishes to obtain recognition and enforcement consistent with Article III should submit to the relevant court the requirements mentioned in Article IV<sup>38</sup> of the Convention. Article IV is set up to facilitate the request for enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement<sup>39</sup>. One of the most important features of the Convention is that the party seeking enforcement of an award no longer has to prove compliance with various conditions, but has to satisfy only the requirements in Article IV, which constitutes *prima facie* evidence that he is permitted to obtain enforcement of the award. It is then up to the resisting party to prove that enforcement should not be granted<sup>40</sup>.

Article IV sets forth formal requirements that must be satisfied when applying for the recognition and enforcement of foreign awards.<sup>41</sup> The main objective of the article is to expedite enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement of a Convention award.<sup>42</sup> In accordance with this article, the party seeking recognition and enforcement has the duty to submit the listed documents. These provisions are designed to provide internationally uniform and transparent standards of proof and to prevent narrow resistance to the recognition of foreign awards in the guise of formal requirements of proof<sup>43</sup>.

The Convention does not define what is required for “authentication”, which has led to some uncertainties and conflicting court decisions.<sup>44</sup> The purpose of authenticating the award is to enable the court hearing the application for recognition or enforcement to verify that the award is genuine,

---

<sup>38</sup> Article IV of the Convention states as follows:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
  - (a) The duly authenticated original award or a duly certified copy thereof;
  - (b) The original agreement referred to in article 2 or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by diplomatic or consular agent.

<sup>39</sup> Supra note 22, p 55.

<sup>40</sup> See Michael Hwang and Yeo Chuan Tat, “Recognition and Enforcement of Arbitral Awards”, published in *The Asian Leading*

*Arbitrator’s Guide to International Arbitration* (2007).

<sup>41</sup> The party seeking enforcement must present the duly authenticated original award or a duly certified copy, the original agreement referred to in article 2 or a duly certified copy. In addition, if the award or agreement is not made in an official

language of the Country where enforcement is sought then the party applying for recognition shall produce a translation of these

documents into such language which is certified by an official or sworn translator or by diplomatic or consular agent.

<sup>42</sup> Supra note 22, pp 55-56.

<sup>43</sup> Fouchard Giallar Goldman on International Commercial Arbitration, (Edited by Emmanuel Gaillard and John Savage) published by

Kluwer International (2012) p. 374.

<sup>44</sup> Dirk, O., Article IV “Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary by H Kronke”, *Kluwer Law International* (2010).

to establish the identity of its owners<sup>45</sup>, and to confirm that the award was made on the basis of an arbitration agreement defined in the Convention.<sup>46</sup> The Convention sets only the procedural prerequisites to applying for enforcement, and it does not specify the law governing the authentication requirements. In addition, Article IV does not include the scope for verification of material presented by the party seeking enforcement or the validity and existence of an arbitration agreement. It is at the next phase, i.e. under Article V of the Convention, that substantive examination of the validity of the arbitration agreement and its compliance with Article II(2) of the Convention takes place<sup>47</sup>.

Translation of the award and arbitration agreement referred to in Article IV of the Convention to the language of the country in which recognition and enforcement are being sought is a mandatory requirement at the time of submitting the application<sup>48</sup>. However, courts in several countries have held that the failure to produce the stipulated documents, usually the authenticated copy, can subsequently be corrected<sup>49</sup>.

Once a party seeking recognition and enforcement has complied with Article IV of the Convention, unless the opposing party proves one or more grounds for refusal (set forth in Article V), the party is entitled to recognition and enforcement of the award.

There are some generally accepted doctrines on enforcement of foreign/international awards, such as that the courts must follow a pro-enforcement bias in facilitating the enforcement of the award. This pro-enforcement bias is also clearly manifested by the provisions of the New York Convention<sup>50</sup>. Under Article V (1) of the Convention, the party resisting enforcement of the arbitration award has the burden of proof to show the existence of at least one of the grounds for refusal set out in Article V(1). It is generally accepted that the enforcement court should not review the merits of the arbitral award and that the grounds for refusing to enforce an award should be narrowly construed.

---

<sup>45</sup> Supra note 22, pp 60-61.

<sup>46</sup> Supra note 22, pp 55-56.

<sup>47</sup> Supra note 44.

<sup>48</sup> Supra note 22, pp 55-56.

<sup>49</sup> Supra note 26, pp. 970.

<sup>50</sup> Supra note 4.

Albert Jan Van Den Berg pointed out:

*As far as the grounds for refusal of enforcement of the award as enumerated in Article V [of the Convention] are concerned, it means that they have to be construed narrowly. More specifically, concerning the grounds for refusal in Article V(1) to be proved by the respondent, it means that their existence should be accepted in serious cases only; obstructions by respondents on trivial grounds should not be allowed. Concerning the ground for refusal of Article V(2) to be applied by the court on its own motion, it means that a court should accept a public policy violation in extreme/exceptional cases only, thereby using the distinction between domestic and international public policy.<sup>51</sup>*

In this context, in practice, application of these doctrines largely depends on the judicial attitude in relation to international arbitration and, accordingly, to enforcement of arbitral awards. The reasons why some judges are not supportive of international arbitration can sometimes be explained by their lack of proper understanding of the arbitral process and their incorrect application of treaties or legislation on arbitration, all culminating in an interventionist attitude towards the arbitral process<sup>52</sup>. From the perspective of the UAE regime, this issue is more relevant, as some of the judges who oversee applications for recognition and enforcement of foreign awards lack a proper understanding of the principles of international arbitration and hence interpret the provisions of international conventions incorrectly. Additionally, although the UAE CPL states in Article 235 that the application seeking execution of an award should be submitted to the competent court of first instance and does not provide for any appeal of this decision, in practice, the UAE national courts permit an application seeking recognition and enforcement of foreign award to be challenged before the Court of Appeal and finally before the Cassation Court. This practice is the result of the lack of having an international arbitration concept in the UAE. The UAE courts' application of Articles 235 and 236 of the UAE CPL to foreign awards and its consequences are discussed in part 3.4.2.3 of chapter three of this thesis.

One of the arguments in favor of restricting the discretion of national court in relation to the enforcement of arbitration awards is that each contracting state is influenced by its own legal tradition and may exercise its discretion differently and that this difference in approach can lead to a high degree of uncertainty and unpredictability<sup>53</sup>.

---

<sup>51</sup> Supra note 4.

<sup>52</sup> Supra note 24.

<sup>53</sup> Supra note 26.

Part three of the present chapter examines a significant judgment issued by the Dubai Court of Cassation that refused to recognize and enforce a foreign award on the ground of a lack of jurisdiction pointing out that the award debtor did not have a domicile in the UAE. In the same case, the Cassation Court interpreted that Article III of the New York Convention granted permission for the Contracting States to consider any request for recognition and enforcement of a foreign award under the procedural rules of the country in which enforcement is sought. In this case, the court applied the UAE procedural law and concluded that it does not have jurisdiction to grant recognition.

The above example of the UAE courts' interpretations of the provisions of the New York Convention confirms that, although the UAE became a signatory to the Convention, it did not set right the procedures applicable to recognition and enforcement of foreign arbitral awards. This research has shown that this regressive approach to recognition and enforcement of foreign arbitral awards is caused mainly by the lack of appreciation by the UAE courts of the international character (concept of international arbitration) of the arbitral awards, led by the UAE courts' failure to consider the principal aim of the New York Convention i.e not to impose substantially more onerous conditions on the enforcement of foreign arbitral awards than those on domestic arbitral awards.

The objections to recognition and enforcement listed in Article V<sup>54</sup> of the Convention are meant to be exhaustive, and national laws cannot be the basis for any additional defense. In addition, the enforcing court must not re-examine the foreign awards on the merits. The control of the enforcing court is limited to verifying whether a ground under Article V exists<sup>55</sup>.

In general, Article V is divided into two parts. The first part lists the grounds upon which enforcement may be refused, all of which must be proven by the respondent. The second part relates to a violation of public policy under the law of the forum and lists the grounds on which enforcement may be refused by a court on its own notion.<sup>56</sup> However, in practice, the respondent can also invoke the grounds related to public policy.

---

<sup>54</sup> The grounds for refusal of enforcement are listed in Article V(1) of the Convention: (a) incapacity of the party or the invalidity of the arbitration agreement under the law of the country where the award was made; (b) lack of notice or violation of due process in relation to the party against whom the award is invoked; (c) excess of jurisdiction of the arbitral tribunal or the award deals with matters not falling within the terms of the submission to arbitration; (d) the composition of the tribunal is not in accordance with the law of the country where the arbitration took place; or (e) the award is not binding or has been set aside. Article V(2) of the Convention stipulates two further grounds for refusing enforcement: (a) public policy and (b) a dispute not capable of settlement by arbitration under the law of the country in which enforcement is sought.

<sup>55</sup> Herbert Kroke, Patricia Nacimiento (ed) Article V(1)(a), "Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary by H Kronke", Kluwer Law International (2010).

<sup>56</sup> Albert Jan van den Berg, "New York Convention of 1958: Refusals of Enforcement", Published in the ICC International Court of Arbitration Bulletin - Vol. 18/No. 2 - 2007, available online at <http://www.arbitration-icca.org/media/0/12>.

The Convention does not as a matter of fact allow an appeal on procedural issues but provides grounds to refuse to recognize or enforce only if one or more of those grounds for refusal exists.<sup>57</sup>

The grounds for refusal of enforcement listed in Article V (1) of the Convention are briefly noted below:

(a) Article V(1)(a) Incapacity of Party or Invalidity of the Arbitration Agreement.<sup>58</sup>

(b) Article V(1)(b) - Lack of Notice and Violation of Due Process.<sup>59</sup>

(c) Article V (1) (c) - Excess of Jurisdiction.<sup>60</sup>

(d) Article V(1)(d) - Composition of Tribunal.<sup>61</sup>

(e) Article V(1)(e) - Award is not Binding or Has Been Suspended or Set Aside.<sup>62</sup>

A critical review of the provisions of the New York Convention as applied in the international arena and corresponding interpretations offered by the UAE national courts to the Convention provisions shows that, in some cases, the UAE courts fail to understand correctly the objectives and requirements of the Convention. Similarly, the UAE national courts fail to apply any distinction between foreign and domestic/non-foreign awards when considering its enforcement as the current enforcement mechanism for both the awards remains the same. This occurs despite the fact that the New York Convention directs the Contracting States to not impose substantially more onerous conditions on the recognition and enforcement of foreign awards than on domestic awards. This approach by the UAE courts, as will be seen further on in this chapter, is the result of the lack of the

---

<sup>57</sup> Supra note 4.

<sup>58</sup> The term "incapacity" in accordance with this article is interpreted to mean "lacking the power to contract". "Incapacity" defenses include mental incompetence, physical incapacity, lack of authority to act in the name of a corporate entity or a contracting party, being a minor incapable of concluding an agreement. This article also provides grounds for refusal where the arbitration agreement referred to in Article II is not valid under the law to which the parties have subjected it, and respondents frequently argue under this ground that the arbitration agreement is not formally valid, because it is not in writing as required by Article II(2) of the Convention.

<sup>59</sup> Article V(1)(b) provides that a party opposing recognition and enforcement on the ground of lack of notice and violation of due process must assert and prove that (a) he was not given proper notice of the appointment of the arbitrator or was unable to present his case. This article requires that parties be afforded a fair hearing that meets the minimal requirements of fairness.

<sup>60</sup> Article V(1)(c) covers two different issues in which enforcement may be refused: (a) if the award deals with a dispute not contemplated by or not falling within the terms of the parties' submission to arbitration or (b) contains decisions on matters beyond the scope of the parties' submission to arbitration. It also includes a provision which provides that the competent national court has discretion to grant partial enforcement of an award, if the award is only partly beyond the jurisdiction of the arbitral tribunal and provided that the part falling within the jurisdiction of the arbitral tribunal can be separated. Please refer to supra note 4 for more details.

<sup>61</sup> This article establishes the supremacy of party autonomy over the law of the place of arbitration and allows a competent national court to refuse recognition and enforcement where a party is deprived of its right to appoint an arbitrator or have its case decided by an arbitral tribunal the composition of which reflects the parties' agreement; For further details, please refer to supra note 26, pp 714-715.

<sup>62</sup> Article V(1)(e) provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has not yet become "binding". This article further provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been set aside by a court of the country in which or under the law of which the award was made. However, notwithstanding that an award has been set aside in the country in which or under the law of which the award was made, a court in another country may still grant recognition and enforcement (France is the best known example of this). This article also provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been suspended by a court of the country in which or under the law of which the award was made. Please refer to Supra note 26, pp. 687-732.

concept of international arbitration in terms of not having a clear and express definition of international arbitration and its implementation.



## PART TWO

The UAE's attitude through its laws and jurisprudence to international commercial arbitration has improved to some extent over the past two decades. Nonetheless, the recognition and enforcement of arbitration awards remain as a problem. Following the UAE's accession to the Convention, the UAE courts started applying the conditions of the New York Convention that must be fulfilled for the enforcement of foreign arbitral awards. Nevertheless, there still remain notable inconsistencies in judgments issued by the UAE national courts on this point. In addition, the incorrect application of arbitration laws by the UAE national courts on the recognition and enforcement of arbitral awards remains a pivotal issue<sup>63</sup>. In this context, in accordance with Article 212(4) of the UAE CPL, if an award is not signed in the UAE, the provisions of Article 235 of the UAE CPL<sup>64</sup>, which deals with the execution of foreign judgments, orders and awards, is applicable to the enforcement process. As noted previously in part 3.4.2 of chapter three, Article 235 of the UAE CPL indicates that the competent court of first instance should deal with the execution of foreign judgments, awards and orders without any scope for appeal. The UAE national courts, nonetheless, continue to apply the provisions of domestic arbitration for both foreign and international arbitration, which consequently leads to complex and lengthy court proceedings for enforcement of foreign awards. In short, the lack of the concept of international arbitration and the resulting misinterpretation of the provisions of the Convention and the arbitration legislations contained in the UAE CPL cause uncertainty in the enforcement process. In addition, due to the lack of appreciation by UAE courts of the

---

<sup>63</sup> Dubai Court of Cassation Commercial in Case No 434/2013 dated 23 November 2014; - In this case the applied the domestic procedural laws to a foreign arbitral award and refused enforcement on the ground that the arbitrator did not take oath as prescribed by the UAE law while administering witness statement. Federal Supreme Court decision in Civil Case No 202 of the Judicial Year 25 dated 14/5/2006- In this case the Federal Supreme Court held that the generality of the provisions of Article 213(3) of the UAE CPL provides for its applicability to both domestic and foreign arbitral awards. Please also refer to Dubai Court of Cassation Case No 258/1999 dated 2/10/1999, Dubai Court of Cassation Case No 267/1999 dated 27/11/1999 and Dubai Court of Cassation Case No 17/2001 dated 10/03/2001.

<sup>64</sup>Article 235 of the UAE CPL reads as follows": 1- An order may be made for the enforcement in the UAE of judgments and orders made in a foreign country on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE.

2 - An order for execution shall be applied for before the court of first instance within the jurisdiction of which it is sought to enforce, under the usual procedures for bringing a claim, and an execution order may not be made until after the following matters have been verified:

a - that the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made, and that the foreign courts which issued it did have jurisdiction thereover in accordance with the rules governing international judicial jurisdiction laid down in their law,

b- that the judgment or order was issued by a court having jurisdiction in accordance with the law of the country in which it was issued,

c - that the parties to the action in which the foreign judgment was issued were summoned to attend, and were correctly represented,

d - that the judgment or order has acquired the force of *res judicata* in accordance with the law of the court that issued it, and

e - that it does not conflict with a judgment or order already made by a court in the UAE, and contains nothing that conflicts with morals or public order in the UAE".

international nature of arbitral awards, the UAE courts fail to apply the principles of international arbitration effectively towards the recognition and enforcement of foreign arbitral awards.

The following parts examine the position of the UAE national courts before and after becoming a signatory to the Convention. They identify the legal obstacles that continue to thwart the recognition and enforcement process of foreign arbitral awards subsequent to the UAE's accession to the Convention.

#### **4.4 The Position of UAE Courts' Before and After Acceding to the New York Convention**

The UAE acceded to the Convention on 19<sup>th</sup> November 2006 under Federal Decree No. 43 of 2006. Following the UAE's accession to the Convention, there was a notable progressive change in the courts' position with regard to the recognition and enforcement of foreign arbitral awards. Prior to ratifying the Convention in November, 2006, the position of the UAE courts was not favorable towards enforcement of foreign arbitral awards, as courts would confirm awards only upon the satisfaction of onerous conditions, which were often unattainable, namely the conditions set out under Articles 235 and 236 of the UAE CPL.<sup>65</sup>

In this context, this study analyzes the position of UAE courts before and after the UAE acceded to the Convention by closely examining court judgments in relation to the recognition and enforcement of foreign awards.

##### **4.4.1 UAE Courts' Position Prior to Accession to the New York Convention:**

Prior to the UAE's accession to the Convention, the ratification and enforcement of domestic arbitral awards issued in the UAE were governed exclusively by the provisions of the relevant section of the UAE CPL.<sup>66</sup> At that stage some procedural obstacles existed due to inconsistent judgments that were issued by the UAE national courts in relation to enforcing domestic awards. However, generally speaking, a decision would be made by the courts confirming the award, if it met the requirements for an action for confirmation before the UAE courts, which required that it fulfilled the conditions mentioned in the UAE CPL and especially Articles 212 and 216 of the UAE CPL.

---

<sup>65</sup> Federal Law No. (11) of 1992 concerning civil procedure, as amended by Law No. (30) of 2005 and Law No (10) of 2014. UAE CPL was explained in the previous chapters. Please refer to part one section 2.4 of chapter two and part one section 3.4.2 of chapter three of this study.

<sup>66</sup> Articles 203-218 - Book II: Miscellaneous Procedures & Proceedings (Chapter III: Arbitration), Law No. (11) of 1992 concerning civil procedure, as amended by Law No. (30) of 2005 and Law No (10) of 2014.

On the other hand, national courts were unwilling to enforce foreign arbitral awards issued outside of the UAE unless they fulfilled the conditions enumerated in Articles 235 and 236 of the UAE CPL, which deal with the execution of foreign judgments, orders and awards in the UAE. The conditions that the UAE courts required to confirm arbitral awards under Article 235 of the UAE CPL<sup>67</sup> are often complex and unsustainable. The fulfillment of these conditions practically remains a challenge. There is no precedent which confirms that the UAE courts granted enforcement of a foreign award based on Articles 235 and 236 of the UAE CPL. In contrast, , the UAE courts have repeatedly refused recognition for lack of compliance with the conditions of Article 235. Since the UAE's accession to the New York Convention, the UAE national courts are presumed not to rely on the conditions contained in Article 235. However, the UAE courts on some occasions continue to apply these conditions. This issue is explained in part one 3.4.2.3 of chapter three of this study.

