

The Dubai Experience:
Evaluating the Effectiveness and Efficiency of International
Commercial Arbitration Laws in the Gulf Arab Region

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Statement of the Candidate

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The work presented in this thesis has not been submitted for a higher degree to any other university or institution. The sources of information used and the extent to which the work of others has been utilised are acknowledged in this thesis.

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Abstract

International commercial arbitration has become the method of choice for dispute resolution between international commercial parties. This thesis analyses and discusses the development of arbitration in the Gulf Arab Region, with a major focus on the United Arab Emirates (UAE), taking the Emirate of Dubai as a case study. It evaluates the growth and development of institutional arbitration as it is conducted in Dubai in relation to other world-class arbitral institutions such as the International Chamber of Commerce (ICC). Dubai has been emerging as a regional hub in attracting international commercial arbitration in the Gulf Arab Region and the Middle East. This thesis analyses the effectiveness and efficiency of the current procedural rules of the Dubai International Financial Centre Arbitration Law of 2008 (hereafter, DIFC Arbitration Law of 2008) on dispute resolution, which can be adopted by parties seeking to conduct arbitration proceedings or attempting to enforce arbitral awards in Dubai.

Since the global financial crisis of 2006, the UAE has made considerable progress in many areas regarding international commercial arbitration. The UAE Federal Government has proposed new arbitration laws and acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) in 2006. Moreover, Dubai as an Emirate of the UAE has established its own arbitration centres, namely the Dubai International Financial Centre (DIFC) and the Dubai International Arbitration Centre (DIAC).

Focusing on institutional arbitration in Dubai, particularly the DIFC Arbitration Law of 2008, the legal frameworks and procedures of international arbitration still experience a number of

procedural issues with regard to effectiveness and efficiency in conducting international arbitration, even given the separation of the DIFC legal system from the national legal culture of the UAE, where resolution of international disputes could be affected by the unique legal heritage (i.e. mixed civil and Shari'a legal systems) found in most jurisdictions within the Gulf Arab Region and the Middle East.

The UAE, particularly the Emirate of Dubai, has established itself as a leading arbitration hub in the Middle East. In his capacity as the Ruler of Dubai, Vice President and Prime Minister of the UAE, His Highness Sheikh Mohammed bin Rashid Al Maktoum, has been active in supporting the success of international commercial arbitration, which in turn will attract foreign investment and promote Dubai as a prominent venue for international commercial arbitration in the Middle East. Accordingly, in 2008, the DIFC amended its arbitration framework to enhance the position of Dubai as an arbitration centre within the region.

However, at the Federal level, if the UAE aims to establish itself as an arbitration-friendly jurisdiction, it should enact its federal government's proposed new arbitration law and advance its court system. At the Emirate level, if Dubai and its arbitration institutions (i.e. the DIFC) aim to develop into a competitive, world-class arbitration hub offering a suitable environment and infrastructure for the modern practice of international commercial arbitration, attracting large and complex international commercial disputes as the ICC does, it is suggested that it should improve its profile by pursuing recent trends in international commercial arbitration that offer the most effective and efficient procedural solutions.

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Table of Abbreviations

AAA	American Arbitration Association
ACICA	Australian Centre for International Commercial Arbitration
ADR	Alternative Dispute Resolution
ARAMCO	Arabian American Oil Company
ASIC	Australian Securities and Investments Commission
BCDR	Bahrain Chamber for Dispute Resolution
BCDR–AAA	Bahrain Chamber for Dispute Resolution and the American Arbitration Association
CA	Court of Appeal
CCP	<i>UAE Civil and Commercial Procedure Law (No 13) 1990</i>
CFI	Court of First Instance
CPL	Civil Procedure Law of the United Arab Emirates
DCCI	Dubai Chamber of Commerce and Industry
DFSA	Dubai Financial Services Authority
DIAC	Dubai International Arbitration Centre
DIFC	Dubai International Financial Centre
DIFC–LCIA	Dubai International Financial Centre and London Court of International Arbitration joint venture
DIFCA	Dubai International Financial Centre Authority
DJA	Dubai International Financial Centre Judicial Authority
ECC	Emirates Competitiveness Council
FDI	Foreign Direct Investment
GCC	Gulf Cooperation Council

HKIAC	Hong Kong International Arbitration Centre
IAA	Australian International Arbitration Act 2010 (Cth)
IBA	International Bar Association
ICC	International Chamber of Commerce (Paris)
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
NADRAC	National Alternative Dispute Resolution Advisory Council
NAI	Netherlands Arbitration Institute
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
NSW	New South Wales
OECD	Organisation for Economic Cooperation and Development
QFC	Qatar Financial Centre
QICA	Qatar International Centre for Arbitration
QICDRC	Qatar International Court and Dispute Resolution Centre
Riyadh Convention	Riyadh Convention on Judicial Cooperation between States of the Arab League 1983
SCAI	Swiss Chambers Arbitration Institute
SCC	Stockholm Chamber of Commerce
SHIAC	Sharm El-Sheikh International Arbitration Centre
SIAC	Singapore International Arbitration Centre
UAE	United Arab Emirates
UK	United Kingdom