The conditions set out under Article 235 of the UAE CPL are as follows.

- 1 - An order may be made for the enforcement in the UAE of judgments and orders made in a foreign country on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE.
- 2 - An order for execution shall be applied for before the court of first instance within the jurisdiction in which it is sought to enforce under the usual procedures for bringing a claim, and an execution order may not be made until after the following matters have been verified:
  - a) That the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made and that the foreign courts that issued it had jurisdiction in accordance with the rules governing international judicial jurisdiction laid down in their law;
  - b) That the judgment or order was issued by a court having jurisdiction in accordance with the law of the country in which it was issued;
  - c) That the parties to the action in which the foreign judgment was issued were

---

<sup>67</sup> Hassan Arab, "The position of UAE courts on the enforcement of foreign arbitral awards", published in BCDR International Arbitration Review September (2014) - Volume 1 - Issue 1.

summoned to attend and were legally represented;

- d) That the judgment or order has acquired the force of res judicata in accordance with the law of the court that issued it; and
- e) That it does not conflict with a judgment or order already made by a court in the UAE and contains nothing that conflicts with morals or public order in the UAE.

Furthermore, Article 236 of the UAE CPL provides:

The provisions of the foregoing article shall apply to the awards of arbitrators made in a foreign country; the award of the arbitrators must have been made on an issue which is arbitrable under the law of the UAE and capable of enforcement in the country in which it was issued.

Recognition and enforcement under Article 235 of the UAE CPL are based on a principle of mutual recognition or reciprocity, whereby the UAE courts will apply the provisions of this article only in relation to awards issued in countries that, in turn, recognize and enforce UAE awards. In practice, it is nearly impossible for a party seeking enforcement of a foreign award to substantiate the principle of reciprocity, i.e. to prove that the country in which the award was issued has recognised and enforced UAE awards. Additionally, in accordance with Article 235(a), the UAE national courts shall refuse recognition and enforcement of a foreign award, if the court observes that it has jurisdiction over the dispute<sup>68</sup>. This will always be the case, since the UAE courts will consider that they have jurisdiction over the disputes, if a party is based in the UAE or has assets in the UAE, as enforcement is likely to be sought only when there are assets in the UAE. Before the UAE became a signatory to the Convention, the Dubai Court of Cassation refused to enforce foreign awards for lack of reciprocity<sup>69</sup>.

In a ruling dated 15 May 2005<sup>70</sup>, the Dubai Court of Cassation held that "...the UAE national courts have competent jurisdiction to ratify awards passed only within the United Arab Emirates. Such

---

<sup>68</sup> The Abu Dhabi Court of First Instance in (Commercial) Case No 410/2008 refused enforcement of a foreign arbitral award on the ground the UAE Courts would have jurisdiction to hear the case under Article 235 (a) of the UAE CPL. In Dubai Court of Cassation Case No 117/93 dated 20 November 1993, the Dubai Court of Cassation held that foreign judgments will not be enforceable in the UAE even if final, if the UAE Courts also have jurisdiction over the subject matter in the original proceedings. Please refer to Richard Price and Essam Al Tamimi, United Arab Emirates Court of Cassation Judgments 1898-1997, Kluwer Law International (1998) p293.

<sup>69</sup> Gordon Blanke, Soraya Corm Bakhos: Enforcement of New York Convention Awards: Are the UAE Courts Coming of Age", published in BCDR International Arbitration Review (2014) p. 10.

<sup>70</sup> Dubai Court of Cassation, Case No 218 of 2004 (Civil) issued on 15 May 2005.

jurisdiction shall not be extended to awards passed in a foreign country, irrespective of whether or not the same award has been ratified in such foreign country”<sup>71</sup>. In this case, an award creditor filed an application before the Dubai Court of First Instance for ratification and enforcement of a foreign arbitral award issued in London by a sole arbitrator. The Court of First Instance recognized the foreign arbitral award, but the award debtor appealed this decision to the Dubai Court of Appeal. The Court of Appeal overturned the First Instance Court’s decision and dismissed the case. Consequently, the award creditor challenged the Appeal Court’s decision before the Dubai Court of Cassation. The award creditor in this case argued that the UAE law includes no provision that excludes the jurisdiction of the UAE court to ratify awards issued in London. However, the Cassation Court reviewed the provisions of the UAE CPL which deal with domestic arbitration, particularly Articles 212(4), 213(3) and 215(1), and held that, according to these articles, only awards issued in the UAE shall be subject to the UAE courts and that any awards issued in a foreign country may not be considered by the UAE courts even if such courts have ratified the foreign award. Additionally, the Court of Appeal held that the UAE courts are permitted to enforce foreign awards only after duly verifying that the conditions stipulated in Article 235 of the UAE CPL have been fulfilled<sup>72</sup>. The Court’s interpretation in this case was examined in detail in chapter three of this thesis<sup>73</sup>. In addition, the Dubai Court of Cassation has on numerous other cases<sup>74</sup> refused to enforce foreign awards on the ground of lack of reciprocity, which is one of the conditions set out in Article 235 of the UAE CPL.

In short, the position adopted by the UAE national courts before the UAE became a signatory of the New York Convention was subject to the application of Article 235 of the UAE CPL or through the application of a bilateral or multilateral convention, which the UAE signed with the country in which the foreign award was issued.

#### **4.4.2 UAE Courts’ Position after Joining the New York Convention**

Pursuant to the UAE’s accession to the Convention, there has been some progress with respect to the UAE courts’ approach towards the enforcement of foreign awards. However, UAE national

---

<sup>71</sup> Hassan Arab, Lara Hammoud and Graham Lovett, “Summaries of UAE Courts’ Decisions on Arbitration”, published by the International Chamber of Commerce (ICC) 2012, p. 51.

<sup>72</sup> Supra note 71, p 52.

<sup>73</sup> Please refer to Section 3.4.3.2 of chapter three of this study.

<sup>74</sup> Dubai Court of Cassation Case No 258/1999 dated 2/10/1999- In this case, the Court refused to enforce a foreign award issued in India for lack of reciprocity; Dubai Court of Cassation No 267/1999 dated 27/11/1999. In this case, the Court refused to enforce a foreign award issued in the UK for lack of reciprocity. Please refer to Supra note 63 for additional details.

courts in some occasions have continued to apply the requirements of Articles 235 and 236 of the UAE CPL when considering applications for recognition and enforcement of foreign arbitral awards<sup>75</sup>.

Although in theory, after the UAE's accession to the Convention, the provisions of the Convention should take priority over local laws to the extent that local laws are inconsistent, following the accession in 2006, in some cases, the UAE courts were unwilling to overlook Articles 235-236 of the UAE CPL in favour of Article V of the Convention when deciding on applications to enforce foreign arbitral awards<sup>76</sup>. On the contrary, they have continued to apply the requirements set out in Article 235 of the UAE CPL and have used this as a pretext to conduct a quasi-review of the merits of foreign awards, which exceeds what is allowed under Article V of the New York Convention in order to refuse their enforcement.

Further, the Abu Dhabi Court of First Instance in one of the cases<sup>77</sup> refused to recognise and enforce a foreign award on the ground that one of the conditions mentioned under Article 235(2)(a) of the UAE CPL - the UAE courts have jurisdiction to try the dispute - was not fulfilled. In the same matter, on appeal, the Abu Dhabi Court of Appeal upheld the above judgment. In another notable case,<sup>78</sup> the Dubai Court of Appeal refused to recognise a foreign award, because the Court was not satisfied that the United Kingdom is a signatory to the New York Convention. These decisions point out the lack of proper understanding of the principles of international arbitration and its application by some of the judges in the UAE. It further confirms the necessity of establishing a competent specialized court in the UAE to deal with recognition and enforcement of foreign arbitral awards.

On several occasions, the UAE courts even proved susceptible to formalistic procedural grounds, which are commonly invoked in the ratification process of domestic awards under the applicable provisions of the UAE Civil Procedures Code, to set aside foreign awards<sup>79</sup>. For the reasons outlined above, UAE initially developed a reputation as a jurisdiction that tended to disregard the

---

<sup>75</sup> Dubai Court of Cassation Case No 258/1999 dated 2/10/1999, Dubai Court of Cassation Case No 267/1999 dated 27/11/1999 and Dubai Court of Cassation Case No 17/2001 dated 10/03/2001.

<sup>76</sup> Henry Quinlan, Alan Kaminski and Sam Stevens, DLA Piper, "Does CCI vs Sudan constitute a reversal of the pro-enforcement stance in UAE?", published in [practicallaw.com](http://practicallaw.com) (27 November 2013).

<sup>77</sup> The Abu Dhabi Court of First Instance Commercial Case No. 410/2008 and its respective appeal. However, the Abu Dhabi Court of Cassation in case No 679/2011 dated 16 June 2011 quashed the Court of Appeal judgment and decided to recognise and enforce the foreign award.

<sup>78</sup> Dubai Court of Appeal in Case No 52/2016 dated 30 March 2016. But the Dubai Court of Cassation in Case No 384/2016 reversed the lower court's refusal to enforce an award and further referred the case back to the Court of Appeal to hear the matter.

<sup>79</sup> Gordon Blanke, "Enforcement of New York Convention Awards in the UAE (Part I): Quo vadis?", published in *Kluwer Law International*, dated 26 July 2012 available at [online at Kluwer Arbitration](http://online.kluwerarbitration.com) (last viewed in June 2016).

objectives of the Convention. This research shows that one of the major reasons why the UAE national courts adopted this approach is due to the lack of the notion of international arbitration.

Pursuant to the UAE's accession to the New York Convention in 2006, some progress has occurred in the position of the UAE national courts' approach to recognition and enforcement of foreign arbitral awards to the extent that the courts started to apply the conditions of the New York Convention to enforce foreign awards. This is evidence that the UAE in some occasions supports international commercial arbitration and reflects the UAE's commitment to respect the provisions of the New York Convention.<sup>80</sup>

To elaborate, the UAE national courts in some cases continued to apply the conditions stated in Article 235 of the UAE CPL and, in this regard, issued decisions from time to time that are not consistent with previous decisions, in which the courts confirmed the recognition and enforcement of foreign arbitral awards based on provisions of the New York Convention. For example, the UAE Federal Supreme Court<sup>81</sup> held in Civil Appeal No. 202 of the Judicial Year 25 dated 14 May 2006 that the arbitral provisions (Articles 203-218) of the UAE CPL are applicable to both domestic and foreign arbitral awards. In another case, the Dubai Court of Cassation in Civil Appeal No. 218/2004 dated 15 May 2005 held that the UAE national courts have competent jurisdiction to ratify awards issued only within the UAE and the courts' jurisdiction shall not be extended to awards issued in foreign jurisdictions. Additionally, the Dubai Court of Appeal in Commercial Case No 52/2016 date 30 March 2016 refused to enforce a foreign award on the grounds that it was not satisfied that the United Kingdom is a signatory to the New York Convention<sup>82</sup>. Such inconsistency in the courts' decisions is a clear indication that the current challenges towards enforcing a foreign award cannot be effectively resolved unless a lucid and independent law on arbitration is enacted that is in line with international best practices and that governs the enforcement process of recognition of foreign and international awards. These decisions are the result of the lack of the notion of international arbitration and of a proper understanding of arbitration principles by judges in the UAE. The following discussions on the UAE court judgments on enforcement of foreign awards shall demonstrate that this outcome is primarily due to the lack of a clear definition that determines the

---

<sup>80</sup> Supra note 67, p 3.

<sup>81</sup> The Federal Supreme Court is the highest court in the UAE.

<sup>82</sup> Sebastian Perry and Alison Ross, "Dubai court questions UK's accession to New York Convention", Global Arbitration Review (GAR) publication dated 7 April 2016.

international character of arbitral awards. The new arbitral legislation in the UAE must contain provisions that differentiate between domestic, foreign and international arbitrations and that set out factors that determine the international nature of arbitration as explained in section 2.6.3 of chapter two of this study.

#### **4.4.3 Case Study - Enforcement of Foreign Arbitral Awards in the UAE**

As mentioned above, since the UAE's accession to the Convention, the UAE courts have taken an arbitration-friendly approach towards recognizing and enforcing foreign arbitral awards. In general, the conditions for enforcing foreign arbitral awards improved to the extent that the UAE national courts started to apply the conditions stated in Articles IV and V of the Convention instead of Articles 235-236 of the UAE CPL, as explained in part one of chapter four of this study. This was not the situation before the UAE became a signatory to the New York Convention. However, the procedure followed for applying for recognition and enforcement of foreign arbitral awards remains the same as the procedure for domestic arbitral awards.

In the following section, recent judgments of various UAE national courts on the subject of recognition and enforcement of foreign arbitral awards will be examined to highlight the major problems underlying this topic and accordingly offer some recommendations to resolve this issue.

##### **4.4.3.1 The Judgment of the Fujairah Federal Court of First Instance- Case No 35 of 2010 dated 27<sup>th</sup> April 2010<sup>83</sup>**

###### **Summary of the Facts:**

The Fujairah Court of First Instance enforced two awards in a ruling dated 27 April 2010, one on the merits and the other on costs. The awards were issued in London under the rules of the London Maritime Arbitration Association (LMAA) by a sole arbitrator. The award creditor sought to have the award recognized and enforced in Fujairah, UAE, because the opponent's assets were located in Fujairah, and both the UK and the UAE are signatories to the Convention. This was the first occasion when a foreign arbitral award was recognized by the UAE courts under the New York Convention.

---

<sup>83</sup> Commercial Case No. 35/2010 dated 27th April 2010; Supra note 71, p 109; Gordon Blanke and Soraya Corm Bakhos. "Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure", published in BCDR International Arbitration Review, September 2014, Vol 1, No. 1, pp 3- 27.



The Court's conclusions were prefaced by its express reference to the prohibition against reviewing the merits of awards<sup>84</sup> and its obligation to comply with international treaties and conventions which form part of the UAE domestic law regarding the enforcement of foreign arbitral awards.<sup>85</sup>

In this case, the Court confirmed that:

- (i) The enforcing court is precluded from examining the merits of the award; (ii) conventions made between the UAE and other countries regarding the enforcement and recognition of arbitral awards are to be considered part of the national legislation<sup>86</sup>, and the national courts shall verify if the necessary criteria are met before confirming any award; and (iii) the Court confirmed the foreign award made in London on the basis that the UK and the UAE are both signatories to the Convention.

**Judgment:** In the recitals, the Court held:

It is a well settled principle of judicial construction that the court shall not review the substantive merits of the arbitral award when hearing an action to recognise it (Appeal No. 556-24, issued on 19.04.05) and that ratified treaties and conventions between the UAE and other states are applicable as internal legislation with respect to the enforcement of foreign arbitral awards subject to national courts verifying that the necessary criteria are met before confirming any award. (Appeal No. 764-24 dated 07.04.05).

Upon reviewing the arbitration clause and the two awards that formed the subject of this case, the Court found no barriers to the enforcement of the awards and accordingly granted the award creditor's claims and recognized the award. This ruling was not appealed and therefore remains unchallenged. The Fujairah Court granted recognition and enforcement of the foreign award in this case after considering the criteria of enforcement under the provisions of the Convention. The significance of this case is that it is the first decision issued by a UAE national court that recognized and enforced a foreign award after the UAE's accession to the New York Convention.

Thus, since the UAE became a party to the New York Convention, the conditions under which a foreign arbitral award can be granted recognition and enforcement have improved. However, the

---

<sup>84</sup> As per the ruling of the Federal Supreme Court in Case No. 556 of Judicial Year 24 dated 19 April 2005.

<sup>85</sup> Supra note 69.

<sup>86</sup> Alessandro Tricoli, "Updates on the Ratification and Enforcement of Arbitral Awards in the UAE and DIFC Courts" published in the IBA Newsletter of the Maritime and Transport Law Committee (August 2012 - Vol 8).

notion of international arbitration in the UAE should be covered in a new law on arbitration, particularly with regard to procedural aspects, such as conferring jurisdiction on the court to hear recognition and enforcement applications or the levels of appeal that are available for a party challenging the recognition and enforcement decisions. The importance of enacting a new law on arbitration is examined in detail in sections 2.3.1 and 2.3.2 of chapter two of this thesis. The significance of differentiating domestic and foreign or international arbitration is discussed in the context of enforcement in section 2.6.2 of chapter two of this study.

#### 4.4.3.2 The Ruling of the Abu Dhabi Court of Cassation in *Explosivos Alaveses SA (Spain) v. United Management Chile Limited*<sup>87</sup>

##### **Summary of the Facts:**

In this case, the claimant filed an action before the Abu Dhabi Court of First Instance and asked the Court to recognize a foreign arbitral award issued in Paris under the ICC Rules. The Court issued its judgment and refused to recognize the award based on the non-fulfillment of one of the conditions laid down in Article 235 of the UAE CPL. In doing so, it ignored Article III<sup>88</sup> of the Convention. The award creditor appealed to the Abu Dhabi Court of Appeal, which upheld the decision of the Abu Dhabi Court of First Instance, after which the award creditor appealed to the Abu Dhabi Court of Cassation. The Court of Cassation overturned the judgment of the Court of Appeal.

The Court of Cassation held that the provisions of the New York Convention apply to the enforcement of foreign arbitral awards and that Articles 235 and 236 of the UAE CPL apply only if the foreign award was issued in a country that is not a signatory to the New York Convention or in those cases in which some other international treaty has been ratified by both the UAE and the foreign state.

Furthermore, the Court established several important principles as illustrated below:

---

<sup>87</sup> Commercial Appeal No. 679/2010 dated 16 June 2011; BCDR International Arbitration Review (2014), Issue 1, pp. 125-128.

<sup>88</sup> For further details on the provisions of the New York Convention and Article III, please refer to part one section 4.3.1.1 of this chapter.

- a) UAE court must apply the provisions of the New York Convention or of any other international conventions ratified by the UAE regarding the recognition and enforcement of foreign arbitral awards even if these provisions contradict the provisions of the UAE procedural laws; and
- b) Fundamentally, the Court iterated that stricter conditions shall not be imposed on the recognition or enforcement of foreign arbitral awards than those imposed on the ratification and enforcement of domestic arbitral awards<sup>89</sup>.

**Judgment:** In the recitals, the Court held:

The Convention requires its contracting parties to refrain from applying stricter provisions for recognizing and enforcing foreign awards than those they apply for ratifying and executing domestic arbitral awards.

The Court stated that Articles 235, 236 and 238 of the UAE CPL require courts to abide by the provisions of all international conventions entered into between the UAE and other foreign states and all international treaties that have been ratified by the UAE. If a foreign award is rendered in a state that is not a signatory to an international convention or a treaty entered by the UAE, the court of enforcement in the UAE must ascertain that the conditions set forth in Article 235 have been met.

Since the UAE ratified the New York Convention in 2006, its provisions have become mandatory laws of the UAE, even though they run counter to previous laws. The Abu Dhabi Court of Cassation accordingly overturned the judgment of the Court of Appeal.