UN	United Nations
US	United States
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law of International Commercial Arbitration
WIPO	World Intellectual Property Organisation

Chapter 1: Overview of the Dubai Experience

Development of International Commercial Arbitration during the Current Global Financial Crisis, and The Call for More Effective and Efficient International Commercial Arbitration Rules

1.1 Introduction

Dispute settlement mechanisms other than litigation take various forms, and are collectively known as alternative dispute resolution (ADR). Arbitration, which is the primary focus of this research, is recognised as an important mechanism in this category. Arbitration enjoys a number of advantages, and it is used to avoid the lengthy, costly and complicated process of litigation.¹

In recent years, arbitration has become an increasingly favoured option internationally. This could be attributed to many causes, including the influence of globalisation and the encouragement of foreign investments,² the development of government attitudes towards arbitration,³ and the challenge of the current global financial crisis.⁴ The latter is a significant factor that forms the basis of the recent growth of international arbitration identified in this research.⁵

¹ A comprehensive comparative study of arbitration and litigation will be developed further in Chapter 2.

² Michael Likosky, *Transnational Legal Process: Globalisation and Power Disparities* (Cambridge University Press, 2002).

³ Stephan Wilske, 'The Global Competition for the 'Best' Place of Arbitration for International Arbitrations—A More or Less Biased Review of the Usual Suspects and Recent Newcomers' (2008) 1 *Contemporary Asia Arbitration Journal* 21.

⁴ Stephan Wilske, 'Crisis? What Crisis? The Development of International Arbitration in Tougher Times' (2009) 2 *Contemporary Asia Arbitration Journal* 187.

⁵ This will be discussed further in the following subsection in the present chapter.

In light of the recent global economic crisis, many jurisdictions have updated their attitudes towards arbitration in order to cope with the crisis's challenges. These changes have also been motivated by the desire to be an effective competitor in the business of international dispute resolution and to be recognised as an arbitration hub or arbitration-friendly jurisdiction. Historically, Western jurisdictions such as Paris, New York and Geneva have been identified as global hubs for international commercial arbitration.⁶ In Asia, Singapore can be considered a leading arbitration centre, while jurisdictions in Hong Kong, China, Tokyo and Australia are developing in the right direction for attracting international arbitration users.⁷

In the Middle East, a jurisdiction such as Dubai in the United Arab Emirates (UAE) can be considered a model for implementing arbitration within the region.⁸ Recently, Dubai has established two major arbitral institutions, namely the Dubai International Financial Centre (DIFC)⁹ and the Dubai International Arbitration Centre (DIAC).¹⁰ Currently, these two arbitral institutions are considered the most popular forums in the Gulf Arab Region and the Middle East for international commercial parties operating businesses in Dubai and elsewhere within the region.

Dubai has become a major jurisdiction for arbitration, and the Government of Dubai has played a core role in offering a suitable environment and infrastructure for the practice

⁶ See '2010 International Arbitration Survey: Choices in International Arbitration, White & Case, available at <<http://www.arbitration.qmul.ac.uk/docs/123290.pdf>> at 15 June 2014.

⁷ Ibid.

⁸ Mike McClure, 'Dubai: A Hub for International Arbitration?' *Kluwer Arbitration Blog*, 23 January 2013 <<http://kluwerarbitrationblog.com/blog/2013/01/23/dubai-a-hub-for-international-arbitration/>> at 28 April 2014.

⁹ Claudine Helou, 'The New Law of the Dubai International Financial Centre' (2009) Vol. 1 *International Journal of Arab Arbitration* No 1

<<http://www.intljaa.com/english/issue.asp?issueID=1&contentid=10&MenuID=1>> at 19 May 2014.

¹⁰ Essam Al Tamimi and Emma Van Son, 'The DIAC Rules and the New UAE Arbitration Law' (2008) 25 *Journal of International Arbitration* 2, 211–217.

of international commercial arbitration.¹¹In attempting to promote Dubai as a regional hub for arbitration, Dubai established the DIFC in 2004 as a separate jurisdiction with its own laws within the UAE.¹²The DIFC has its own arbitration centre and arbitration legislation derived from the UNCITRAL Model Law, as well as its own judicial system based on common law.¹³ The establishment of the DIFC is one of the Dubai Government's initiatives and strategies for attracting international business and financial services into Dubai.¹⁴Between its creation in 2004 and the amendments to its arbitration law in 2008, the DIFC has gradually extended its work from disputes among DIFC members to disputes among the wider international business community. It has also become an international commercial dispute resolution centre that offers its arbitration services to foreign business parties from all over the world.

However, because the UAE does not have an independent arbitration law, it is obvious that there is an urgent need for it to enact one at the Federal level. Arbitration in the UAE is currently governed by minor provisions of the *UAE Federal Law No11 of 1992* (hereafter, *UAE Civil Procedure Code*). These provisions have often been criticised as outdated and inadequate to resolving international commercial disputes.¹⁵ This undoubtedly affects the position of the UAE as an arbitration-friendly seat. It is worth noting that the UAE Government is working diligently to overcome this issue and enact a new Federal arbitration law based on the UNCITRAL Model Law.¹⁶

¹¹Reza Mohtashami, 'Recent Arbitration-related Developments in the UAE' (2008) 25 *Arbitration International Kluwer Law International* 5, 631-640.

¹² Claudia T Salomon, J.P. Duffy and Tom Canning, 'The New Dubai International Arbitration Law' (2008) Vol. 240 *New York Law Journal* No 97.

¹³ Ibid.

¹⁴ Reza Mohtashami and Sami Tannous, 'Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East' (2009) 25 *Arbitration International (Kluwer Law International)* 2, 173-185.

¹⁵ S R Luttrell, 'Choosing Dubai: A comparative Study of Arbitration under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC' (2008) 9 *Bus. Int'l* 254.

¹⁶ The new draft UAE Federal Arbitration Law is still under the drafting process and it is expected to be enacted in the near future. See Quinn Smith and Omar Ibrahim, 'Arbitrating at the Crossroads of East and West: An Overview of Prominent Arab National Arbitration Laws' (2008) 24(3) *Int'l Lit. Quarterly* 20;

This chapter is divided into two main parts. The first part presents an overview of the work of the thesis, addressing the thesis question, the scope and limits of the thesis, the research methodology, the structure and the contribution of the thesis to the field. The second part provides an introduction to the arbitration regime in the UAE, particularly in Dubai.

Dubai, as an Emirate of the UAE, hosts one of the leading dispute resolution centres within the region and in the Middle East, namely the DIFC. The DIFC amended its arbitration law in 2008 and has extended its jurisdiction from resolving disputes within the DIFC registers to disputes within the wider Dubai business community, as well as among other commercial parties from all over the world. This has led to an enhancement of the DIFC's position as an international commercial dispute centre. However, the amended DIFC arbitration law of 2008 still faces some challenges to achieving effective and efficient conduct in international commercial arbitration.¹⁷ Therefore, future changes to the DIFC arbitration law of 2008 should proceed on the basis of recent trends in the conduct of international commercial arbitration. This is necessary if the DIFC is to become a real competitor in the business of international dispute resolution and to raise its position to the level of other world-class arbitration centres.

This thesis analyses and discusses the development of arbitration in the Gulf Arab Region, with the major focus on the UAE, taking the Emirate of Dubai in particular as a case study. It will evaluate and compare the growth and development of institutional

Ahmed M. Almutawa and A.F.M. Maniruzzaman, 'The UAE's Pilgrimage to International Arbitration Stardom' (2014) 15 *The Journal of World Investment & Trade*, p.221.

¹⁷S R Luttrell, 'The Arbitration Law of the Dubai International Finance Centre' (2008) 3 *Journal of International Commercial Law and Technology* 3, p170.

arbitration as it is conducted in Dubai in relation to other world-class arbitral institutions such as the International Chamber of Commerce (ICC). Primarily, this thesis analyses the effectiveness and efficiency of the current procedural rules of the *DIFC Arbitration Law of 2008* on dispute resolution, which can be adopted by parties seeking conduct arbitration proceedings or attempting to enforce arbitral awards in Dubai. In the following discussion, background context is provided to the recently enhanced significance of arbitration. This is followed by a brief introduction to the arbitration regime in the UAE, particularly in Dubai.

1.2 The Global Financial Crisis and Resulting Increase in International Commercial Disputes and Arbitrations

Recently, international trades and businesses have faced one of the most severe financial crises since the Great Depression in the 1930s.¹⁸ This crisis has been extremely widespread globally, and has created concerns about a global economic breakdown. The impact of the economic crisis has generated a substantial increase in the number and nature of international commercial disputes.¹⁹ This increased number of disputes has led to an arbitration boom.²⁰ All over the world, figures indicate that many international arbitral institutions have experienced a dramatic increase in the number of cases referred to arbitration.²¹ As stated by Schwartz,

arbitration helps to reduce risks associated with foreign investments principally by providing a neutral forum for the final and binding resolution of

¹⁸ As stated by Wilske, the financial crisis reached its peak in September and October 2008. See Wilske, above n 3, p.187.

¹⁹ Ibid, p.187.

²⁰ Ibid.

²¹ Ibid; pp. 192-195. Wilske gave examples of the dramatic increase in the number of cases referred to institutional arbitration during and after the period of the global financial crisis. He indicated that the number of arbitration cases filed within the ICC in 2009 has significantly increased compared to the same time of the last year. Also, he pointed out that the number of cases in Arbitration Institute of the Stockholm Chamber of Commerce (SCC) had increased in the first six months of 2009 by approximately 50% compared to 2008. He also mentioned the increase of arbitrations in other arbitral institutions such as London Court of International Arbitration (LCIA), The American Arbitration Association (AAA), German Institute of Arbitration (DIS) and Hong Kong International Arbitration Centre (HKIAC).

such disputes. Over the course of the last several decades, international arbitration has gained wide acceptance as the dispute resolution method of choice in relation to international transactions and foreign investment.²²

The challenges facing the global economy affect not only businesses, but also the business of international dispute resolution.²³ When arbitration users are under increased pressure to continue their businesses due to the impact of the financial crisis, it is expected that there is demand among them for arbitration that is more time- and cost-efficient. In response, arbitration players and practitioners are required to meet these challenges.²⁴ Not surprisingly, the global financial crisis has also affected businesses in the United Arab Emirates (UAE), particularly Dubai, including the business of dispute resolution. Many construction projects and real estate markets in Dubai have been hit hard as a consequence of late payments and contract terminations.²⁵ This has resulted in enormous claims by contractors pursuing compensation on account of lost profits.²⁶ This increased number of disputes caused by the global financial crisis in Dubai has produced a substantial surge in demand for efficient arbitration to face these global economic challenges.²⁷

Given the increased complexity of international business, the increased number of international commercial disputes and the economic value of arbitration, it is clear that the availability of effective and efficient arbitration is of vital importance, and has the potential to bring great benefit to businesses and arbitration users.