The above decisions demonstrate that that, after the UAE's accession to the New York Convention, there has been some progress in the court's attitude towards the recognition and enforcement of foreign arbitral awards, as the UAE national courts have begun applying the conditions stipulated in the Convention while examining applications for recognition and enforcement. This shift in the approach adopted by the UAE national courts is evident if a comparison is made with the judgments issued by the UAE national courts before the UAE signed the Convention and the judgments issued thereafter. The judicial approach of the UAE courts towards the enforcement of foreign awards prior to acceding to the Convention was not conducive to enforcement as explained in section 4.4.1 of this chapter. In fact, as noted above, this study could find not a single precedent in which a UAE

---

<sup>89</sup> Supra note 69.

court approved the recognition and enforcement of a foreign award before the UAE joined the New York Convention.

But despite the UAE courts' stance in support of the enforcement of foreign arbitral awards since the UAE became a signatory to the New York Convention, there has been no change in the procedures that must be followed when seeking the recognition and enforcement of awards. In some cases, the UAE national courts have continued to apply Articles 235 and 236 of the UAE CPL, which added complexity to this issue. Further, the lack of a proper understanding of the principles of international commercial arbitration by some of the judges in the UAE national courts combined with the absence of the concept of international arbitration, as explained in section 2.6 of chapter two of this study, continues to be some of the major issues that hinder the progress and development of international arbitration in the UAE.

#### 4.4.3.3 The Ruling of the Dubai Court of Appeal in *Nimbus Sports International Company v. Ary Digital Free Zone LLC*<sup>90</sup>

##### **Summary of Facts:**

The claimant commenced proceedings before the Dubai Court of First Instance against the respondent seeking to have the Singapore International Arbitration Centre ("SIAC") arbitral award recognized, enforced and vested with a writ of execution<sup>91</sup>. The Dubai Court of First Instance dismissed the claimant's request on the basis that the award concerned was not ratified in the country of origin and could not therefore be executed under Articles 235 and 236 of the UAE CPL.

The Court of Appeal overturned the decision of the Court of First Instance and held that it was a well established principle of the Court of Cassation that Articles 235, 236 and 238 of the UAE CPL state that international treaties ratified by the UAE must be enforced with regard to the enforcement of foreign judgments and foreign arbitral awards, even if the conditions set forth in Article 235 of CPL have not been met.

---

<sup>90</sup> Dubai Court of Appeal Case No. 531/ 2011 (Commercial) issued on 6 October 2011. For further details, please refer to Supra note 71, p 118.

<sup>91</sup> Hassan Arab, "Dubai: The Position of the UAE Courts Following Accession to the New York Convention, published in Al Tamimi & Company law update (October 2012) available online (last viewed on June 2016).

**Judgment:**

In its ruling, the Court of Appeal noted that both the UAE and Singapore are signatories of the New York Convention and that the claimant had provided all necessary documents and evidence to have the award recognized and enforced pursuant to Article IV of the New York Convention. Additionally, the respondent had failed to appear before the arbitral tribunal, the First Instance Court and the Court of Appeal and did not raise any arguments pursuant to Article V of the New York Convention. The Court of Appeal accordingly overturned the judgment of the Court of First Instance.

In this case, the judgment of the First Instance Court dismissed the claimant's request on the basis that the award cannot be executed under Articles 235 and 236 of the UAE CPL, because the award was not ratified in the country of origin. Under UAE law, no provision requires that the foreign award seeking recognition must be ratified in the country of origin. This finding of the Court of First Instance points towards the lack of the concept of international arbitration in the UAE and the absence of a proper understanding of the principles of arbitration by some of the judges in the UAE national courts. This is also against the provisions of the New York Convention, which states that the Contracting States should not impose more onerous conditions for recognition and enforcement than those set out under the Convention. Further, the respondent (award debtor), who had the burden to prove that the award was defective with any apparent errors, failed to appear before the First Instance Court, in spite of which the court found reason to reject the application.

All of these issues point towards having a separate modern arbitration law in line with international best practice, which can supersede the current enforcement procedures. In addition, applications seeking recognition and enforcement of foreign awards have to be determined by judges who are well-informed about the principles of international commercial arbitration.

**4.4.3.4 The Ruling of the Dubai Court of Appeal in *Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co. KG*<sup>92</sup>**

**Summary of Facts**

In this decision, the Dubai Court of Appeal enforced an award rendered by a sole arbitrator under the ICC Rules seated in Stuttgart, Germany. The decision addressed the important issue of the place (seat) of arbitration versus locations in which hearings were held as well as several points regarding the applicability of conventions and their supremacy over domestic law. In this context, it may be pointed out that one of the major obstacles to the enforcement of foreign awards in the UAE is the complexity involved in distinguishing the legal seat of arbitration and the place/venue in which the arbitration hearings are conducted. This issue often leads to the difficulty of determining if an award is domestic, foreign or international. It also results in a problematic situation of having to determine which law applies to a particular award which has a different legal seat and venue for the arbitration proceedings. These issues arise because of the absence of a clear definition of the concept of international arbitration in the UAE and is discussed in detail in section 2.7.1 of chapter two of this study.

The Dubai Court of Appeal addressed this issue in the instant case and clearly distinguished between the seat of arbitration and the venue or place in which arbitration hearings were conducted. One of the grounds raised by the award debtor in challenging the enforcement of the award was that the conduct of the arbitral proceedings for this case was in Paris, France, rather than at the seat of the arbitration, Stuttgart, Germany. The Dubai Court of Appeal, however, held that the seat of the arbitration is the legally significant factor regardless of where the arbitrator decides to conduct hearings. In short, the Court disregarded the procedural challenges raised by the award debtor to prevent the application of the provisions of the Convention. Furthermore, the Court established several points related to the application of international conventions, such as the New York Convention, and their supremacy over domestic law.

The Court of Appeal confirmed that the international conventions ratified by the UAE within the terms of Article 238 of the UAE CPL had to be enforced.

---

<sup>92</sup> Dubai Court of Appeal Case No 1/2013 (Commercial) issued on 9 July 2013.

**Judgment:**

The Court's supervisory role when considering a request for the recognition and enforcement of foreign awards is limited to verifying the absence of any violation against a Federal Decree<sup>93</sup>. The Court examined whether the request fulfills the formal and substantive elements required under Articles IV and V of the Convention. The arbitral award in question was duly certified and authenticated, and the subject matter of the dispute was capable of resolution by conciliation.

Further, the Court did not find any violation of public policy, especially since the appellant did not submit to the Court any evidence confirming the existence of one of the elements set out in Article V of the Convention. The appellant did not prove any incapacity, that the agreement was invalid, that the appellant was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, that the appellant was otherwise unable to present its case before the arbitrator, that the award dealt with a difference not contemplated by or not falling within the scope of arbitration as set out in the agreement made with the respondent, that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement, or that the arbitrator's award had not yet become binding on the parties or had been set aside or suspended by a competent authority of the Federal Republic of Germany in which that award was issued<sup>94</sup>.

Since the arbitration award in question fulfilled the conditions set out in the Decree, the Court, by virtue of these grounds, recognized the arbitral award issued in accordance with the ICC Rules of Arbitration and awarded enforcement.

The Dubai Court of Cassation recently confirmed<sup>95</sup> the decision of the Court of Appeal in this case.<sup>96</sup>

Notwithstanding the favorable outcome of this matter, the process took much time and effort to complete. After the award creditor filed the application for recognition and enforcement before the Dubai Court of First Instance, the award debtor had the opportunity to challenge the decision of the court granting recognition and enforcement before the Court of Appeal and finally before the Court of Cassation. Hence the award creditor was unable to execute the award until after it obtained a successful judgment from the Court of Cassation. The whole process took almost two years, which

---

<sup>93</sup> UAE Federal Decree No 43 of 2006 enacted pursuant to UAE's ratification of the New York Convention on 13 June 2006.

<sup>94</sup> Supra note 71, p 123.

<sup>95</sup> Dubai Court of Cassation Case Number 434/2013 (Commercial) issued on 23 November 2014.

<sup>96</sup> Hassan Arab and Dalal Al Houti, "Dubai Issues Judgment in Support of International Arbitration" published in Al Tamimi & Co Law update( April 2015) Issue 278 available online (last viewed on June 2016).

is not in line with the internationally accepted standards. Furthermore, this timeline adversely affects the main advantage of arbitration, which is the speedy resolution and conclusion of a dispute.

In this context, no specific or uniform procedural mechanism is set out in the New York Convention for the recognition and enforcement of a foreign arbitral award. Article III of the Convention allows the Contracting States to apply their own respective rules and procedures when considering an application for the enforcement of a foreign award. But, as noted, the article states further that the Contracting States should not impose more onerous conditions to the enforcement of foreign awards than the procedures applied for ratification of domestic awards<sup>97</sup>. This discretion permitted by the New York Convention has led some of the Contracting States, such as the UAE, to apply their own procedures to the enforcement process. Consequently, countries such as the UAE, in effect, do not maximize the advantage offered by the Convention, which is to provide common legislative standards for the enforcement of arbitration awards without any obstacles. In this regard, Article III of the New York Convention limits the review by national courts of the contracting states to verify that the conditions mentioned under Articles IV and V are fulfilled when granting enforcement of the foreign award. This review of the conditions stipulated by the Convention does not require two tiers of appeal by the contracting states.

Some other countries, such as the Netherlands, have taken advantage of being a signatory to the New York Convention by enacting domestic legislation with rules and conditions that provide a relatively simple process for enforcing awards than those established under the New York Convention. The Dutch Arbitration Act, entered into force on 1 December 1986, generally reflects the provisions of the Model Law and sets out the statutory rules regulating the enforcement of both domestic and foreign arbitration awards in the Netherlands<sup>98</sup>. As the statutory rules set out in the Dutch Arbitration Act are simpler than the provisions envisaged in the New York Convention, the parties in international arbitration have the opportunity to choose between the provisions of the New York Convention and the Dutch Arbitration Act with regard to the recognition and enforcement of foreign awards. This is in line with Article VII of the New York Convention, which allows the parties of the Contracting States to avail themselves of the rights they may have in an arbitral award in the

---

<sup>97</sup> Supra note 32.

<sup>98</sup> Pieter h F Bekker and Jacques F de Heer, *Enforcement of Arbitral Awards against Sovereigns - The Netherlands*, published by Juris Net LLC, pp381-382



manner and to the extent allowed by the law or treaties of the country where the award is sought to be enforced.

An examination of similar situations compels parties to question whether agreeing to arbitrate a dispute is justifiable, if the award so obtained by the award creditor can only be executed after being contested again with the award debtor before the national courts of the State in which the award is sought to be enforced. This is particularly true in the UAE, where the award creditor may have to endure and prevail in three tiers of appeal before being able to execute the award. This is a massive obstacle towards the growth of international arbitration which requires serious consideration by the UAE legislators.

#### 4.4.3.5 The Ruling of the Dubai Court of Cassation in *Airmec Dubai LLC v. Max International FZE*<sup>99</sup>

##### **Summary of Facts:**

The Dubai Court of First Instance enforced two awards, one on the merits and one on costs, issued in London by a sole arbitrator under the DIFC-LCIA Rules. The case involved two Dubai-based companies, one free zone and one limited liability company. The award debtor challenged the enforcement on several procedural grounds, including the lack of capacity of the signatory of the arbitration clause to sign on behalf of the respondent and the failure of the arbitral tribunal to apply the mandatory provisions of UAE law on oath-taking for witnesses. The First Instance Court rejected these arguments, and the respondent appealed to the Dubai Court of Appeal. The Court of Appeal affirmed the judgment of the First Instance Court. Upon further appeal by the respondent, the Dubai Court of Cassation affirmed the ruling issued by the Court of Appeal<sup>100</sup>.

This decision and the decision of the Abu Dhabi Court of Cassation (Commercial Appeal No. 679/2010), discussed previously in this chapter, are important decisions concerning the recognition and enforcement of foreign arbitral awards, because they set out that the court's supervisory role when considering the recognition of a foreign arbitral award is strictly limited to ensuring that the substantive requirements of Articles IV and V of the Convention are fulfilled. .

---

<sup>99</sup> Dubai Court of Cassation Case No 132 of 2012 (Commercial) dated 18 September 2012.

<sup>100</sup> Supra note 71, p 124.

**Judgment:**

The Court of Cassation expressly referred to Article 212(4) of CPL according to which an “arbitral award issued outside the UAE shall be subject to the rules applicable to awards issued in a foreign country” and ruled in the following terms:

*It is established pursuant to Article 238 of the UAE Civil Procedure Law that international conventions that come into full force in the United Arab Emirates by ratification shall be construed as internal law applicable in the State. The judge shall be required to apply the provisions thereof to the disputes concerning the execution of judgments made by foreign courts and foreign arbitral awards as established in Federal Decree No 43 of 2006 that the [UAE] approved to accede to the New York Convention and its provisions shall be applicable to the dispute<sup>101</sup>.*

In light of the above ruling, the Dubai Court of Cassation dismissed the appeal.

While issuing judgment confirming recognition and enforcement, the Court of Cassation recognized that, in accordance with Article 238 of the UAE CPL, UAE courts must apply the provisions of the conventions or treaties that have been incorporated into UAE law concerning the execution of foreign judgments and foreign arbitral awards. Accordingly, the Court rejected Airmech’s arguments on various procedural grounds for setting aside the award under the UAE CPL.

The various judgments by the UAE courts in relation to the enforcement of foreign awards since the UAE’s accession to the New York Convention demonstrate that the enforcement of a foreign award in accordance with the provisions of the Convention is progressing slowly as explained in the case law above. But the lengthy procedural rules remain the same as they were before the accession occurred, as the result of which they remain a major obstacle not only towards the enforcement of foreign awards but also generally towards the development of international arbitration in the UAE.

Given that the focus of this study is to examine critically the issues involved in the enforcement of foreign awards in the UAE subsequent to the UAE’s accession to the New York Convention, the following section will explore further the approach adopted in the UAE courts by examining a recent decision by the Dubai Court of Cassation. An important issue is that, although several favourable

---

<sup>101</sup> Supra note 71, p 124.

judgments have been issued by the UAE courts on the enforcement of foreign awards, the position adopted by the courts is not consistent on the enforcement aspect and keeps oscillating. The major reason for this inconsistent approach by the UAE courts is the absence of a well-defined concept of international arbitration.

## PART THREE

Despite several positive decisions and a consolidated friendly approach by the UAE courts to the enforcement conditions of foreign awards, one of the major challenges facing enforcement in the UAE is the misinterpretation of the Convention provisions by the national courts, in particular those that concern the procedural aspects when the court fails to apply the pertinent provisions of the Convention. One of the reasons for these defective procedural issues is the lack of the concept of international arbitration under the arbitration provisions in the UAE law as explained in section 2.7 of chapter two of this study.

The following sections conduct an in-depth analysis of the possible reasons behind misinterpreting the Convention by the UAE national courts and the consequences of that misinterpretation.

### 4.5 Misinterpretation of the Provisions of the New York Convention by Dubai Courts

Misinterpretation of the provisions of Articles III and V of the Convention led some national courts in the UAE to apply provisions of domestic legislation erroneously and accordingly to refuse to enforce foreign or international awards. Such an approach is based on an inaccurate interpretation of the Convention and the provisions of domestic laws, such as the UAE CPL and the UAE Civil Transaction Law<sup>102</sup>.

In a very recent decision, the Dubai Court of Cassation<sup>103</sup> dismissed the appellant's appeal to enforce an ICC award due to lack of jurisdiction. This decision reappraised the Court's position in pro-enforcement case law, in which the UAE's courts have expressly recognized their obligation to apply the Convention provisions rather than provisions of the domestic legislation and in particular the provisions under the UAE CPL when considering the enforcement of foreign arbitral awards rendered in the UAE<sup>104</sup>.

#### **Summary of Facts:**

Construction Company International (CCI) and another French company called Compagnie Francois d'Entreprises S.A (CFE) entered into an agreement with the Ministry of Irrigation of the Government of Sudan (MOI) for the construction of the Jonglei Canal in Sudan. A dispute arose

---

<sup>102</sup> Federal Law No. 5 of 1985 amended by the Federal Law No. 1 of 1987.

<sup>103</sup> Dubai Court of Cassation, Case No 156/2013 (Civil) issued on 18 August 2013.

<sup>104</sup> Supra note 69.

among the parties, as construction had to be abandoned because of the Sudanese civil war. Arbitration proceedings were commenced by CCI and CFE in Paris under the rules of the ICC. Arbitration awards on the merits and as to costs were rendered in 1988 and 1989 in favor of CCI and CFE, under which the MOI was ordered to pay substantial sums<sup>105</sup>.

CCI, to whom CFE had assigned its rights under the awards, sought to enforce the awards in various jurisdictions, including France, where it was successful in obtaining an order for enforcement, and Dubai. In doing so, it sought for enforcement under the Convention and/or the 1992 Convention on Judicial Cooperation and Recognition and Enforcement of Judgments in Civil and Commercial Matters between the UAE and France (Convention on Judicial Cooperation)<sup>106</sup>.

#### **Proceedings before Dubai Courts:**

The Dubai Court of First Instance declined to enforce CCI's arbitral awards on the grounds that it did not have jurisdiction under Articles 21(1)<sup>107</sup> and (3) of the UAE CPL, as neither party was domiciled in the UAE, and the subject matter of the dispute was not performed in the UAE. The Dubai Court of Appeal upheld the decision of the Court of First Instance, and the Dubai Court of Cassation affirmed that both lower courts were essentially correct in their refusal to enforce and accordingly dismissed CCI's appeal.

#### **The Court of Cassation's Interpretations:**

Although the Dubai Court of Cassation recognized that the New York Convention provisions should be applicable, it held that the jurisdiction of the UAE courts over international disputes was a matter of public order and that the UAE courts did not have jurisdiction over claims brought against foreigners, who did not have a domicile or a place of residence in the UAE (Article 21(1) and (3) of the UAE CPL), unless the claims were related to agreements that had been concluded or were required to be performed in the UAE<sup>108</sup>.

---

<sup>105</sup> Omar Al Shaikh, Hadeef and Partners, "New York Convention: Lack of Jurisdiction Prevents Enforcement in the UAE", published in November 2013 available at [www.hadeefpartners.com](http://www.hadeefpartners.com).

<sup>106</sup> Henry Quinlan, Sam Stevens and Natalie Wainwright, DLA Piper "Enforcing arbitration awards in the UAE", practice note published in Practical Law, (21 May 2013).

<sup>107</sup> Article 21 of the UAE CPL: "The courts shall have jurisdiction to hear actions against a foreigner who does not have a domicile or place of residence in the State in the following circumstances:

1 - if he has an elected domicile in the State;

2 - if the action relates to property in the State or the inheritance of a national or an estate opened therein;

3 - if the action relates to an obligation entered into or performed or that is stipulated to be performed in the State or to a contract intended to be notarized therein or to an event that occurred therein or to a bankruptcy declared in one of its courts..."