²²Eric A. Schwartz, 'The Role of international arbitration in economic development' (2009) 12 *Int'l Trade & Bus. L. Rev.* 127.

²³*Ibid.*, p.209.

²⁴*Ibid.*, p.196. He stated that 'it is a frequently heard complaint from the users of arbitration- namely companies- that arbitrations are too long and too costly'. He also refers to JorgRisse, *Procedural Risk Analysis: An ADR- Tool in Arbitration Proceedings*, in Austrian Arbitration Yearbook (2009), 461.

²⁵ Nick Carnell, 'Castles build on sand: the effects of the global financial crisis on Dubai provide some interesting lessons for the future', *Kennedays LLP* (United Arab Emirates) 20 May 2009, <<http://www.lexology.com/library/detail.aspx?g=58c2f205-0db4-4c76-b171-8da34f5f6412>> at 12 July 2014.

²⁶*Ibid.*

²⁷Smith and Ibrahim, above n 16.

1.3 Rise of Arbitration Bodies to Fill the Need

A steady rate of increase has been reported in international arbitration over the last two decades. However, recent years have seen an additional increasing level of demand for international arbitration as a consequence of the current global crisis.²⁸ In response, many arbitral institutions, especially in the UAE, have been mounted to cope with the demand for continued global investment.

The Dubai Government, particularly the Emirates Competitiveness Council (ECC), has recognised that international investors increasingly favour arbitration, rather than litigation, as a dispute resolution mechanism.²⁹ Therefore, it has identified arbitration as a key priority area for legislative development. Accordingly, the Emirate of Dubai has seen swift growth in the number of arbitration institutions that are developing their arbitration law to bring it into line with international standards and best practice. In particular, two arbitral bodies, namely the DIAC and DIFC, have raised their profiles rapidly in conducting modern international arbitration in Dubai.

The UAE Government particularly that of the Emirate of Dubai, has also become aware of the need to change the ways in which laws and regulations are viewed and

²⁸ Many practitioners in the field of arbitration in the UAE emphasise that there has been an increase in the number of arbitration cases at both arbitral bodies in Dubai, specifically the DIAC and the DIFC. It is estimated that the DIAC filed 77 new cases in 2007, 100 in 2008, 292 in 2009, 431 in 2010 and 440 in 2011. See Mark Bezzant, James Nicholson and Howard Rosen, 'Dispute Resolution in the Global Economy' (2010) *FTI Journal* <<http://www.ftijournal.com/article/Dispute-Resolution-in-the-Global-Economy/>> at 10 June 2014;

VM Sathish, 'Arbitration Centres Doing Brisk Business', *Emirates* 24/7 (Dubai), 17 May 2009 <<http://www.emirates247.com/eb247/banking-finance/finance/arbitration-centres-doing-brisk-business-2009-05-17-1.32294>> at 10 June 2014.

²⁹ Patrick Bourke, 'Client briefing: Potential Change to the UAE's Federal Arbitration Law', *Norton Rose Fulbright* (Dubai) August 2010 <<http://www.nortonrosefulbright.com/knowledge/publications/30004/client-briefing-potential-change-to-the-uaes-federal-arbitration-law>> at 10 June 2014.

enforced.³⁰ This would contribute to changing undesirable perceptions of the UAE regarding dispute resolution, overcome issues pertaining to the legal frameworks of the settlement system, enhance efficiency and facilitate transactions. Consistently with these aims, in 2005, the Government of the Emirate of Dubai launched the Dubai Strategic Plan of 2015 under the theme ‘Dubai: Where the Future Begins’. The plan aims to develop the identity and reputation of Dubai to make it an economic hub and an excellent destination for investment. Most importantly, the plan provides a strategic agenda for development in many aspects, including the economic, social, infrastructure, land and environment, security, justice and public sector excellence.³¹

Subsequently to the launch of the Dubai Strategic Plan, the UAE and the Emirate of Dubai introduced significant legislative changes. First, in 2006, the UAE became the 138th state to adopt the New York Convention. In 2007, the DIAC amended its arbitration law to bring it into line with international standards and best practices of dispute resolution processes. In 2008, three significant additional developments occurred: the UAE Federal Government drafted a new arbitration law, which has been published for comment and is expected to be enacted in near future; the DIFC adopted a comprehensive and jurisdictionally new arbitration law; and the DIFC and the London Court of International Arbitration (LCIA) joined to create the DIFC–LCIA Arbitration Centre.

The DIAC was first established in 1994 as the Centre for Commercial Conciliation and Arbitration. The Centre for Commercial Conciliation and Arbitration applied Law No 2 of 1994 (*Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of*

³⁰ John Bentley, Egyptian Legal and Judicial Sector Assessment: Report and Recommendation, submitted to USAID/Egypt in association with Kamel, Yehia, Abul Ela and Sakr, Vol 4, February 1994.

³¹ See Highlights Dubai Strategic Plan 2015, available at <<http://www.sclgme.org/Dubai%20Strategic%20Plan%20-%20English.pdf>> at 18 June 2014.

Commerce and Industry);³² however, these rules were not adequate to meet the needs of modern international arbitration and best practice. Further, they did not address certain matters included in the rules of world-class arbitral institutions.³³ In other words, the rules were principally aimed at domestic arbitration, and were not designed to deal with commercial arbitration involving foreign businesses. For this reason, there was a need to adopt new rules that could line up with modern practices of international arbitration.

In May 2007, by Decree No 11, the DIAC amended its arbitration rules to pursue the trends of modern and international practice and other arbitration institutions around the world. The 2007 DIAC arbitration rules replaced the previous Law No 2 of 1994 (*Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry*). The aim of adopting these new arbitration rules was to enable the DIAC to cope with international as well as domestic arbitration.

The DIFC is a financial free zone, providing its registered entities with no tax on income and profit, 100 per cent foreign ownership and duty-free foreign exchange transactions. The DIFC was founded in 2004 by the Government of the Emirate of Dubai with the intention to promote Dubai as a recognised hub for institutional finance and commerce. It comprises, among other things, an autonomous judicial system. The DIFC had previously applied Arbitration Law No 8 of 2004; however, on 1 September 2008, the DIFC amended its arbitration rules to overcome a number of deficiencies concerning the scope of its application.³⁴ The DIFC Arbitration Law of 2008 replaced

³² The *Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry* 1994, No (2) of 1994 was applicable to all arbitration cases since 1994 until the 7th of May 2007. See Dubai International arbitration centre, available at <<http://www.diac.ae/idias/rules/>>. [hereinafter 'DCCI Rules'].

³³ Al Tamimi and Van Son, above n 10, pp.211-217.

³⁴ Despite the fact that the previous DIFC Arbitration Law 2004 was based on the UNCITRAL Model Arbitration Law, its application was limited to arbitrations in which one of the parties, or the dispute itself, was connected to the DIFC. See Salomon, Duffy and Canning, above n 12.

the previous Law No 8 of 2004. The DIFC Arbitration Law of 2008 introduced the DIFC as a possible venue of arbitration for all parties seeking to seat their arbitrations in the Middle East.

Despite this indisputable progress in its institutional and legal frameworks, more needs to be done if Dubai is to become an international arbitration hub, offering a suitable environment and infrastructure for the practice of international commercial arbitration and attracting large and complex international commercial disputes in the Middle East. Subsequent to the global financial crisis, it is clear that many businesses are under pressure to reduce costs, including the costs of arbitration. Parties to potential commercial disputes can be expected to choose a dispute resolution method that meets their expectations of solving the dispute in a cost-effective and expeditious manner.³⁵ There is a demand for more arbitration that is more time- and cost-efficient, and the arbitration community must take these challenges into consideration. Simultaneously, a number of studies have shown that international arbitration has certain remaining issues, including inefficient proceedings, increasing costs and delays, all of which should be considered if the aim is to maintain the competitive superiority of arbitration against other forms of dispute resolution.³⁶

The global financial crisis and the demand from arbitration users to provide cost-effective and expeditious arbitration services are the main factors underlying recent

³⁵ See George Gluck, 'Great Expectations: Meeting the Challenge of New Arbitration Paradigm' (2012) Vol.23 *The American Review of International Arbitration* No 2, p. 231.

³⁶ Statistically, a number of studies indicate that there is dissatisfaction regarding the time spent in arbitration to render an award. Another study shows that the length of time to resolve disputes is considered as the second disadvantage of international arbitration. See Andreas Respondek, 'Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings' (2014) 31 *Journal of International Arbitration Kluwer Law International* 4, pp. 507-513; Queen Mary, University of London, *International Arbitration: Corporate Attitudes and Practices 2006*, available at < <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>>; Queen Mary, University of London & PWC, *International Arbitration Survey 2013: Corporate Choices in International Arbitration*, available at < <http://www.arbitration.qmul.ac.uk/research/2013/index.html>> at 12 July 2014.

movements in the practice of international commercial arbitration.³⁷ These factors have combined to increase the popularity of fast-track arbitration rules and raise the level of competition among global arbitration businesses (i.e. international arbitral institutions).³⁸

International arbitration institutions provide their users with a set of procedural rules that aim to prevent unnecessary delays and expenses arising from the arbitration process. However, the degree of their success can vary, as delays and high costs occur in a number of existing arbitral institutions. Therefore, it is necessary that further changes are made regarding the existing regulations of a number of these institutions.