<sup>108</sup> Supra note 69.

In this decision, the Court of Cassation restricted the scope of the application of the New York Convention to situations in which the UAE courts have personal jurisdiction. In spite of having established that the Convention is applicable, the Court proceeded to rely exclusively on wording in Article III of the Convention, namely “in accordance with the rules of the procedure of the territory where the award is relied upon”. Unfortunately, the judgment failed to address the question of whether the final part of Article III of the Convention, namely “under the conditions laid down in the following Articles”, limits the applicability of Article 21 of the UAE CPL.

The Court also declined jurisdiction on public policy grounds, although it made no reference to Article V(2) of the Convention, which allows enforcement to be refused where the court finds that enforcement will be contrary to public policy. The Court of Cassation’s decision was also based on the wording of Article 15 of the Convention on Judicial Cooperation between the UAE and France, which provides: “The procedure for obtaining enforcement of a decision shall be governed by the law of the State of which the request is made.”<sup>109</sup>

The Dubai Court of Cassation stated:

*The general provisions of law covering enforcement are set out in Book III - Chapter I of the Civil Procedure Law. Articles 235-238 of Section IV of that Chapter contain rules relating to the enforcement of foreign decisions, orders and awards. Article 238 states that “The rules provided for in the preceding articles shall apply without prejudice to applicable agreements signed between the UAE and other States. This indicates that the provisions of agreements signed between the UAE and other states and international conventions which the UAE has ratified shall apply to the enforcement of foreign court decisions and arbitral awards notwithstanding that the conditions of Chapter IV are not satisfied.*

The Court further referred to Federal Decree No. (43) of 2006 by which the UAE acceded to the Convention, which therefore has to be applied to the facts of the dispute. The Court also referred to Article III of the Convention which states that the Contracting States shall recognise and enforce awards in accordance with the rules of the procedure of the territory where the award is relied upon<sup>110</sup>. The Court also relied on Article 15 of the UAE’s Judicial Cooperation Agreement with

---

<sup>109</sup> Stuart Paterson and Mike McClure, Hebert Smith Freehills, “Enforcement of foreign arbitral award in Dubai: a setback”, Published in (Oct 2013) available at <http://hsfnotes.com/arbitration/2013/10/23/enforcement-of-foreign-arbitral-awards-in-dubai-a-set-back/>.

<sup>110</sup> supra note 32

France, which the UAE ratified by Federal Decree No. (31) of 1992 and which states: “The procedure for obtaining enforcement of a judicial decision shall be governed by the law of the State of which the request is made. The subject matter of the decision shall not be subject to any examination by the judicial authorities of the Requested State.” In other words, foreign decisions and arbitral awards are enforced in accordance with the rules of procedure of the requested state.

In addition to the provisions of the international conventions, the Court also considered the UAE’s procedural laws, namely Article 21 of the Civil Transactions Law, which provides: “The rules relating to jurisdiction, and all procedural matters, shall be governed by the law of the State in which the action is brought or in which the procedures are carried out.” Article 19-1 of the UAE CPL states: “The provisions of this Law apply to all civil, commercial and personal status cases as filed before the courts of law in the UAE”. Article 21 of the UAE CPL states:

*The courts shall have jurisdiction to examine claims against an alien who maintains no domicile or residence in the UAE in the following cases: 1- If he has elected domicile in the UAE; ... 3- If the proceedings involve an obligation that was made, performed or was supposed to be performed in the UAE.*

Article 93-2(d) of the Civil Transactions Law states that “the domicile of a juridical person shall be deemed to be the place in which it has its administrative centre, and as far as concerns juridical persons whose head office is abroad but which carry on an activity in the UAE, their administrative centre, with regard to the law of the State, shall be deemed to be the place at which the local administration is situated.”

Accordingly, the Court held that the international jurisdiction of courts is a matter of public policy. UAE courts have no jurisdiction over cases against an alien who maintains no domicile or residence in the UAE, unless the case involves an obligation concluded, performed or was supposed to be performed in the UAE or, in the case of a foreign juridical person whose head office is abroad, it has a branch in the UAE and the dispute relates to a matter pertaining to that branch. Therefore, the Court of Cassation rejected the request for recognition and enforcement of the foreign award.

#### 4.6 Comparison of the Judicial Principle Established in the CCI Case with Previous Enforcement-Friendly Decisions of UAE Courts

The legal principle established by the Dubai Court of Cassation in the *CCI* case directly contradicts the principles set out in the previous decisions by the Dubai and Abu Dhabi Courts of Cassation regarding the enforcement of foreign awards.

To elaborate, the Dubai Court of Cassation in *Maxtel International FZE v. Airmech Dubai LLC*<sup>111</sup> stated unequivocally for the first time that the relevant provisions of the UAE CPL would be superseded by the New York Convention in cases of enforcement of Convention awards. In doing so, the Court recognized that, under Article 238 of the UAE CPL, the courts of the UAE must apply the provisions of the Convention that have been incorporated into UAE law and that concern the execution of foreign judgments and foreign arbitral awards<sup>112</sup>. As a result, the Court rejected Airmech's reliance on various procedural grounds for setting aside the award under the UAE CPL and concluded that none of the more limited grounds set out in Article V of the Convention had been established. In Airmech's case, the Court of Cassation stated clearly that the UAE Courts have no jurisdiction to set aside foreign arbitral awards and clarified that the Court of Appeal reached the right conclusion as a matter of law and could not be faulted for finding that jurisdiction belonged to the arbitrator who issued the awards. The Court of Cassation can make up for incomplete reasoning and rectify errors without having to reverse the decision. The effect of Federal Decree No. 43 of 2006 is that all UAE Courts must recognize and enforce such awards in the territory in which the award is relied upon.<sup>113</sup>

Similarly, the Abu Dhabi Court of Cassation in Appeal No. 679/2010<sup>114</sup> reversed the judgment of the Court of Appeal, which had rejected the enforcement of a foreign award, because the conditions set out in Article 235 of the UAE CPL were not satisfied. In this case, the Court established the principle that the provisions of the New York Convention are applicable to the enforcement of foreign awards in the UAE even if they contradict the conditions set forth in the domestic law<sup>115</sup>.

---

<sup>111</sup> Dubai Court of Cassation, Cassation Appeal No. 132/2012 (Commercial) discussed in detail in part 4.4.3.5 of this chapter.

<sup>112</sup> *Supra* note 71, pp 123-124.

<sup>113</sup> *Supra* note 71, p 124.

<sup>114</sup> *Supra* note 87.

<sup>115</sup> Gordon Blanke and Soraya Corm Bakhos, Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure, BCDR, Kluwer Law International, p17.



The Court further distinguished between the rules applicable for domestic and foreign awards by holding that, if a foreign award is issued in a state that is not a signatory to the New York Convention or to a treaty ratified by the UAE, then the court must determine whether the conditions set forth in Article 235, which deals with the enforcement of foreign judgments or orders, have been fulfilled<sup>116</sup>.

Based on these positive decisions by UAE courts, the *CCI* case stands aloof in terms of the Court of Cassation's interpretation of the New York Convention and the application of the UAE procedural laws. For instance, the application of Article III of the Convention by the Dubai Court of Cassation in the *CCI* case was unexpected, as there is no requirement in this article or in any other article of the Convention that the respondent be a resident or domiciled in the State in which enforcement is sought<sup>117</sup>. In addition, under the Convention, enforcement does not depend on the award debtor having a geographical nexus to the country in which enforcement is sought. Furthermore, the UAE CPL, upon which the Court relied to conclude that it did not have jurisdiction, specifically provides that the courts are exempted from applying the provisions of the UAE CPL when there is a conflict with the terms of an international convention.

The following section further explores the interpretations made by the UAE courts in the *CCI* case by examining the views expressed by some of the legal commentators about that case.

#### 4.7 Divergent Views on the CCI Case

The majority of the views were not supportive of the Court of Cassation's decision, and some have gone so far as to condemn the decision as being unfriendly to international arbitration. However, some legal commentators have viewed this judgment positively for the following reasons<sup>118</sup>:

- (a) Court jurisdiction over foreign parties is a matter of public order; and
- (b) Article 15<sup>119</sup> of the Convention on Judicial Cooperation between the UAE and France and Article III of the Convention allow Dubai Courts to apply domestic law relating to the jurisdiction of the UAE Courts over foreign parties.

---

<sup>116</sup> *Supra* note 115.

<sup>117</sup> Hassan Arab and Naief Yahia, Al Tamimi & Co, "A setback for the enforcement of foreign arbitral awards in Dubai", published in the IBA Arbitration Newsletter, February 2014.

<sup>118</sup> Christopher Mainwaring Taylor and Yacine Francis, Allen & Overy, "Decision on Enforcement of Foreign Awards under the New York Convention" published in Allen & Overy Newsletter (2013) available at <http://www.allenoverly.com/publications/en-gb/lrrfs/middleeastandafrika/Pages/Legal-developments.aspx>.

<sup>119</sup> Article 15 of this Convention states: "The procedure for securing the enforcement of the judgment shall be governed by the law of the requested State."

To support the Court of Cassation's judgment in this case, some legal commentators argue that this judgment cannot be considered a backward step, because, in the current case, the Dubai Court of Cassation considered and relied upon the terms of the Convention's provisions, although it can be debated whether the Court's interpretation of the Convention was correct.<sup>120</sup> Further, it is not uncommon for the courts of the Contracting States to require that their jurisdiction over the award debtor be established under domestic law as a pre-condition to the application of the Convention, such as claims brought before the courts in the United States.<sup>121</sup>

In addition, it is unusual for a party to seek to enforce a foreign award in a jurisdiction in which the award debtor does not have a physical presence or any identifiable assets. When the award debtor has a presence or identifiable assets in Dubai, the Dubai Courts will have jurisdiction under the UAE domestic law. In this case, the Court relied on Article 21(2) of the UAE CPL, which stipulates that one of the situations in which UAE courts shall have jurisdiction to hear actions against a foreign entity that does not have a domicile or place of residence in the State is when the action relates to a property, inheritance or an estate in the State.

Notwithstanding this view, other legal commentators question the rationale supporting this judgment of the Dubai Court of Cassation mainly on the following points:

- (a) Under the Convention, enforcement does not depend on the geographical nexus to the country in which the enforcement is sought; and
- (b) The UAE CPL provisions upon which the Court relied to conclude that it had no jurisdiction specifically provide that the courts are exempted from applying them where there is a conflict with the terms of an international convention.

The judgment appears to be a step back from the generally pro-enforcement approach that the UAE courts have demonstrated over the past few years.

According to some legal commentators, there have been some suggestions that the decision may have been politically motivated.<sup>122</sup> However, in the researcher's view, this decision cannot be

---

<sup>120</sup> Supra note 118.

<sup>121</sup> Supra note 118.

<sup>122</sup> See Supra note 118; See also Supra note 10.

considered politically motivated; rather, this decision is the result of the misinterpretation of the provisions of the New York Convention by the UAE courts.

In addition, no rule in the UAE specifically governs recognition and enforcement of arbitral awards against foreign states. No provisions under UAE law grant immunity to foreign states from a judgment obtained against them. As such, a party can enforce judgments/awards against the assets of foreign states.

In this context, the judicial approach of various national courts of the Contracting States of the New York Convention and how they deal with the enforcement claims related to recognition of foreign arbitral awards against other States or State entities is relevant. Each Contracting State has its own principles concerning State immunity when considering enforcement claims against states or State entities. For instance, in Switzerland, foreign arbitral awards can be enforced against states in accordance with the provisions of the Convention, without regard to where the award was issued, except in those cases where the subject matter of the award is based on an act of sovereign authority, and the state has not waived its restricted authority.<sup>123</sup> Furthermore, assets of a foreign state can be seized for the purpose of enforcement in Switzerland, unless the state establishes that the asset<sup>124</sup> is specifically assigned to tasks that are part of its duties as a public authority.<sup>125</sup> Therefore, if a State is unable to establish that assets and/or funds are assigned for a public purpose, then immunity cannot be claimed for such funds.<sup>126</sup>

In France, the courts have traditionally endowed States with immunity from execution based on the principles of sovereignty, dignity, propriety and international courtesy.<sup>127</sup> In one notable case, the French Court of Cassation confirmed that the “assets of a foreign state cannot in principle, be seized, *save for exceptions*, particularly when they have been allocated to economic or commercial activities of a private nature, which is at the basis of the creditor’s claim<sup>128</sup>”. However, the complex nature of restricted immunity from execution is still evolving in France based on case law, and the

---

<sup>123</sup> Michael E Schneider, Joachim Knoll, Enforcement of Foreign Arbitral Awards against Sovereigns - Switzerland, published in Jurisnet LL (2009), pp 311-353.

<sup>124</sup> The Federal Act of Debt Collection and Bankruptcy passed in 1889 (revised in 1994) applies to the enforcement of monetary claims against the Swiss Federal Government and other Swiss Federal Entities. Article 92(1) of this Act states: “Execution is excluded with respect to assets belonging to a foreign state or a central bank and assigned to tasks which are part of their duty as public authorities”. Please also refer to Supra note 123, pp 346-347.

<sup>125</sup> Supra note 123, p 353.

<sup>126</sup> This was decided in the case of *The Arabic Republic of Egypt v. Mrs X*, ATF 86 (1960) I 23, 31. Please see Supra note 123, p 347, for further details for this case.

<sup>127</sup> Sarah Francios Poncet, Brenda Horrigan and Lara Karam, “Enforcement of Arbitral Awards against Sovereign States or State Entities - France”, published by Jurisnet LLC (2009) pp 355-379.

<sup>128</sup> Eurodif et Republique Islamique d’Iran 1984, JCP. G. II. Please see Supra note 127, pp 360-361.

French courts have demonstrated their willingness to find a balance between respect for the sovereignty of states carrying out their public functions on one hand and cases in which states have attempted to abuse their sovereignty to avoid obligations in commercial arbitration on the other<sup>129</sup>.

In general, the New York Convention applies to all foreign awards that are “arising out of differences between persons, whether physical or legal”. It is not indicated that the expression “legal persons” does not include foreign states.<sup>130</sup> Albert van den Berg has stated that “an arbitration agreement and an arbitral award to which a State is a party are not excluded from the ambit of the Convention”<sup>131</sup>, and he has further explained that “inclusion of such arbitration agreements and arbitral awards is generally accepted if they relate to a transaction concerning commercial activities in their widest sense”.<sup>132</sup> Albert van ben Berg refers to a number of cases in which the enforcement of awards against a state was sought under the New York Convention. However, he reports that the “applicability of the Convention was not questioned on the ground that a State was involved as a party to the agreement and award”, and, in light of the above discussions, he concluded that the Convention is to be considered applicable to cases with which the state is involved.<sup>133</sup>

As the focus of this section is on the CCI case and not on the applicability of the New York Convention to foreign states as a party involved with an award, this study will continue to examine the comments of some of the legal scholars about this decision in the succeeding paragraphs.

**(a)** As noted by Judge Ismael Ibrahim Elzeyady<sup>134</sup> (“Judge Zeyady”) in his analysis<sup>135</sup> of the *CCI* case, a foreign arbitral award does not possess execution power *per se*; hence, the intervention of the courts of the state in which enforcement is sought is inevitable. The New York Convention contributed to the regulation of a set of internationally recognized and unified rules that are binding upon the signing states for enforcement and execution of foreign arbitral awards<sup>136</sup>.

---

<sup>129</sup> Supra note 123, p 379.

<sup>130</sup> Supra note 123, p 353.

<sup>131</sup> Supra note 123, p 321.

<sup>132</sup> Supra note 123, p 321.

<sup>133</sup> Supra note 123, p 321.

<sup>134</sup> Judge/Ismael Ibrahim Elzeyady is the Head of the Cairo Court of Appeal, Egypt.

<sup>135</sup> This study was published originally in Arabic in the International Arbitration Journal-Issue (22) of 2014 ,pp 437-457.

<sup>136</sup> Supra note 135, p 443.

In Judge Zeyady's view, the criticism by legal commentators of the *CC/* case can be divided into two groups. The first group is comprised of, legal scholars who support the Dubai Court's reasoning in the *CC/* decision particularly on the following grounds:

- (i) Matters relating to procedures are subject to the law of the national courts in which enforcement is sought and accordingly are subject to the law of procedure of Dubai.<sup>137</sup>
- (ii) Since the defendant in the *CC/* case did not have a domicile in Dubai, the Dubai courts did not have jurisdiction to hear the case, unless it is related to an obligation established or executed or was conditioned to be executed in Dubai, a factor that was not present in the case.<sup>138</sup>
- (iii) The enforcement proceedings brought before the UAE courts involve a dispute in which the national courts are required to apply their country's internal legislation pertaining to international jurisdiction, and the judge is obliged to look into the question of the national courts' jurisdiction *sua sponte*.<sup>139</sup>

The other group of legal scholars was critical of the Dubai Court's reasoning in the *CC/* decision particularly on the following grounds:

- (i) The Convention does not require that an actual connection between the subject or parties of the foreign arbitral award and the signatory state in which the enforcement of this award is sought.<sup>140</sup>
- (ii) Every award creditor is entitled to resort to the Dubai courts and to file the enforcement application regardless of the regulations set forth by the UAE legislator for the international jurisdiction of its state. The question of enforcement must not be left for each national legal regime to decide, so that each legislator favors the interest of its own state.<sup>141</sup>

---

<sup>137</sup> Supra note 135, p 447.

<sup>138</sup> Supra note 135, p 448.

<sup>139</sup> Supra note 135, p 448.

<sup>140</sup> Supra note 135, p 449.

<sup>141</sup> Supra note 135, p 449.

- (iii) The Convention stipulated an exhaustive list of conditions upon which a state can rely when refusing to enforce a foreign arbitral award. Lack of jurisdiction of the courts of the state in which enforcement is sought is not one of these conditions.<sup>142</sup>
- (iv) When a state accedes to the New York Convention, the accession includes an implicit acceptance that its national courts will enforce a foreign arbitral award even though the same courts do not have jurisdiction according to their private international laws.<sup>143</sup>

Judge Zeyady is of the view that, prior to determining the substantive applicable laws, every court must consider if it has jurisdiction to hear the case brought before it. In addition, if a treaty stipulates that the procedural laws of the national courts of the signatory states must be followed to recognize and enforce an arbitral award, this does not mean that the states' courts are obliged to entertain every enforcement proceedings brought before them.<sup>144</sup> In Judge Zeyady's analysis, the Dubai courts' jurisdiction in relation to applying the New York Convention to all enforcement proceedings brought before the UAE courts comes second after the courts look into the question of their jurisdiction.<sup>145</sup> However, Judge Zeyady's analysis is erroneous and will be critically evaluated later in this section.