Since the conduct of international arbitration requires the effective and efficient resolution of international commercial disputes, the practices of institutions and legislative arbitral rules should ensure that arbitration can be conducted in an expeditious and cost-effective manner. These practices also require the capacity to deal with emergency arbitration, involving urgent interim or conservatory measures, as well as growth in the complexity and diversity of disputes.³⁹ Accordingly, a number of arbitral institutions, such as the International Chamber of Commerce (ICC) and the Australian Centre for International Commercial Arbitration (ACICA), have recently made considerable and innovative changes to the procedural rules and practices of arbitration. These changes have been made with the hope of achieving effectiveness and efficiency in the conduct of arbitration proceedings and meeting users' expectations.⁴⁰

³⁷Wilske, above n 3.

³⁸*Ibid.*

³⁹ Some institutional arbitration such as ICC, ACICA and others introduced in their rules, for example, expedited proceedings, emergency arbitration and other measures with the aim to reduce costs and time. See *ACICA Arbitration Rules 2011* and *ICC Arbitration Rules 2012*.

⁴⁰ The ACICA Arbitration Rules was amended in 2011, while the ICC Arbitration Rules was amended in 2012.

1.4 New Arbitration Rules in Dubai: The Main Focus

The massive upsurge in arbitration caused by the financial and real estate crises necessitates urgent development in arbitration legislation in Dubai. This is because at the time of the financial crisis, the existing legal frameworks in the UAE, particularly UAE *Federal Law No 11 of 1992* and the rules of the existing arbitral institutions in Dubai—that is, the DIFC arbitration rules of 2004 (*DIFC Arbitration Law No 8 of 2004*) and DIAC arbitration rules of 1994—were considered as outdated and insufficiently competent in resolving large and complex international commercial disputes effectively and efficiently. Therefore, the UAE and the Emirate of Dubai have realised the need for significant legislative changes.

To cope with the upsurge in arbitration, there has been much consideration and work done on the subject of the new arbitration law in the UAE. Since the UAE's accession to the New York Convention in 2006, there have been a number of fundamental indicators of the UAE's evolution regarding international commercial arbitration, namely the UAE draft Federal arbitration law, the amendments to the DIFC arbitration rules of 2008 and the amendments to the DIAC arbitration rules of 2007.

The new arbitration rules of the DIFC and DIAC are considered the best practice in international arbitration law in the Middle East. This is in view of the fact that both rules are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which forms the source of arbitration laws in most countries.⁴¹ Further, these rules have built a new

⁴¹ It should be noted that the current DIFC arbitration law contains many of the provisions of the UNICTRAL Model Law; however, a slight modifications have been inserted. See Damien P. Horigan, 'The New Adventures of the Common Law' (2009) Vol. 1 *International Law Review Online Companion* No 5.

investment climate that is fair and appealing to both Gulf Arab and Western states, through a sophisticated arbitration law that governs principles common to these culturally distinct states. The new arbitration rules of the DIFC and DIAC form part of a series initiatives accomplished by the UAE Government, including the ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) as well as the UAE draft law on arbitration, which combines the UNCITRAL Model Law with the examples of other countries such as Egypt.

Further evidence of the pro-West and pro-investment position of the Dubai Government exists in the joint venture between the DIFC and the LCIA. The latter has a long history in the field of international commercial arbitration; it has been said that the DIFC has had the benefit of the reputation of the LCIA as a result of the joint venture. For example, the benefits of this venture for the DIFC have included the number of foreign entities that have registered with the DIFC and the increased attractiveness of the DIFC for foreign entities following the introduction of the new arbitration rules of 2008.

The aim of these enactments of new institutional rules has been to create an adequate regulatory framework in Dubai to attract foreign investment and promote Dubai as a venue for conducting international commercial arbitration in the Middle East. It is also hoped that they will change the perception of arbitration in the UAE as uncertain and unpredictable.⁴² These legal reforms demonstrate a pro-West and pro-investment policy on the part of the Emirate of Dubai leadership, putting the UAE at the forefront of arbitration development in the region and in the Middle East. Despite these encouraging

⁴²Anna Gee, Charles Lilley and Natasha O'Neill, 'Arbitration in the United Arab Emirates' *The European, Middle Eastern and African Arbitration Review* 2015, Law Business Research, <<http://globalarbitrationreview.com/reviews/67/sections/233/chapters/2712/united-arab-emirates/>> at 19 June 2015.

developments, Dubai's regional arbitral institutions—specifically the DIFC, which is the main focus of this research—still have some tasks to accomplish before they can compete with other well-established international arbitral institutions such as the ICC.

The primary thrust of this thesis is to question the effectiveness and efficiency of the conduct of arbitration under the DIFC arbitration law of 2008. To achieve this objective, the thesis takes a comparative approach, taking recent changes to the arbitration rules of the ICC and ACICA as models with which to interrogate whether the DIFC arbitration law of 2008 is consistent with recent developments in the conduct of arbitration.⁴³

1.5 Thesis Question

The expansion of international transactions and trade has played a significant role in shaping the arbitration laws of many international arbitration institutions. Complex international commercial relationships between businesses and investors require a sophisticated means of dispute resolution such as arbitration. Therefore, the development of arbitration must continue, not only because of the relative advantages of arbitration against other dispute resolution mechanisms, but also as a result of the increased complexity of the commercial relationships between businesses and investors.