Judge Zeyady asserts that Article 21 of the UAE CPL brings jurisdiction to the UAE courts when a claim is related to assets within its territory whether the assets in question are movable or not.<sup>146</sup> The existence of assets within the territory of a state reveals a close link between such assets and the state in which the enforcement proceedings are brought.<sup>147</sup> According to Judge Zeyady, as with the enforcement of a monetary claim, in which the creditor resorts to the courts of the state in which the funds are located, an arbitral award becomes enforceable in the country of enforcement. Therefore, the state retains full execution powers over such an award within its territory.<sup>148</sup> As noted above, the researcher's view on this issue will be explained later in this section.

According to Judge Zeyady, UAE courts will automatically have jurisdiction over proceedings to enforce a foreign arbitral award so long as the award creditor initiated the claim against assets

---

<sup>142</sup> Supra note 135, p 450.

<sup>143</sup> Supra note 135, p 450.

<sup>144</sup> Supra note 135, p 452.

<sup>145</sup> Supra note 135, p 453.

<sup>146</sup> Supra note 135, p 454.

<sup>147</sup> Supra note 135, p 455.

<sup>148</sup> Supra note 135, p 455.

owned by the award debtor that are located within the territory of the UAE.<sup>149</sup> In his view, if the Dubai courts opted to disregard the location of the assets criterion regulated by the UAE legislators, this would disrupt international dealings pertaining to foreign arbitral awards.<sup>150</sup> Judge Zeyady concluded that the instant judgment is tainted, because it contradicts with the UAE law of procedures and violates the terms of enforced international treaties that are valid in the state.<sup>151</sup>

Judge Zeyady failed to consider some important points, as the result of which some of his findings are erroneous. Firstly, several judgments of the UAE courts have established that, pursuant to the UAE's ratification of the New York Convention, the provisions of the Convention have effect as a national law in the UAE. Further, the courts have set forth that, if there is any conflict between the provisions of the Convention and the domestic law of the UAE, the Convention provisions must prevail over the domestic law. This is in line with the UAE's obligation to respect the provisions of the Convention after the UAE became a signatory. Article 238 of the UAE CPL also supports this point.

Secondly, an application for recognition and enforcement cannot be considered a fresh litigation claim regardless of whether the national courts of the enforcement country have jurisdiction or not. Rather, it is only a formal process to enable the national courts to decide whether to grant recognition of foreign awards without reviewing the merits of the award. The national courts must review only if the foreign award fulfills the conditions set out in the Convention before an enforcement order can be issued. Thirdly, the main objective of the New York Convention is to facilitate the award creditor to pursue the assets of the award debtor in any of the Contracting States in a smooth manner without confronting a new litigation claim. Accordingly, the national courts of the Contracting States are obliged to comply with the main objective of the Convention and in particular to apply the conditions mentioned in the Convention. Similarly, the Contracting States must not impose substantially more onerous conditions than are set out for ratifying domestic awards.

Finally, the New York Convention under Article III refers to the domestic law of the state in which the award is enforced. The article states that the Contracting States must enforce foreign arbitral

---

<sup>149</sup> Supra note 135, p 456.

<sup>150</sup> Supra note 135, p 456.

<sup>151</sup> Supra note 135, p 457.

awards “in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles”. But this rule relates to the procedures for enforcement and may not be involved as a ground for refusing a foreign award, which is otherwise enforceable under the Convention.<sup>152</sup>

(b) Another notable legal writer, Dr. Fathi Waly (“Dr Fathi”) analyzed the *CCI* judgment by comparing its reasoning with some decisions issued by the Egyptian Courts. At the inception of his commentary,<sup>153</sup> he notes that the instant judgment’s reliance in its reasoning on Article III of the Convention and on Article 15 of the Treaty between the UAE and France in Judicial Cooperation is an unproductive reference and does not lead to the conclusion of the judgment, because the aforementioned articles regulate the enforcement procedures and not the courts’ jurisdiction to bestow the arbitral award with the writ of execution.<sup>154</sup>

Furthermore, the conclusion of the *CCI* judgment conflicts with provisions of the New York Convention to which both the UAE and France are signatories. In this context, Dr. Fathi notes Article III of the Convention and the exhaustive list of the conditions contemplated in Article V by which a state may refuse to enforce recognition and enforcement whether by a request of the adverse party or *sua sponte* by the national court of the state in which enforcement is sought. This exhaustive list does not include the lack of the jurisdiction of the national court in a case in which enforcement is sought in accordance with the rules of international jurisdiction.<sup>155</sup>

It is recognized that the provisions of a treaty signed by a state overrides the national laws of that state. This is explicitly stated in Article 238<sup>156</sup> of the UAE CPL concerning the enforcement of foreign judgments. The Dubai Court of Cassation had previously confirmed that the New York Convention must be applied, “and the national judge is under the obligation to apply its rules to any dispute brought before him in relation to the enforcement of arbitral awards” (Appeal to Cassation no. 132/2012 dated 18 September 2012).<sup>157</sup> A similar conclusion was also reached by the Egyptian Court of Cassation in many of its decisions, as it held that, “in the event there were treaties in place

---

<sup>152</sup> Supra note 123, p 323.

<sup>153</sup> Dr Fathi Waly was the Dean of the Faculty of Law, Vice President of Cairo University. He is now an attorney at the Court of Cassation in Egypt and the Head of the Egyptian Society for Civil and Commercial Procedure. This study was published (originally in Arabic) in the International Arbitration Journal issue No (21) of 2014, pp 299-315.

<sup>154</sup> Supra note 153, pp 311 - 312.

<sup>155</sup> Supra note 153, p 313.

<sup>156</sup> Article 238 of the UAE CPL states: “The rules laid down in the foregoing articles shall be without prejudice to the provisions of Conventions between the UAE and other countries in this regard”.

<sup>157</sup> Supra note 153, p314.



between Egypt and other States in relation to the enforcement of foreign judgments, provisions of such treaties must be applied. Egypt had acceded to the Convention of 1958, the Convention is then considered a statute of the State that must be applied even if it was found contradicting the national arbitration law” (Petitions to Cassations no. 10350/65 JY dated 1/3/1999 and 2994/57 JY dated 16/7/1990 and 2010/64 JY dated 22/1/2008)<sup>158</sup>.

Dr. Fathi correctly concludes that the courts of the UAE have jurisdiction to hear cases related to the enforcement of foreign arbitral awards despite the lack of jurisdiction pursuant to the international jurisdiction rules stipulated in its law of civil procedure. Dr Fathi highlighted the significance of complying with the provisions of the New York Convention, as part of each Contracting State’s obligation, by granting recognition and enforcement of foreign awards based on the conditions referenced under Articles IV and V.

(c) In the legal analysis<sup>159</sup> of Dr. Hosni Abdul Wahid (“Dr Hosni”)<sup>160</sup> and Bishoy Marquis Kamal (“Dr Bishoy”)<sup>161</sup>, it is reported that the principle relied on by the Dubai Court of Cassation in affirming the lower court’s decision that the Dubai Courts did not have the jurisdiction in the case filed by CCI is based on Article 21 of the UAE CPL. In accordance with Article 21 of the UAE CPL, the courts shall have jurisdiction to hear actions against a foreigner who does not have a domicile or place of residence in the state in the following circumstances: (1) if he has an elected domicile in the State; ... (3) if the action relates to an obligation entered into or performed or that is stipulated to be performed in the state.<sup>162</sup>

The Dubai Court of Cassation upheld the jurisdiction of the Dubai courts to consider this case, citing Article 21 of the CPL. Surprisingly, the Court ignored paragraph 2 of the same article<sup>163</sup>, which includes the phrase, “if the action relates to property in the State or the inheritance of a national or an estate opened therein”.

The Dubai Court of Cassation’s judgment shows that the Court relied on Article 21(3) of the UAE CPL to dismiss the appeal. However, the Court’s analysis was deeply flawed, as it overlooked the

---

<sup>158</sup> Supra note 153, p314.

<sup>159</sup> This study was published (originally in Arabic) in the *International Arbitration Journal* Issue No. (21) of 2014, pp 329-347.

<sup>160</sup> Dr. Hosni Abdulwahid is a lawyer and professor of law.

<sup>161</sup> Bishoy Marquis is a lawyer.

<sup>162</sup> Supra note 159, pp 344-345.

<sup>163</sup> Supra note 159, pp 344-345.

second paragraph of the article, which provides jurisdiction for the UAE courts over cases filed against a foreign entity holding assets in the UAE even if it does not have a home or place of residence therein.

The view expressed by Dr Hosni and Dr Bishoy are correct to the extent that the reason for refusing to grant recognition for the foreign award on the pretext of Article 21 of the UAE CPL is vague, as it is not clear why the court disregarded Article 21(2), which grants jurisdiction to the UAE courts. Similarly, the New York Convention grants jurisdiction as per its Article I, as it “shall apply to the recognition and enforcement of awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought...” However, the UAE Court failed to explain the reason behind the lack of jurisdiction other than the ground that the award debtor has no domicile or place of residence in the UAE.

(d) According to Professor Mathias Audit (“Prof Mathias”)<sup>164</sup> and Elias Bou Khalil (“Elias”)<sup>165 166</sup>, Dubai being one of the international financial hubs in the world, it is common to locate assets owned by other states in Dubai, which is one of the major reasons why parties initiate enforcement actions there. It is reported that many of the assets and funds owned by other states pass through the financial and banking systems in Dubai, and hence it is chosen as a place to enforce arbitral awards.<sup>167</sup>

The commentators point out that the Dubai Court of Cassation in the instant case had its own interpretation of the New York Convention and the judicial cooperation treaty between the UAE and France and decided that the UAE courts lack the jurisdiction to hear the recognition case, because (a) the respondent was not domiciled in the UAE, and (b) the agreement that is the subject of the arbitral award was signed and executed outside of the territory of the UAE.<sup>168</sup>

Professor Mathias and Elias report that the Dubai Court of Cassation erred when it relied exclusively in determining its jurisdiction on national legislation and disregarded the international treaties to which the UAE is a signatory. The Dubai Court of Cassation relied on Article 21 of the UAE Civil

---

<sup>164</sup> Professor Mathias is a law professor at the University of Paris Quest, Nanterre La Defense (France).

<sup>165</sup> Elias Bou Khalil is a partner in the Arago Law Firm.

<sup>166</sup> This study was published (originally in Arabic) in the *International Arbitration Journal* issue No. (21) of 2014, pp 316-328.

<sup>167</sup> Supra note 166, p 317.

<sup>168</sup> Supra note 166, p 322.

Transactions Law<sup>169</sup> and disregarded Article 22 of the same law, which stipulates that the provisions of the foregoing articles shall not apply in cases where there is a contrary provision in a special law or in an international convention in force in the state.<sup>170</sup>

Professor Mathias and Elias conclude for the aforementioned reasons that, according to Article 22 of the Civil Transactions Law and the fact that the UAE is a signatory to the New York Convention and the treaty with France on judicial cooperation, there is no lack of jurisdiction under UAE procedural rules. This conclusion is despite the fact that the defendant in the instant case did not have a domicile in the UAE, and the UAE courts by force of law possess the authority to enforce foreign arbitral awards<sup>171</sup>.

Additionally, the UAE and France signed an international treaty on judicial cooperation, which the UAE ratified by Federal Decree no. 31 of 1992. Article 13 of this treaty stipulates five conditions for foreign judgments and awards to be enforceable in another Contracting State. The fifth condition is related to the competence of the initial tribunal or court that originally rendered the decision, and, in the correct view of the commentators, this competence should not under any circumstances be interpreted to question or address whether the tribunal in which the enforcement is sought has jurisdiction to examine the enforcement request.<sup>172</sup>

The commentators in this study further stated that, in light of the above international conventions, the ruling of the Dubai Court of Cassation is difficult to understand and harder to justify, unless international conventions signed by the states are not binding, and their observance or application is optional by a state party.<sup>173</sup> Further, it is quite certain that this decision of the Dubai Court of Cassation will adversely impact the impression of the arbitration community and practitioners that the UAE is becoming the hub of arbitration in the region.<sup>174</sup>

To conclude from the views expressed by various legal commentators, the Dubai Court of Cassation has misinterpreted the provisions of the New York Convention and failed to take note of its most

---

<sup>169</sup> Supra note 166, p 323

<sup>170</sup> Supra note 166, p 324.

<sup>171</sup> Supra note 166, p 324.

<sup>172</sup> Supra note 166, p 325.

<sup>173</sup> Supra note 166, p. 325.

<sup>174</sup> Supra note 166, p. 328.

important objective of ensuring the possibility of enforcing foreign awards against the assets of award debtors in the Contracting States.

The Dubai Court of Cassation misinterpreted Article III of New York Convention and assumed that this article grants the Contracting States with jurisdiction to apply their own procedural laws, including their rules of jurisdiction in the same way as a fresh dispute is heard by the court. The Dubai Court of Cassation missed this integral aspect while issuing the judgment in the *CC/* case.

If the court adjudicates an application for recognition and enforcement of foreign awards as a fresh dispute, the resulting judgment will have a *res judicata* effect, as the dispute was previously heard by the tribunal that issued the award. Under Article III of the New York Convention, although the Contracting States may establish a separate set of rules for the recognition and enforcement of foreign awards that is different from the ratification and enforcement of domestic awards, the recognition and enforcement of foreign awards should not be subjected to more onerous conditions than domestic awards. Furthermore, the application of procedural laws as set forth under Article III of the Convention relates only to the enforcement formalities of the Contracting States and this must not be invoked as a ground for refusing foreign awards.

In the *CC/* case, instead of refusing to grant recognition of the foreign award, the Dubai courts should have considered (i) issuing a decision to recognise the award subject to the fulfillment of the conditions stated under Articles IV and V of the New York Convention and referring the question of how to execute the judgment to the execution judge, or, alternatively (ii) obliging the party seeking enforcement to substantiate that the award debtor has sufficient assets and properties in the UAE as a prerequisite to issuing a decision recognising the foreign award.

The reason why the Court of Cassation concluded the UAE court lacked jurisdiction in the *CC/* case is not very clear, but it may be interpreted as the UAE court's reluctance to permit any award creditor to apply for recognition and enforcement of a foreign arbitral award even though the court may not be sure if award debtor has sufficient assets in the jurisdiction in which recognition is sought.

#### 4.8 Overall Conclusion

One of the major factors that makes the New York Convention remarkable is that it is a treaty freely entered into by states to regulate their respective courts to ensure that foreign arbitral awards are recognized and enforced<sup>175</sup>. It facilitates the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements. In general, courts are required to adopt a pro-enforcement approach when interpreting the Convention and to limit themselves to those few grounds set out in Article V in determining whether to refuse enforcement<sup>176</sup>.

It is evident from the UAE case law as noted in part 4.4.3 above, with the exception of the *CC* case and some other decisions<sup>177</sup>, that the UAE national courts started applying the enforcement conditions set forth in Article V to foreign arbitral awards after the UAE's accession to the New York Convention. Before the UAE ratified the Convention, the national courts applied the conditions contained in Articles 235 and 236 of the UAE CPL to the enforcement of foreign awards. Accordingly, the courts refused recognition on grounds of non-compliance with the conditions in accordance with those articles of the UAE CPL, and they also invoked several procedural grounds stipulated under the UAE CPL that are applicable to domestic awards to refusing recognition of foreign awards.

The UAE courts' recent enforcement practice under the New York Convention has sent positive signals to the international arbitration community concerning the UAE's willingness and commitment to comply with its obligations under international conventions. However, the procedure for the enforcement of foreign awards remains lengthy, complex and time consuming. The requirement of filing a fresh litigation claim seeking recognition and enforcement of a foreign award followed by two tiers of appeal leads parties seeking recognition to a long, sophisticated, costly and time consuming process. This is one of the major legal obstacles currently presented by the enforcement practice in the UAE.

Another major problem, subsequent to the UAE's accession to the New York Convention, is some ambiguity concerning the UAE courts' approach towards enforcement of foreign arbitral awards in

---

<sup>175</sup> Conyers, Dill & Pearman, *The New York Convention - BVI as Part of the Global System for Promoting International Trade*, October 2014.

<sup>176</sup> For further details, please refer to part one section 4.4.3 of chapter three, which discusses several judgments issued by the UAE national courts on this subject.

<sup>177</sup> Abu Dhabi Court of Cassation Case No 679/2010 dated 16 June 2011; Dubai Court of Appeal Case No531/2010 (Commercial) dated 6 October 2011; Dubai Court of Appeal Case No 1/2013 dated 9 July 2013. Please refer to part 4.4.3 of this chapter for additional details.

relation to the application of the correct law<sup>178</sup> and in determining whether an award is foreign/international or domestic when considering cases on recognition and enforcement of awards. This is mainly due to the lack of a clear definition to identify international arbitration in the UAE and its implementation. A generally accepted way to ascertain whether a dispute is international in scope is to apply the definition contained in the arbitration law of the state. However this pivotal aspect is not covered under the UAE law.

The current court structure in the UAE leads to different courts having to deal with disputes in arbitration. In contrast, there are specialized courts in many countries that deal with arbitration matters separately. For example, in Egypt, the Cairo Court of Appeal is entrusted with dealing with the recognition and enforcement of foreign/international awards. In France, the President of the Court of First Instance in Paris has the jurisdiction to hear applications seeking recognition of foreign awards. Such an approach produces consistency in the enforcement procedures and in relation to judgments on the enforcement of arbitral awards. Furthermore, the judges nominated to adjudicate arbitration matters must possess adequate knowledge about the mechanism of arbitration as a mode of resolving disputes and principles of international arbitration. Assigning specialized courts to deal with arbitration will help the UAE to achieve its goal of becoming an arbitration hub in the MENA region.

As can be seen in the foregoing, several reasons are identified responsible for the current legal obstacles underlying the enforcement of foreign awards in the UAE. The most significant is the absence of an independent and separate arbitration law in line with international standards that defines the mechanism or procedures for the enforcement of foreign/international arbitral awards. The current laws on arbitration in the UAE lacks the concept of international arbitration which determines the international nature of arbitral awards and thus do not help to develop an effective mechanism for enforcement.

---

<sup>178</sup> Please refer to section 3.4.3 of Chapter three for further details.

## Chapter Five

# CONCLUSION AND RECOMMENDATIONS

### 5.1 Overview of the Study

International arbitration is an increasingly important and effective means to resolve disputes that arise in connection with complex cross-border transactions, international trade and investments. The economy of the UAE has expanded considerably over the past decades and is emerging as the regional business hub of the Middle East. As such, arbitration as a dispute resolution system is widely preferred in the UAE, and commercial entities conducting business in the UAE are increasingly more inclined to enter into arbitration agreements. This is due mainly to the contractual nature of arbitration and its greater speed and confidentiality as opposed to the traditional national courts. Accordingly, the need for effective procedures to support the development of arbitration continues to rise.

This thesis has critically reviewed the current arbitral law and practice in the UAE with particular focus on the proceedings for the recognition and enforcement of foreign arbitral awards and has compared them with the best practices followed in other internationally leading arbitration jurisdictions, such as France and Switzerland. One key finding of this research is that the UAE law lacks a clear and express definition for international arbitration which has resulted in numerous legal obstacles to the enforcement process of foreign and international awards in the UAE.

In general, the recognition and enforcement of foreign arbitral awards continues to be an increasingly significant topic in the UAE, as the number of award creditors approaching the UAE courts seeking to recognise and enforce foreign arbitral awards has been steadily increasing. This research has demonstrated that the UAE's arbitral law contained in the UAE CPL is not in line with the internationally accepted best standards. These deficiencies are hindering the development of international arbitration in the UAE.

Since the UAE's accession to the New York Convention on 19th November 2006 under Federal Decree No. 43 of 2006, foreign arbitral awards have been recognised and enforced in the UAE in accordance with the provisions of the New York Convention. The approach adopted by the UAE courts before the UAE joined the New York Convention was different, and the courts were unwilling to enforce a foreign arbitral award that was issued outside of the UAE, unless it fulfilled the

conditions specified in Articles 235 and 236 of the UAE CPL, which deal with the execution of foreign judgments, orders and awards. After the UAE signed the New York Convention, its courts established that the provisions of the Convention take priority over local laws to the extent that local laws are inconsistent with the Convention. However, some of the UAE courts continued to apply the requirements of Articles 235 and 236 of the UAE CPL when considering applications for recognition and enforcement of foreign arbitral awards. The thesis has examined whether the New York Convention has helped to improve the enforcement regime of foreign and international arbitral awards in the UAE and whether it has positively contributed towards the enforcement procedures.

## **5.2 Research Objectives and Preliminary Results:**

The study demonstrates that, in some instances, the UAE courts failed to consider Article V of the New York Convention and continued to rely upon the provisions of Articles 235-236 of the UAE CPL in refusing to enforce foreign arbitral awards. Moreover, in some cases, the UAE courts erroneously applied the provisions applicable to the enforcement of domestic awards to the enforcement of foreign awards and thus relied on formalistic procedural grounds set out in the applicable provisions of the UAE CPL for setting aside foreign awards. Furthermore, the proceedings before the UAE courts to recognise and enforce an arbitral award are complex and lengthy procedures. The award creditor must incur substantial amounts of time and costs to obtain recognition and enforcement of an award. The lack of a separate arbitral law to deal with the enforcement procedures is yet another reason why parties have been reluctant to participate in arbitration in the UAE.

For the above stated reasons, initially the UAE courts were criticized for disregarding the objectives of the New York Convention. However, the comprehensive analysis of the thesis shows that the arbitration provisions contained in the UAE CPL and the proceedings before the UAE courts seeking recognition and enforcement leads to various legal obstacles connected to the enforcement process. The thesis has demonstrated that various judgments issued by the UAE national courts led to the finding that one of the major reasons underlying such an approach by the UAE courts is mainly the lack of the notion of international arbitration.

The UAE law containing the arbitral provisions does not define the term “international arbitration”. In other words, there is no express distinction set out between domestic arbitration and international or foreign arbitration in relation to enforcement. Accordingly, when reviewing an application for



recognition and enforcement of foreign/international arbitral awards, the UAE courts tend to misinterpret the provisions of the UAE CPL applicable to domestic awards and apply them to foreign/international awards, which consequently led to conflicting decisions from the UAE national courts.

The main purpose of this thesis has been to identify the issues related to recognition and enforcement of foreign arbitral awards and to determine how the lack of the concept of international arbitration in the UAE contributed towards these issues. To achieve this objective, the researcher conducted an in-depth analysis of the concept of international arbitration and how the notion of international arbitration is defined and implemented in various jurisdictions, including France, Switzerland, the United States, Egypt and Lebanon. The researcher selected the legal systems of these jurisdictions, as some of them, such as France and Switzerland, are recognised by arbitral scholars as internationally leading jurisdictions on arbitration. Egypt and Lebanon, both having civil law systems, are closely connected with the legal system in the UAE and to a large extent have similar legal concepts. To conduct the in-depth analysis, the researcher also studied the court proceedings of various jurisdictions, including those indicated above, to evaluate how they recognize foreign awards, their case law on the issues of enforcing foreign arbitral awards, and how their national courts classify an arbitral award as an international award.

### **5.3 Summary of the Main Findings:**

This part highlights the main findings of this study and sets out general conclusions based on the studies presented in this thesis. Furthermore, suggestions or recommendations for further research are considered, and the part concludes with recommendations.

The main aim of this study is to explore whether the lack of the concept of international arbitration is the key factor impacting the recognition and enforcement of foreign arbitral awards in the UAE. As noted above, there is no specific provision in UAE law that considers the international nature of arbitration and thereby accords a proper classification to identify international arbitration, which is one of the major problems in the enforcement perspective of foreign/international arbitral awards. In this regard, the thesis examines the prevailing issues in the UAE arbitration provisions. Pursuant to Article 212(4) of the UAE CPL, an arbitration is determined as either domestic (the arbitration is conducted and an award is issued in the UAE) or foreign (the arbitration is conducted and an award is issued in a foreign jurisdiction). The prevailing law does not take into account that most of the

arbitrations conducted in the UAE are linked to international factors, such as the nationality of the parties or the subject matter involves one or more states or is linked with the interests of international trade. In spite of this, in accordance with the current UAE law and/or the court practices, such arbitrations may be regarded as purely domestic and therefore subject to similar restrictions, procedures and rules as are applicable to domestic arbitration. This is mainly because UAE law applies the geographic criterion to distinguish between domestic and foreign arbitration. The legal obstacles to the enforcement of foreign and international awards in the UAE are due to the absence of international arbitration, which forms a fundamental and critical finding of the study and is examined in further detail in chapter two.

Based on the systematic examination of several factors, the researcher further identified various instances when arbitration could have been identified as purely domestic due to the nationality of the parties involved or the governing law or the seat of arbitration, and yet the UAE courts identified the awards resulting from these arbitrations as foreign for the sole reason that the arbitration hearing was conducted outside of the UAE or because the award was signed outside of the UAE, thereby ignoring other prominent aspects.

The thesis shows that, in addition to the absence of a clear and express definition of international arbitration under current law, there is also a lack of proper understanding of the principles of international arbitration by the UAE courts. This lack of understanding is best exemplified in instances in which the UAE courts failed to distinguish between the seat of arbitration and the location in which arbitration hearings were conducted, which is often referred to as the venue of arbitration. This problem was caused by Article 212(4) of the UAE CPL, which provides that the arbitrator must issue the award in the UAE or else the rules set out in the foreign country in which the award was issued shall apply. Nevertheless, when the parties have agreed on the UAE being the legal seat, the UAE courts treated their arbitration as foreign, solely because the award was issued outside of the UAE. Thus, the parties exercise the option under UAE law and endeavor to circumvent the law by having the arbitral award issued in a foreign jurisdiction so that it will be enforced in accordance with the provisions of the New York Convention, although the arbitration might be domestic in all other respects. In other instances, the parties have agreed on a foreign jurisdiction as the legal seat, but, for some reason, the arbitral award is signed in the UAE, in which event the UAE courts have proceeded to identify such awards as domestic and accordingly apply

the procedural laws applicable for the enforcement of domestic awards. The UAE courts have even moved a step forward and set aside such an award, even though they have no jurisdiction. This is due to the UAE courts' lack of understanding of the basic principles of international arbitration and its characteristics.

The thesis has examined the profound practical implications of confusing the legal seat of arbitration with the venue of arbitration or the place where the arbitral award is signed. One of the major issues is the possibility that the UAE courts may set aside international arbitral awards for not complying with the mandatory provisions of UAE law applicable to domestic arbitrations. For instance, UAE courts require that the oath be administered in the form prescribed by the UAE Law of Evidence in Civil and Commercial Transactions as the result of the holding in the *Bechtel* case, in which the Court set aside the award on the grounds that the arbitrator failed to comply with mandatory provisions of domestic law. In this case, the lack of a definition of international arbitration was the primary reason why the UAE courts considered the award to be domestic, although it was purely an international arbitral award.

The study indicates that there is much more to the issue of the absence of the concept of international arbitration and its effect on the enforcement of foreign and international arbitral awards. The procedural issue constitutes a major factor that adversely affects the evolution of arbitration in the UAE. The absence of a definitive concept for international arbitration is reflected in the approach adopted by the UAE national courts in arbitration. In the UAE, to enforce an arbitral award, the award creditor must initiate a claim following the same procedures stipulated for issuing a normal claim before the court and must follow the same appellate hierarchy. The time required for the award creditor to obtain a final judgment and to ratify and enforce a domestic arbitral award by prevailing in all of the stages of appeal could exceed two years.

To elaborate, the UAE legislator requires that a party ratify an arbitral award issued in the UAE by initiating a claim at the Court of First Instance to hear the dispute to enable the court to ensure that the award conforms with the procedural requirements of Article 215 of the UAE CPL. In accordance with Article 215(1) of the UAE CPL, a judgment of ratification issued from the Court of First Instance is subject to a two-tier appellate system, first before the Court of Appeal and then before the Court of Cassation. Moreover, according to the UAE CPL, the award debtor can seek to annul the award, and the judicial decision regarding such a claim is also subject to the same appellate system. In

this regard, Article 217(2) of the UAE CPL states that a judgment ratifying or annulling the award of an arbitrator may be appealed by the appropriate avenues of appeal.

In relation to the enforcement of foreign judgments and awards, the UAE legislator promulgated specific rules in Articles 235 and 236 of the UAE CPL. The UAE legislator required for the recognition of a foreign arbitral award that the award creditor issue a claim at the Court of First Instance, where enforcement is sought to enable that court to scrutinize whether the award conforms to the required conditions. However, it is of particular significance that the UAE legislator did not stipulate that a judgment issued by the Court of First Instance be subject to appeal in the same way as claims relating to the ratification of domestic arbitral awards. The direction of the UAE legislator to submit the confirmation and enforcement procedures to a single phase litigation conforms with the international best practices, such as those of France and others. It also conforms with the international treaties, like the New York Convention, which requires that member states refrain from imposing higher fees and more onerous procedures than those imposed on domestic arbitral awards.

Notwithstanding the fact that the New York Convention did not specifically set out any procedural mechanism for the recognition and enforcement of foreign arbitral awards, Article III of the New York Convention granted the Contracting States the freedom to apply their own procedural law provided that such procedures are not more complex than the procedures applicable for domestic arbitration. This option offered by the New York Convention aimed at achieving its major objective, which is to simplify the process for award creditors to enforce foreign arbitral awards in every jurisdiction within the contracting states in which the award debtor has assets. Article III of the New York Convention limits the national courts of the contracting states in which enforcement is sought to reviewing the conditions stipulated in Articles IV and V of the Convention when considering an application for recognition. However, this does not stipulate a review by three levels of courts to decide if a foreign arbitral award fulfills these conditions.

Based on the studies conducted on international best practices in this thesis, some of the countries have made significant progress after becoming a signatory to the New York Convention. For instance, the Netherlands amended their Dutch Arbitration Act (the amendment of 2015 that came into force on 1 January 2015), which contains rules and conditions that are easier than those contained in the New York Convention and that support the choice of the parties in arbitration

between the New York Convention or the Amended Dutch Arbitration Act in relation to the recognition and enforcement of awards. This is in line with Article VII of the New York Convention, which grants its Contracting States the liberty to avail the benefit provided under their own law or any other international instruments on the recognition and enforcement of awards to which they are a party to simplify the process of enforcement.

In the UAE, due to the lack of a concept of international arbitration, the national courts continue to apply similar procedures of ratifying the domestic awards to the recognition and enforcement of foreign awards, although the procedures that they should apply to the foreign awards must not be more onerous than those applicable to domestic awards. The UAE courts continue to insist on following lengthy court procedures when ruling upon the recognition and enforcement of foreign arbitral awards, which consumes several years before an award creditor can finally obtain a judgment that either recognises and enforces the award or refuses its recognition or enforcement. This is clearly a violation of the principle of international arbitration as followed by the leading international arbitration jurisdictions. These practical obstacles underscore the depth of the issue of recognition and enforcement of foreign/international arbitral awards in the UAE. The issue is not only related to the old-fashioned arbitration law that prevails in the UAE, but, as the thesis demonstrates, Articles 203-218 of the UAE CPL were enacted exclusively for the benefit of domestic arbitration as explained in chapters two and three. Moreover, the rulings issued by the UAE courts are often perplexing on the recognition and enforcement of foreign arbitral awards.

The thesis has examined numerous court decisions and considered various elements of the jurisdictional approach adopted by the UAE courts. The inconsistency of the examined judicial decisions is the result of the lack of the concept of international arbitration in terms of defining arbitration combined with the insufficient experience and expertise of some judges with regards to understanding arbitration as an alternative method of resolving commercial disputes. The consequences of the absence of the concept of international arbitration can be construed in two different ways: the absence of an express definition from which to determine the international scope of an arbitral award and, because of the lack of this definition, the UAE courts fail properly to identify international awards and accordingly to apply the correct provisions for their recognition and enforcement. It was found that this lack of familiarity with the principles of the international

arbitral regime as a whole produced adverse outcomes in the form of court judgments that impede the general enforcement process of foreign arbitral awards in the UAE.

While the UAE's membership in the New York Convention has brought certain improvements in the conditions as noted above, several legal obstacles remains that hinder international arbitration in the UAE. There has been absolutely no change in the duration of the enforcement process, which still include the appellate procedures to enforce a foreign award. In addition, the UAE courts have failed to provide a consistent and rational approach to the recognition and enforcement of foreign awards. As such, some decisions of the UAE courts support the recognition and enforcement of foreign arbitral awards in accordance with the provisions of the New York Convention. However, other decisions of the UAE courts have refused to grant recognition and enforcement by failing to apply the New York Convention properly. In some instances, the UAE national courts have failed to recognize the precise objective of the New York Convention, which provides that the contracting states must not treat foreign awards differently by imposing substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the convention applies. Although the New York Convention limited the requirements and conditions of the recognition of foreign awards to those conditions contained in Articles IV and V of the Convention, the UAE courts in some cases<sup>1</sup> have required the party seeking recognition and enforcement to verify that the award fulfils the conditions mentioned in Articles 235 and 236 of the UAE CPL, or the courts have reviewed the institutional rules, such as the ICC rules, to determine if the foreign award complied with the rules of that respective arbitration Institute. In one case<sup>2</sup>, the Dubai Court of Appeal imposed further conditions beyond those stated in the New York Convention by requiring proof of evidence that the state in which the arbitral award was issued is a party to the New York Convention.

All of these questions together can be traced back to the absence of the concept of international arbitration in terms of having a clear definition under the UAE laws and its implementation by the UAE courts. Modern arbitration laws accord international arbitration a different level of importance than domestic arbitration in recognition of the predominating interests of international trade and the binding commitments that member states have made under international conventions to treat

---

<sup>1</sup> For instance, the Abu Dhabi Court of Cassation Commercial Appeal No. 679/2010 dated 16 June 2011. This case is discussed in chapter four of this thesis.

<sup>2</sup> Dubai Court of Appeal Case No 52/2016 dated 30 March 2016.

international arbitrations under conditions and procedures that are less onerous than those imposed on domestic arbitration.

Finally, as examined in chapter four of this study, the Dubai Court of Cassation in *CCI v. The Ministry of Irrigation Sudan* refused to recognize and enforce a foreign arbitral award on the pretext that the UAE courts have no jurisdiction, because the award was rendered in a foreign jurisdiction, and the parties have no place of domicile in the UAE. In this regard, the court based its decision on the ground that Article III of the New York Convention grants freedom to its contracting states to recognize and enforce the foreign award under their own procedural rules. Therefore, the Court applied the UAE CPL and concluded that it did not have jurisdiction. These instances reveal that the UAE's accession to the New York Convention did not rectify the issues related to the procedures of recognition and enforcement of foreign arbitral awards in the UAE. This can be attributed to the lack of the concept of international arbitration in the UAE, whereby UAE national courts treat foreign awards differently from domestic awards in terms of the applicable procedures.

In the same case, the Dubai Court of Cassation ignored one of the key features of the New York Convention, which is that the award creditor has the right to pursue the award debtor's assets and properties within the jurisdiction of every Contracting State of the Convention. The Dubai Court of Cassation refused to recognize the arbitral award, and, although it applied the New York Convention or the Bilateral Agreement on Judicial Cooperation with the Republic of France, the Court of Cassation pointed out that both agreements allowed the UAE courts the right to apply their own procedural law. Accordingly, the Court held that the enforcement mechanism of the New York Convention does not apply due to the lack of personal jurisdiction over cases against an entity that has no domicile or residence in the UAE. However, by this reasoning the UAE Court overlooked the fact that a request for recognition and enforcement of a foreign arbitral award is not a substantive action; it is only a request to recognize an award that has the effect of *res judicata*.

The thesis shows that the inconsistent rulings of the UAE courts confirm that joining the New York Convention has not entirely resolved all of the issues of enforcement of foreign arbitral awards, only some of them (as evident from some of the judgments rendered by the UAE national courts discussed in chapter four) through applying the conditions of enforcement but not change procedural wise. In a nutshell, this thesis can conclude that the cases in which a UAE court declined

recognition and enforcement underline a lack of sufficient awareness of the concept of international arbitration and the absence of suitable parameters to determine whether an arbitration is domestic, foreign or international and their respective conditions, provisions and procedures.

#### **5.4 Recommendation for Future Research**

Having highlighted the important point of this study, which is linked to the absence of the concept of international arbitration and which impedes the recognition and enforcement of foreign/international arbitral awards, certain other pivotal issues are connected to the enforcement process. However, these are not within the scope of this study. These issues are highly recommended for proposed researchers, who wish to conduct further research on this topic. These issues can be further explored along the following lines:

- (i) One of the issues is related to the concept of public policy. Recently, the UAE courts have set aside and refused to ratify several domestic awards on public policy grounds despite having determined that the awards are otherwise enforceable. Study can be conducted on the public policy concept under UAE law and consideration given as to when the public policy exception can be properly invoked. Research may consider whether it is simply a matter of arbitral awards dealing with a matter relating to public policy even if the tribunal's conclusions are correct as a matter of law, or whether there is a real problem with the findings of tribunal in arbitral awards that goes against the public policy of the state.
- (ii) How can the countries of the Middle East, including the UAE, be persuaded to accept the international public policy standards and the aspects that set those standards apart from the local public policy of the country? Is there any apparent separating line between these two concepts considering that the New York Convention is silent on this aspect? At the same time, the Contracting States are afforded discretion to refuse to enforce foreign arbitral awards as contrary to public policy of that state.
- (iii) Can the New York Convention be considered a factor that determines whether countries like the UAE are justified in refusing recognition and enforcement of foreign arbitral awards? For instance, the New York Convention grants the Contracting States the liberty to apply their own procedural rules while reviewing an arbitral award for enforcement. State parties are therefore able to interpret their laws in an absolute and broad sense to avoid the



enforcement of arbitral awards, as transpired in *CCI v. The Ministry of Irrigation Sudan*. In that case, the Dubai Court of Cassation, having considered the applicability of the New York Convention, refused to enforce a foreign arbitral award on the ground that, under the UAE's procedural law, the Court has no international jurisdiction.