As mentioned previously, many international arbitration institutions have recently revised their procedural rules (e.g., the ICC's revised arbitration rules of 2012) to meet practitioners and commercial parties' expectations for more effective and efficient

⁴³ It should be noted that the ICC arbitration rules of 2012 is the main model in measuring the effectiveness and efficiency of the DIFC arbitration law of 2008. The ACICA arbitration rules, however, will be used in circumstances, where ACICA rules provide more advanced rules than ICC rules. One of the reasons behind the selection of DIFC, ACICA and ICC in this thesis is that all these international arbitration institutions are considered leading arbitral institutions in their region as well as all of them have recently revised their arbitration rules with the aim to facilitate the conduct of arbitration. Other reasons will be outlined further.

conduct of arbitration and as the types of disputes that parties seek to resolve have become more challenging. However, the procedural rules of other international arbitral institutions such as the DIFC still present some challenges (in the case of the DIFC, since its previous amendments in 2008). The DIFC arbitration law of 2008 may require further changes to accommodate practitioners' and users' expectations for more effective and efficient arbitration processes.

Indeed, effectiveness and efficiency of process are reasons why parties choose to arbitrate: arbitration provides rapid decisions and lower costs compared to other dispute resolution techniques.⁴⁴ However, the current debate in the arbitration community has raised time and costs as fundamental challenges in international arbitration.⁴⁵ Given this, it can be understood that there is a need to achieve more efficient and effective conduct of the arbitral process. Modern institutional and legislative arbitral rules require effort to develop arbitration practices in order to carry them out in an expeditious and cost-effective manner, as well as to ensure respect for party autonomy and fairness.⁴⁶

Following this brief background, the central research question addressed in this thesis is the extent to which the new DIFC rules of 2008 achieve this effectiveness and efficiency in governing the conduct of international commercial arbitration in Dubai. This thesis argues that, although the *DIFC Arbitration Law of 2008* made substantial changes to the previous *DIFC Arbitration Law No 8 of 2004* in aid of facilitating the conduct of arbitration in Dubai, these changes appear far from sufficient. Based on a

⁴⁴ See Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012), p. 14.

⁴⁵ See Lord David Hacking and Michael E. Schneider, 'Towards More Cost-Effective Arbitration' (1998) Vol. 3 *International Bar Association Newsletter Arbitration and ADR* No 1; Queen Mary, University of London, *International Arbitration: Corporate Attitudes and Practices 2006*, available at <<http://www.arbitration.qmul.ac.uk/docs/123295.pdf>> at 10 June 2013.

⁴⁶ As stated by Al-Fadhel, 'the principle of party autonomy is fundamental to the whole approach of modern law'. See Faisal Al-Fadhel, 'Respect for Party Autonomy Under Current Saudi Arbitration Law', (2009) 23 *Arab Law Quarterly* 31, p. 32.

comparative study, detailed proposals are developed to improve further the effectiveness and efficiency of international arbitration proceedings of the DIFC arbitration law of 2008. The proposals presented focus on creating incentives to ensure that arbitration proceedings are conducted in an expeditious and cost-effective manner. They also address the issues of emergency arbitration for urgent interim or conservatory measures and the growing complexity and diversity of disputes.

In order to address this central research question, it is further necessary to do the following:

1. Consider a theoretical framework that will assist in judging the effectiveness and efficiency of arbitration and determining the appropriate method of dispute resolution in an international context.
2. Analyse the amendments to the DIFC arbitration rules of 2008 and compare the DIFC arbitration rules of 2008 with the ICC arbitration rules of 2012.
3. Address the deficiencies of the existing law of the DIFC in order to design options for reform and refinement.

These objectives are significant as bases for assessing the effectiveness and efficiency of international commercial arbitration in Dubai and in achieving the aim of this research.

1.6 Scope and Limits of the Thesis

This research focuses primarily on institutional arbitration in the UAE, taking the Emirate of Dubai in particular as a case study. However, it also highlights lessons found in the experiences of jurisdictions other than those of the Gulf Arab Region that offer

insight into trends in the systems of modern arbitration hubs like the ICC. It concentrates on adaptations to legal frameworks that may play a part in the enhancement of international arbitration bodies and legislation in Dubai with the aim of providing effective and efficient arbitral procedures to attract arbitration users. Therefore, this research mainly focuses on procedural aspects rather than substantive issues.

Having established a framework for the discussion, the thesis pursues two main aims. First, it aims to determine which methods are likely to be the most effective and appropriate in dispute settlement in international commerce. The strategic objective of this investigation is to support the argument that arbitration is likely to be the most effective and appropriate mechanism for resolving large and complex international commercial disputes. Providing recommendations for achieving effectiveness and efficiency in the conduct of international arbitration is a very important aim of this thesis: it is hoped that this thesis will assist in addressing and defeating continuing criticism concerning the costs and duration of arbitration, raising the credibility of arbitration in comparison to other means of dispute resolution.