- iv) Does the UAE legal system act as an impediment to the enforcement of foreign arbitral awards considering its court structure, i.e., the presence of four high courts in one jurisdiction, as this may generate varying and conflicting interpretations of the same law.

## 5.5 Conclusion

The lack of independent arbitration law is one of the primary factors effecting the development and advancement of arbitration in the UAE. The prevailing arbitration law (Articles 203-218 UAE CPL) on arbitration is obsolete and fails to facilitate its development. These articles date back almost twenty-five years and are no longer in step with current practices and trends in commercial arbitration. Thus, there is a dire need to develop world-class arbitration legislation in line with the internationally accepted standards to bridge the current gap in legislation.

While having independent arbitration law is critically important. It is hoped that the new arbitration law will be tailored to provide a highly advanced statutory framework of arbitration that addresses current issues, such as the mechanism of enforcing foreign and international arbitral awards by designating a competent court to determine the matters on arbitration. Furthermore, the new law must incorporate the concept of international arbitration, like other progressive regimes, such as the French law as explained in chapter two of this study.

Various factors have been adopted by different jurisdictions to determine the nature of international awards. The French arbitration law, for example, has adopted an "economic" factor to determine if arbitration is international. In Switzerland, the "nationality" of the parties determines whether arbitration is international. Egypt has adopted the Model Law approach. It is evident that the application of any of the factors, namely legal, economic or dual factors, as explained in chapter two of this study, has its own implications for any legal order. Nonetheless, the economic factor, in which arbitration is deemed international "when it involves the interests of international trade" as construed in France and Lebanon is comparatively less ambiguous than adopting geographical

factors or legal factors, such as the nationality of the parties or a dual approach, which is a combination of legal factors and the interests of international trade.

It is hoped that the new arbitration law in the UAE will define the legal seat of arbitration and establish separate rules governing domestic arbitration from foreign and international arbitration so that UAE courts do not intermix the rules, conditions and procedures of each type of arbitration. It is generally preferred that the law be drafted from two perspectives, one dealing with domestic arbitration and the other dealing with foreign and international arbitration, to ensure that the law is correctly applied without any ambiguity or uncertainty.

It can be concluded that, with a clear arbitral law determining domestic and international arbitration, followed by a competent court with judges having specialised legal knowledge of international arbitration principles most of the legal obstacles, which have been highlighted and critically analysed by this research will be resolved.

## Bibliography

### Articles

Alan Redfern, Having Confidence in International Arbitration, published in the Dispute Resolution Journal (2003), Volume 57.

Albert Jan van den Berg, The New York Convention of 1958: An Overview, ICCA publication (2008).

Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?* ICSID Review 2014.

Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, The ICC International Court of Arbitration Bulletin - Vol. 18/No. 2 - 2007.

Alec Emmerson and Keith Hutchison, *The UAE Enforcement Saga: A New Dawn*, Clyde & Co, 8 November 2012.

Alec Emmerson, Sapna Jhangiani and Keith Hutchison, *Developments in Enforcement of Awards*, International Bar Association (IBA) Arbitration Committee Newsletter, Volume 2, September 2011.

Alexander K.A. Greenawalt, *Does International Arbitration Need A Mandatory Rules Method?*, Pace Law Faculty Publications (2007).

Alessandro Tricoli, *Updates on the Ratification and Enforcement of Arbitral Awards in the UAE and DIFC Courts*, published in the IBA Newsletter of the Maritime and Transport Law Committee (August 2012 - Volume 8).

Ahmed Bin Sulaiman Al Busafi (Judge), *Obstacles in the enforcement of foreign arbitral awards in the Sultanate of Oman*, published in the Journal of International Arbitration Issue 29 of 2016, (This study was originally published in Arabic).

Ahmed M Almutawa and A. F. M Maniruzzaman, *The UAE's Pilgrimage to International Arbitration Stardom*, published by The Journal of World Investment and Trade Volume 15 (2014).

Ahmed Abdul Sadeq, *Egypt Arbitration Award between Theory and Practice*, published in GCC Arbitration Magazine, Issued on 23 June 2014 (This study was originally published in Arabic).

Andrew Barraclough and Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, Melbourne Journal of International Law, Volume 6.

Beth Trent, *Important trends in International Dispute Resolution*, published in Lexology (2015).

Cameron L Schroeder, *International Bechtel Company, Ltd v Department of Civil Aviation of the Government of Dubai*, United States District Court for the District of Columbia, 03-0277, published in Kluwer Arbitration 5 February 2004.

Christopher Mainwaring Taylor and Yacine Francis, Allen & Overy, *Decision on Enforcement of Foreign Awards under the New York Convention*, published in Allen & Overy Newsletter (2013).

Christopher Style QC and Stephan Balthasar, *Enforcing International Arbitral Awards: Pitfalls and Strategies*, published in the Journal of the Dispute Resolution Section of the International Bar Association (IBA) in May 2012 Volume 6.

Charles Manzoni, *International Arbitration- The Key Elements*, available online, 5 May 2016.

Conyers, Dill & Pearman, *The New York Convention - BVI as Part of the Global System for Promoting International Trade*, October 2014.

Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates*, Kluwer Law International, 2003.

Essam Al Tamimi, *Enforcement of Foreign Arbitral Awards in the Middle East*, published in BCDR International Volume No 1(2014)

Elizabeth Oger-Gross and Anaïs Harlé, White & Case LLP, *Arbitration procedures and practice in France: overview*, published by Practical Law Compant (PLC).

Emmanuel Gaillard, *The Enforcement of Award set Aside in the Country of Origin*, 14 ICSID Review 16 (1999).

Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitration Awards- The New York Convention in Practice*, published by Cameron May (2008).

Faris Nasrallah, Baker Botts LLP, *Arbitration in the UAE*, published in Lexology Navigator Question & Answer (2014).

Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, Northwestern Journal of International Law & Business, Volume 1, Issue 1.

Gary Born, *Dallah and the New York Convention*, Kluwer Arbitration, April (2011).

Gordon Blanke and Soraya Corm Bakhos, Chapter on United Arab Emirates, published in *Getting the Deal Through* (2014).

Gordon Blanke and Soraya Corm Bakhos Baker & McKenzie Habib Al Mulla, *United Arab Emirates: Enforcement of New York Convention Awards; Are the UAE Courts Coming of Age*, published in BCDR International Arbitration Review (2012).

Gordon Blanke, *Enforcement of New York Convention Awards in the UAE (Part I): Quo vadis?*, published in Kluwer Law International, 26 July 2012.

George A. Smith and Matthew A. Marrone, *Recent Developments in Arbitration Law in the Middle East*.

Hassan Arab and Dalal Al Houti, *Dubai Issues Judgment in Support of International Arbitration*, published in Kluwer Arbitration, 13 April 2015.

Hassan Arab, *The position of UAE Courts on the enforcement of foreign arbitral awards*, published in BCDR International Arbitration Review September (2014) - Volume 1 - Issue 1.

Henry Quinlan, Alan Kaminski and Sam Stevens, *Does CCI vs Sudan constitute a reversal of the pro-enforcement stance in UAE?*, published in [practicallaw.com](http://practicallaw.com), 7 November 2013.

Hassan Arab, *Dubai: The Position of the UAE Courts Following Accession to the New York Convention*, published in Al Tamimi & Company law update, October 2012.

Henry Quinlan, Sam Stevens and Natalie Wainwright, DLA Piper, *Enforcing arbitration awards in the UAE*, practice note published in Practical Law, 21 May 2013.

Hassan Arab and Naief Yahia, Al Tamimi & Co, *A setback for the enforcement of foreign arbitral awards in Dubai*, published in the IBA Arbitration Newsletter, February 2014.

H Kronke, Edited by Dirk O, *Article IV - Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary*, Kluwer Law International (2010).

Hebert Kronke, Patricia Nacimiento, *Article III - Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International (2010)

Herbert Kroke, Patricia Nacimiento (ed) *Article V (1) (a) Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary*, Kluwer Law International (2010).

Henry Quinlan, Sam Stevens and Natalie Wainwright, DLA Piper *Enforcing arbitration awards in the UAE*, practice note published in Practical Law, 21 May 2013.

ICCA Congress Series No 12, Beijing, May 2004: *New Horizons in International Commercial Arbitration and Beyond* (The Hague: Kluwer Law International, 2004).

Jalal El Ahdab, *The Draft of the Federal Arbitration Law of the United Arab Emirates*, published by the International Bar Association (IBA) Arbitration Newsletter, March 2011.

James O Rodner, *International and National Arbitration: A Fading Distinction*, *International Journal for Arbitration*, Vol 12, (2002) Issue 5, Kluwer Arbitration.

Jana Karam, *International Arbitration in Lebanon*, published by [Aceris Law LLC](#) (2005).

J Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, *American Review of International Arbitration* 1(1) Apr 1990.

John Gaffney and Dalal Al Houti, *Arbitration in the UAE: Aiming for excellence*, published in the Law Update, Al Tamimi & Company, May 2014.

John Gaffney and Aissatou Ndong, *International Commercial Arbitration Procedural Approaches In Civil Law versus Common Law*, published in *Transnational Dispute Management* (2015).

Jonathan Lawrence, Peter Morton and Hussain Khan, *Dispute Resolution in Islamic Finance*, *Global Islamic Fin* (2012).

Jessika Stadwick, Cylda & Co, *The birth of a New UAE Federal Arbitration Law; A long and difficult Labour*, published in *Kluwer Arbitration Blog*, August 2014.

Karim Nassif, Gordon Blanke and Soraya Crom-Bakhos, *Arbitration under UAE Law: Towards a Modern Legal Framework?*, *The In-House Lawyer*, 9 September 2010.

Khaled Al Shalakany, *Arbitration in Egypt: the need for a systemic review*, *Africa and the Middle East Arbitration Newsletter- Country Development section-* March 2010.

Khaled El Shalakany, *Arbitration procedures and practice in Egypt: overview*, *Practical Law* published in 1 Jun 2014.

Khaled El Shalakany and Adam El Shalakany, *Arbitration Guide- IBA Arbitration Committee*, published in August 2013.

Kurt Blickenstorfer & Silvia Renninger, Bratschi Wiederkehr & Boub, *Recognition and Enforcement of Foreign Arbitral Awards Requirements Pursuant to the New York Convention*, IBA Arbitration Newsletter (Vol 2) August 2014.

Lovells, Client Note: *Project Dispute Resolution in the Middle East: arbitration and enforcement*, (Lovells 2006).

Laura Warren, *The seat of arbitration - Why is it so important?*, published in Mondaq (2011).

Laurence Franc-Menget, Vincent Bouvard, and Peter Archer, *Appeal against order granting enforcement only permitted under limited grounds relating to arbitral award (French Supreme Court)*, published online (2015).

Latham Watkins - Guide to International Arbitration, published in 2014.

Loukas A Mistelis and Julian D M Lew Q.C, *Pervasive Problems in International Arbitration*, published by Kluwer Law International (2006).

Dr. Markus Altenkirch and Jan Frohloff, *Global Arbitration Cases Still Rise - Arbitral Institutions, Caseload Statistics for 2015*.

Mark Beswetherick and Keith Hutchison, *Enforcement of arbitration awards: Moving in the right direction*.

Mark Bezant, James Nicholson and Howard Rosen, FTI Consulting, *Trends in International Arbitration in the New World*, published in Global Arbitration Review (overview), 2015.

Matthias Scherer and Martin Dawidowicz, *Arbitration Guide (Country Report) - IBA Arbitration Committee*, published in March 2012.

Matthias Scherer and Sam Moss, *Resisting Enforcement of a Foreign Arbitral Award Under the New York Convention*, published in Inter Pacific Bar Association Journal (IPBA), September 2008.

Manuel Arroyo, *Chapter 3, Part I: Introduction to the Swiss Rules of International Arbitration- Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013.

Michael Hwang and Yeo Chuan Tat, *Recognition and Enforcement of Arbitral Awards*, published in The Asian Leading Arbitrator's Guide to International Arbitration, 2007.

Michael E Schneider, Joachim Knoll, *Enforcement of Foreign Arbitral Awards against Sovereigns - Switzerland*, published in Jurisnet LLC, 2009.

Mohamed Abdel Wahab, *UPDATE: An Overview of the Egyptian Legal System and Legal Research*, published in Global Lex (October 2012).

Mohamed Abdel Wahab, *Chapter on Egypt*, Published in Global Arbitration Review (January 2012), last verified in August 2013.

Mohamed A.M. Ismail (Dr), *International Investment Arbitration: Lessons from Developments in the MENA*, published by Routledge Taylor and Francis Group, 2013.

Mohamed Oweis Taha, *Egypt; Legal Frame Work for Arbitration*, The Law Library of Congress Legal Research Centre, published in August, 2014.

Nigel Duffield, *International arbitration in the UAE - Dubai, a two-seater city*, published in Clayton Utz Insights newsletter.

Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin H. Hunter, *An Overview of International Arbitration*, published in Kluwer Arbitration, Oxford University Press, 2009.

Nayla Comair Obeid and Ziad Obaid, *Chapter on Lebanon*, Contributed to Global Arbitration Review, published, [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com) 7 July 2015.

Nishit Desai, *What finally happened in Bharat Aluminum Co. [Balco] v Kaiser Techinal Services?* Nishit Desai Associates, Dispute Resolution Newsletter (February 2016).

Omar Al Shaikh, Hadeef and Partners, *New York Convention: Lack of Jurisdiction Prevents Enforcement in the UAE*, published in November 2013.

Patrick Bourke & Dominic Hennessy, *Brighter times - developments in arbitration in the United Arab Emirates*, International Bar Association (IBA), Arbitration Committee Newsletter, September 2008.

Patrick Bourke and Adam Vause, '*Latest Draft of UAE Federal Arbitration Law Released*', Norton Rose Fulbright March 2012.

Paul Taylor, *On the Path to Sophistication*, published in the Oath magazine, Issue 49, February 2016.

Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L274 (1986).



Pakorn Nilrapunt, *Judicial Control over International Commercial Arbitration*, published in [www.lawreform.go.th](http://www.lawreform.go.th) (2004).

Pieter F Bekker and Jacques F de Heer, *Enforcement of Arbitral Awards against Sovereigns - The Netherlands*, (2009).

Reza Mohtashami and Merryl Lawry-White, *The (Non)-Application of the New York Convention by the Qatar Courts: ITIIC v. Dyncorp*, *Journal of International Arbitration* (Kluwer Law International), Volume 29 (2012) Issue 4.

Raid Abu-Manneh, *Dubai: A Regional Arbitration Centre?*, *Mayer Brown International, LLP*, August 10, 2009.

Richard Gubbins, *Legal View: Enforcement of foreign arbitral awards in India*, published by the *Indian Investment Journal*, June 2014.

Richard Price and Essam Al Tamimi, *United Arab Emirates Court of Cassation Judgments 1898-1997*, Kluwer Law International (1998).

Robert Karrar Lewsley, John Gaffney and Dalal Al Houti, "*United Arab Emirates*", published by *Global Legal Insights* (2015).

Robert Karrar-Lewsley and Dalal Al Houti, *A checklist for what you need for an enforceable UAE Arbitral Award*, published in *Al Tamimi Law Updated*, August 2015.

Saloni Kantaria, *The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law*.

Stephen Jagusch & James Kwan, *Middle East Overview*, the *European & Middle Eastern Arbitration Review 2008*, *Global Arbitration Review*.

Saloni Kantaria, *The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law* (2012) 2 *Int'l Arb. L. R.* 61.

Samuel Sharp, *India reins in the courts: Bharat Aluminium v. Kaiser Aluminium Technical Services*, December 2012.

Sabah M A Mahmoud, *Gulf Law-com, Background on the United Arab Emirates (UAE) Legal System*.

*Switzerland: Enforcement of Foreign Judgments In Switzerland*, published in Mondaq (updated 30 October 2012).

Sebastian Perry and Alison Ross, *Dubai court questions UK's accession to New York Convention*, Global Arbitration Review (GAR) publication dated 7 April 2016.

Stuart Paterson and Mike McClure, Hebert Smith Freehills, *Enforcement of foreign arbitral award in Dubai: a setback*, Published in (Oct 2013).

S M Hyder Razvi, *Mandatory Rules in Law in International Business Arbitration*, published in the Lahore Journal of Economics, Volume 3, No 2.

Stephanie Cohen, *The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards*.

Thomas Clay, Philippe Pinsolle, Thomas Voisin, *French International Arbitration Law Reports: 1963-2007*, published in Kluwer Law International (2014).

Thomas Childs, *Egypt, Syria and Saudi Arabia: Enforcement of foreign arbitral awards in Egypt, Syria and Saudi Arabia*.

Veronica Junger, *International Requirements under UNICITRAL Model Law*, published by Juridice dated 27 October 2014.

Wafa Janahi, *Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts* (2011).

William W Park, *National Law and Commercial Justice*, 63 Tulane L. Rev. 647 (1989); reprinted as *Judicial Controls in the Arbitration Process*, 5 Arb. Int'l 230(1989).

William W. Park, *Why Courts Review Arbitral Awards*, reprinted in 16 Int'l Arb. Rep. 27, November 2001.

Y Zainal, *The Prevalance of Arbitration in the Gulf Cooperation Council Countries*, Journal of International Arbitration volume 18, Issue No 6, 2001.

## Books

Abdel Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries*, (third revised and expanded edition) Wolters Kluwer Law and Business, 2011.

Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third Edition published by Sweet & Maxwell (1999).

Alan Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, published by Sweet & Maxwell (2004).

Alan Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, (2004).

Albert Jan van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 ICSID Rev. Foreign Investment L.J 349 (1987).

Albert Jan van den Berg, *International Commercial Arbitration: Important Contemporary Questions*, published by Kluwer Law International (2003).

Ali Naser Mohamad Al Ahdabi, *Setting Aside Foreign Arbitral Awards*, published by The Judicial Department of the Emirate of Abu Dhabi, First Edition, (This study is originally published in Arabic).

Amazu A Asouzu, *International Commercial Arbitration and African States*, published by Cambridge University Press, (2001).

CMS Guide on International Arbitration available online on [www. cmslegal.com](http://www.cmslegal.com).

CMS Guide to Arbitration in Switzerland, Vol I, available online.

Emmanuel Gaillard and John Savage (eds), Fouchard Gaillard Goldman on *International Commercial Arbitration*, published by Kluwer Law International, 1999.

Elliott Geisinger and Julie Raneda, *Chapter 1- Legislative Framework in Elliott Geisinger and Nathalie Voser (eds), International Arbitration in Switzerland: A Handbook for Practitioners* (Second Edition), 2nd edition Kluwer Law International 2013.

Dr Essam El Deen Al Qasabi, Head of International Private Law School - Al Mansoorah University- Egypt, *International Enforcement of the Arbitration Award*, Dar Al Nahda Al Arabia 1998, (This study is originally published in Arabic).

Dr Fathi Waly , Former Dean of Cairo University, *Arbitration in the Commercial Domestic and International Disputes* , published by Al Maarif 2014, (This study is originally published in Arabic).

Dr. Fathi Waly, *Commentary on the CCI Case*, (originally in Arabic) Published in the International Arbitration Journal issue No (21) of 2014, (This study is originally published in Arabic).

Fouchard Gaillard Goldman, *International Commercial Arbitration* (Edited by Emmanuel Gaillard & John Savage), published by Kluwer Law International (1999).

Fouchard Gaillard Goldman on *International Commercial Arbitration*, (Edited by Emmanuel Gaillard and John Savage) published by Kluwer International (revised version, 2012).

Gary B. Born, *International Arbitration: Law and Practice*, published by Kluwer Law International (2012).

Gabrielle Kaufmann- Kohler, *Enforcement of Awards - A Few Introductory Thoughts* in Albert Jan van den Berg (Gen. Ed).

Hassan Arab, Lara Hammoud and Graham Lovett, *Summaries of UAE Courts' Decisions on Arbitration*, published by the International Chamber of Commerce (2012).

Hosni Abdul Wahid (Dr) and Bishoy Marquis Kamal, *Commentary on the CCI Case*, published (originally in Arabic) in the International Arbitration Journal Issue No. (21) of 2014 (This study is originally published in Arabic).

Irene Welser/Giovanni De Berti, "*Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices*."

Jean de la Hosserye, Stephanie de Giovanni and Juliette Huard Bourgeois, CMS Guide on "Arbitration in France", available online on [www.cmslegal.com](http://www.cmslegal.com)

John D. Franchini, *International Arbitration under the UNCITRAL Arbitration Rules: a Contractual Provision for Improvement*, published by Fordham Law Review (1994), Volume 67, Issue 7.

Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, Kluwer International, 2003.

Karyln Nairn, Patrick Heneghan, *Arbitration Word Jurisdiction Comparisons*, published by Thomson Reuters, Fourth Edition 2012.

Lew J.D.M., *Applicable law in international Commercial Arbitration*, (1978).

Loukas Mistelis and Crina Baltag, *Recognition and Enforcement of Arbitral awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 2008.

Mistellis, *Concise Arbitration*, published by Kluwer Law International (2010).

Mohamed Abdel Raouf (Dr), *dirasat tahliliya lil-Qada' elmasri fi da'awa boutlan ahkam*, 21 J. Arab Arb.

Nicolas Bouchardie (Counsel) and Celine Tran (Associate), White & Case LLP, Paris, Arbitration in France, published by Practical Law Company (PLC) available online. Arbitration agreements in international arbitration are not subject to any formal requirements (Article 1507, CCP).

Peter Ashford, *Handbook on International Commercial Arbitration* (Second Edition), published by Jurisnet LLC (2014).

Prof Christopher R. Drahozal, *International Arbitration Law in the United States*, University of Kansas School of Law (2007).

Prof. Mathias Audit and Elias Bou Khalil, *Commentary on the CCI Case*, the study was published (originally in Arabic) in the International Arbitration Journal issue No. (21) of 2014 (This study is originally published in Arabic).

Dr Ousama Ousta, "*Judicial Control Over International Awards*", published by Sader Publishers, Part I (This study is originally published in Arabic).

Ongur Ergun, *The New [2012] Arbitration Rules Of International Chamber Of Commerce*.

Dr Omar Eltom, *The Emirates Law in Practice*, (This study is originally published in Arabic).

Richard Chernick, Daniel M Kolkey, *Practitioner's Handbook on International Arbitration and Mediation* (3rd Edition), published by [Juris Publishing Inc.](#)

*Request for Recognition and Enforcement of an Arbitral Award: ICCA's Guide to the Interpretation of the 1958 New York Convention*; A Handbook for Judges International Council for Commercial Arbitration 2011 Kluwer Law International.

Sarah Francios Poncet, Brenda Horrigan and Lara Karam, *Enforcement of Arbitral Awards against Sovereign States or State Entities - France*, published by Jurisnet LLC (2009).

Simone Hofbauer (edited by Manuel Arroyo) "*Chapter-1, Part1: History of Arbitration in Switzerland: The Practitioners Guide*", Published in Kluwer Law International 2013.

The International Solution to International Business Solutions - ICC Arbitration, ICC publication No 301 (1977).

## Reports and Official Publications

Alexis Mourre, *Arbitration Guide - France*, IBA Arbitration Committee, published in March 2012.

A commentary of International Council for Commercial Arbitration (ICCA) 2012 Congress in Singapore *Judicial Debate on the General Theme State Courts & Intl. Arbitration: The Future*, Introduction by V.V. Veeder.

Comparing regional arbitration process published in Oct 2013, Financial worldwide magazine (Special Report: International Dispute Resolution, available online on [www.financierworldwide.com](http://www.financierworldwide.com)).

Domitille Baizeau, *Litigation, Arbitration & Dispute Resolution Guide*, published in 2010.

Diana Hamade, The National; *Lawyers have to bridge the gap in a split legal system*, 24 July, 2011.

*Dispute Resolution Around the World - Switzerland*, published by Baker Mackenzie available online [ww.bakermckenzie.com](http://ww.bakermckenzie.com)

Hassan Arab and Hussain Eisa, Global Arbitration Review (GAR) *Know-How Enforcement Litigation*, published in GAR, January 2016.

Ian Clarke, Charles Lilley, *United Arab Emirates*, Global Arbitration Review (GAR) The European, Middle Eastern and African Arbitration Review 2013.

ICC 2010 Statistical Report, *ICC Arb. Bull. 2011/1*.

Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts*. Report published in 1999.

Nicolas Bouchardie and Celine Tran, White & Case LLP, Paris, *Arbitration in France*, published in Practical Law, 2013.

Report prepared by Yasuhei Taniguchi on *Enforcement in Action: Theoretical and Practical Problems*, published by ICCA Congress Series 1998.

Report on Paris, *Paris stronghold of International Arbitration*, published in Le Monde (2016).

Sona Nambiar, *Common law needed as UAE sees spurt in arbitration*, Emirates Business 24/7, September 9, 2009.

Yves Derains and Laurence Kiffer, *National Report for France* (2013), International Handbook on Commercial Arbitration, published in Kluwerlaw, May 2013.

**APPENDIX 1  
UAE CIVIL PROCEDURE LAW (ARBITRATION PROVISIONS)**

**CIVIL PROCEDURE [FED. LAW 11 OF 1992] AS AMENDED**

**CHAPTER THREE ARBITRATION**

**Article 203**

1 - It shall be permissible for contracting parties generally to stipulate in the original contract or in a subsequent agreement to refer any dispute between them concerning the implementation of a specified contract to one or more arbitrators and it shall likewise be permissible to agree by special conditions to arbitration in a particular dispute.

2 - An arbitration agreement may be proved only by writing.

3 - The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void.

4 - It shall not be permissible to arbitrate matters in which conciliation is not permissible. An agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the right the subject matter of the dispute.

5 - If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be cancelled.

**Article 204**

1 - If a dispute arises and the parties have not agreed on the arbitrators or if one or more of the agreed arbitrators refuses to act or retires or is removed or judgment is passed rejecting him or if an obstacle arises preventing him from conducting the arbitration and there is no agreement in that respect between the parties the court having original jurisdiction to try the dispute shall appoint the necessary arbitrators on the application of one of the parties made by the normal procedures for bringing an action and the number appointed by the court shall be equal to the number agreed upon by the parties or must supplement that number.

2 - There shall be no appeal from the order issued in that behalf by any means of appeal.

**Article 205**

It shall not be permissible to empower the arbitrators to effect a conciliation unless they are mentioned by name in the arbitration agreement or in a subsequent document.

**Article 206**

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

2 - If there is more than one arbitrator their number must in all cases be uneven.

**Article 207**

1 - The acceptance by the arbitrator [of his appointment] must be in writing, or his acceptance must be noted in the record of the hearing.

2 - If after he has accepted his appointment an arbitrator declines without serious reason to perform his function, he shall be liable to have judgment for compensation passed against him.

3 - An arbitrator may not be dismissed save by the consent of all the parties save that it shall be permissible for the court having original jurisdiction to determine the dispute, on the application of one of the parties, to discharge the arbitrator and to order the appointment of a substitute for him by the same means by which he was originally appointed, in the event that it is proved that the arbitrator has deliberately failed to act in accordance with the arbitration agreement despite the matter having been brought to his attention in writing.

4 - It shall not be permissible to recuse him from issuing an award save for reasons that have arisen or become apparent after his appointment and the recusal is applied for for the same reasons that a judge may be recused or by virtue of which he is unfit to issue an award. The application for recusal shall be made to the court having original jurisdiction to determine the action within five days from notice being given to the party of the appointment of the arbitrator or from the date of the arising of the cause of recusal or his becoming aware of it if it is subsequent to his receiving notice of the appointment of the arbitrator. In no case shall an application for recusation be entertained if the judgment of the court<sup>1</sup> has been passed or if the pleadings have been closed in the case.

---

<sup>1</sup> The official text has 'the judgment of the court'. This appears to be an error for 'the award of the arbitrator'.



**Article 208**

1 - The arbitrator shall, within thirty days at the most from his acceptance of the arbitration, notify the parties of the first session fixed for the hearing of the dispute and of the place at which it is to be convened, without being bound by the rules laid down in this law for service, and a time shall be specified for them to submit their documents, memoranda, and arguments.

2 - It shall be permissible to make an award on the basis of the submissions of one party alone if the other party fails to do so within the time limit laid down.

3 - If there is more than one arbitrator, they shall jointly carry out the enquiry [fact finding] procedures, and each of them shall sign the minutes.

**Article 209**

1 - The proceedings before the arbitrator shall be interrupted upon the arising of any of the causes of interruption of litigation laid down in this law and such interruption shall have the same effects as are laid down by law unless the action has been reserved for judgment.

2 - If during the course of the arbitration a preliminary issue is submitted that falls outside the scope of the arbitrator's power or if there is a challenge based on forgery of a document or if criminal proceedings have been taken in respect of the forgery thereof or in respect of another criminal incident, the arbitrator shall suspend his function until the passing of a final judgment thereon, and the arbitrator shall likewise suspend his function in order to refer to the president of the competent court for the carrying out of the following:

a - judgment for the penalty laid down by law for any witness who fails to attend or who refuses to answer questions;

b - judgment ordering a third party to produce a document in his possession, being one necessary for judgment in the arbitration;

c - an order for judicial letters rogatory<sup>2</sup>.

**Article 210**

---

<sup>2</sup> i.e. a request from one court to another court to perform an act in the latter's area of jurisdiction.

1 - If in the arbitration agreement the parties have not stipulated a time limit for the judgment the arbitrator must pass judgment within six months from the date of the first hearing in the arbitration failing which it shall be permissible to any party to so wishes to bring the dispute before the courts or to continue with it before the courts if it has already been brought.

2 - The parties may agree - expressly or impliedly - to extend the time limit laid down in the agreement or by law and they may authorise the arbitrator to extend it to a specified date and it shall be open to the court upon the application of the arbitrator or one of the parties to extend the time limit laid down in the previous subsection to such date as it deems appropriate for a determination on the dispute.

3 - The time limit shall be suspended so long as the suit is suspended or interrupted before the arbitrator and it shall start to run again as from the date that the arbitrator has knowledge of the cessation of the cause of the suspension or interruption and if the balance of the time is less than one month it shall be extended to one month.

#### **Article 211**

The arbitrators must administer the oath to the witnesses and any person who gives false testimony before the arbitrators shall be treated as being guilty of the offence of perjury.

#### **Article 212**

1 - The arbitrator shall issue his award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow.

2 - The award of the arbitrator shall follow the rules of law unless he is authorised to effect a compromise, in which event he shall not be bound by such rules save in so far as they relate to public order.

3 - The rules relating to expedited execution shall apply to the awards of arbitrators.

4 - The award of the arbitrator shall be issued in the United Arab Emirates, otherwise the rules laid down in respect of awards of arbitrators issued in a foreign country shall apply.

5 - The award of the arbitrators shall be issued by a majority; it must be in writing, with the dissenting

view, and it must in particular include a copy of the arbitration agreement, a summary of the statements and documents of the parties, the reasons for the award and the order made, the date of issue, the place at which it was issued, and the signatures of the arbitrators, and if one or more of the arbitrators has refused to sign the award such fact shall be stated, and the award shall be valid if signed by a majority of the arbitrators.

6 - The award shall be written in Arabic unless the parties have agreed otherwise, and in that event it must, on being deposited<sup>3</sup>, be accompanied by an official [notarised] translation.

7 - The award shall be deemed to have been issued on the date on which the arbitrators signed it after it was put in writing.

### **Article 213**

1 - In an arbitration proceeding through the court, the arbitrators must deposit the award with the original of the arbitration instrument and the minutes and documents with the clerk of the court originally having jurisdiction in the dispute within fifteen days from the day on which the award is made, and they must deposit a copy of the award with the clerk of the court for delivery to each party within five days from the deposit of the original; the clerk of the court shall prepare a minute of such deposit, which he shall place before the judge or president of the division as the case may be for a date to be fixed within fifteen days for ratification of the award, and the parties shall be notified thereof.

2 - If the arbitration supervenes upon appeal proceedings, the deposit shall be made with the clerk of the court originally having jurisdiction to hear the appeal.

3 - So far as concerns an arbitration taking place between the parties outside the court, the arbitrators must deliver a copy of the award to each party within five days from the issue of the decision in the arbitration, and the court shall determine whether it shall be ratified or annulled upon the application of one of the parties through the normal procedures for bringing actions.

---

<sup>3</sup> i.e. deposited with the competent court for ratification

**Article 214**

It shall be permissible for the court in the course of considering an application for ratification of the award of the arbitrators to remit it to them to consider any issue in the arbitration on which they have omitted to make a determination or to clarify the award if it is insufficiently specific for it to be capable of enforcement and the arbitrators must in each case issue their decision within three months from the date of service on them of the decision [of the court] unless the court has ruled otherwise.

There shall be no appeal against the decision [of the court] save with a final judgment<sup>4</sup> ratifying or annulling the award.

**Article 215**

1 - An award of the arbitrators shall not be enforced unless it is ratified by the court with whose clerk the award has been deposited, [such ratification to be made] after perusal of the award and the arbitration instrument and an ascertainment that there is no obstacle to enforcement thereof and the court shall have jurisdiction to rectify any material<sup>5</sup> errors in the award of the arbitrators on the application of the persons concerned by the same means laid down for the rectification of judgments.

2 - The execution judge shall have jurisdiction over all matters relating to the execution of the award of the arbitrators.

**Article 216**

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

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

b - if the award was made by arbitrators appointed otherwise than in accordance with the law, or was issued by some of them without their being authorised to make an award in the absence of the

---

<sup>4</sup> 1 i.e. as part of an appeal against the final judgment of the court ratifying or annulling the award; an appeal against an interlocutory decision made by the court under article 214 may not be brought independently.

<sup>5</sup> Material in the sense of accidental typing errors or arithmetical errors or the like

others or if it was issued on the basis of an arbitration instrument that does not specify the subject matter of the dispute or was issued by a person not having capacity to make an arbitration agreement or an arbitrator not satisfying the requirements of the law;

c - if there is a nullity in the award or a nullity in the proceedings having an effect on the award.

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

#### **Article 217**

1 - There shall be no appeal by any means of appeal against the awards of arbitrators.

2 - A judgment passed ratifying or annulling the award of an arbitrator may be appealed against by the appropriate avenues of appeal.

3 - By way of exception to the provisions of the foregoing paragraph a judgment shall not be appealable if the arbitrators have been empowered to make a composition or if the parties have expressly waived their right of appeal or if the amount in the dispute does not exceed ten thousand dirhams.

#### **Article 218**

The assessment of their fees and the costs of the arbitration shall be left to the arbitrators and they may make an award in respect of the whole or part thereof against the losing party. The court may, upon the application of one of the parties, vary such assessment to make it appropriate to the effort expended and the nature of the dispute.

### **Section Four Execution of foreign judgments, orders and instruments**

#### **Article 235**

1 - An order may be made for the enforcement in the UAE of judgments and orders made in a foreign country on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE.

2 - An order for execution shall be applied for before the court of first instance within the jurisdiction of which it is sought to enforce, under the usual procedures for bringing a claim, and an execution order may not be made until after the following matters have been verified:

- a - that the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made, and that the foreign courts which issued it did have jurisdiction thereover in accordance with the rules governing international judicial jurisdiction laid down in their law,
- b- that the judgment or order was issued by a court having jurisdiction in accordance with the law of the country in which it was issued,
- c - that the parties to the action in which the foreign judgment was issued were summoned to attend, and were correctly represented,
- d - that the judgment or order has acquired the force of res judicata in accordance with the law of the court that issued it, and
- e - that it does not conflict with a judgment or order already made by a court in the UAE, and contains nothing that conflicts with morals or public order in the UAE.

#### **Article 236**

The provisions of the foregoing article shall apply to the awards of arbitrators made in a foreign country; the award of the arbitrators must have been made on an issue which is arbitrable under the law of the UAE, and capable of enforcement in the country in which it was issued.

#### **Article 237**

1 - An order may be made for the enforcement in the UAE of notarised documents and memoranda of settlement certified by the courts of a foreign country on the same conditions laid down in the laws of that country for the enforcement of similar instruments issued in the UAE.

2 - An application for an enforcement order referred to in the foregoing subsection shall be made by a petition submitted to the Execution Judge, and no order for enforcement may be made until after it has been ascertained that the conditions for the enforceability of the document or memorandum have been satisfied in accordance with the law of the country in which it was notarised or certified, and that it contains nothing contrary to morals or public order in the UAE.

#### **Article 238**

The rules laid down in the foregoing articles shall be without prejudice to the provisions of conventions between the UAE and other countries in this regard.

**APPENDIX 2**  
**UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF**  
**FOREIGN ARBITRAL AWARDS (NEW YORK, 10 JUNE 1958)**

**Article I**

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

**Article II**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

**Article III**

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

**Article IV**

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

**Article V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated



from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

#### **Article VI**

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

#### **Article VII**

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

**Article VIII**

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

**Article IX**

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article X**

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

**Article XI**

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

#### **Article XII**

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

#### **Article XIII**

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

**Article XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**Article XV**

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

**Article XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.