Second, this thesis aims to analyse and compare the DIFC arbitration law of 2008 with innovations to the procedural rules of other international arbitration institutions, particularly the ICC arbitration rules of 2012 and the ACICA arbitration rules of 2011. The primary goal of this second investigation is to determine whether the new procedural rules of the DIFC conform to other recent developments in international commercial arbitration procedure, or whether they require further changes. It is hoped that the result of the comparative analysis undertaken in this research will contribute to eliminating any possible shortcomings in the conduct of arbitration under the DIFC

arbitration law of 2008. It is anticipated that the implications of the findings will help to generate modern legal frameworks to bring arbitration proceedings under the DIFC arbitration law into line with current international practices.

In order to substantiate the first claim—that arbitration is likely to be the most effective and appropriate mechanism for resolving large and complex international commercial disputes—this thesis raises conceptual arguments about what constitutes effective and efficient arbitration. It considers the practices involved in various dispute resolution methods, which can be broadly divided into litigation and alternative dispute resolution methods. It then goes on to focus in greater detail on arbitration as a dispute resolution process and its effectiveness in solving international commercial disputes. The more specific aim of this discussion is to determine the most appropriate method of dispute settlement in an international context. It is argued that the manifest advantages of arbitration as dispute resolution technique may, in fact, make it the only technique that is effective and efficient in international transactions.⁴⁷

With the intention to determine the effectiveness and efficiency of the DIFC arbitration law of 2008 and before embarking on the comparative study of the procedural rules of the DIFC, ICC and ACICA, it is essential as a cornerstone of this study to identify the principal reasons for the decisions of the DIFC, ICC and ACICA to amend their arbitration rules. This will help to identify whether these international bodies shared similar approaches in making their respective amendments. Next, the comparative study of the procedural rules of the DIFC, ICC and ACICA aims to determine whether the procedural rules of the DIFC satisfy the requirements of efficient and effective conduct

⁴⁷ The criteria will be developed will support the argument that arbitration is more likely to be effective and appropriate mechanism to resolve international commercial disputes. This will be discussed further in Chapter 2. Hence, a number of reasons of the effectiveness of arbitration as a dispute resolution method will be considered later.

of arbitration. On the basis of the comparative study and the identified criteria for effective and efficient dispute resolution methods mentioned above, it is claimed that in settling large and complex international commercial disputes, the procedural rules of the DIFC of 2008 require further changes in order to be as effective and efficient as the procedural rules of world-class international arbitral institutions such as the ICC.

1.7 Research Methodology

Two separate methodologies are adopted. The first is a theoretical analysis of the arguments in the literature on the bases for assessing the effectiveness and efficiency of dispute resolution methods in solving international commercial disputes and the adequacy of arbitration law. It involves an in-depth analysis of the secondary literature on the topic of effective arbitration. The second aspect of the research methodology requires identifying factors that can help measure the effectiveness and efficiency of arbitration laws.

1.7.1 Theoretical Framework: Bases for Assessing the Effectiveness and Efficiency of Arbitration Procedures and Law

A number of studies have discussed the effectiveness and efficiency of dispute resolution methods such as litigation and arbitration. A selection of these studies will be used as criteria for measuring the effectiveness and efficiency of arbitration in resolving international commercial disputes and the adequacy of the law. Scholars such as Okekeifere and Wang have suggested features of effective resolution methods for international disputes. For example, Okekeifere stated that an effective dispute resolution method has the following features: speed of proceedings, affordability, possibility of expert adjudication, flexibility and certainty, confidentiality, aiding of

international business, accommodation of third party interests, aiding the growth of the law, public policy restrictions and ease of enforcement.⁴⁸ Additionally, Wang claimed that in order to determine whether alternative dispute resolution methods are superior to litigation in settling international disputes, it is important to take into consideration a number of factors including costs, speed of resolution, confidentiality, best interest for both parties, flexibility, perceived fairness, effectiveness and impact on continuing business relations.⁴⁹

A World Bank Group study titled ‘Arbitrating Commercial Disputes Methodology’ will also be used as a source of criteria for measuring the effectiveness of the new arbitration rules of the DIFC.⁵⁰ The World Bank Group study indicated three factors that are considered essential to the operation of an effective arbitration regime:⁵¹

1. The strength of a country’s arbitration laws (including adherence to international conventions on arbitration);
2. The ease of the process for the parties conducting arbitration proceedings in that country;
3. The extent to which domestic courts assist the arbitration process, both during the proceedings and regarding the enforcement of arbitral awards.

Recently, international arbitration has been subject to pressure for change. This pressure has arisen from commercial parties and practitioners in the field of international arbitration due to the growing complexity of international commercial transactions, as

⁴⁸Andrew I. Okekeifere, ‘Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a myth?’ (1998)15 *Journal of International Arbitration (Kluwer Law International)*, pp.81-106.

⁴⁹ Margaret Wang, ‘Are Alternative Dispute Resolution Methods Superior to Litigation In Resolving Dispute in International Commerce?’ (2000) 16 *Arbitration International (Kluwer Law International)* 2, pp. 198-212.

⁵⁰The World Bank Group, *Arbitrating Commercial Disputes Methodology*, (2012) <<http://iab.worldbank.org/Methodology/Arbitrating-disputes>>.at 10 of September 2014.

⁵¹Ibid.

well as the demand from clients for more efficient arbitration processes. The criteria for assessing the effectiveness and efficiency of international arbitration processes can be applied to the investigation of whether the procedural rules of the DIFC arbitration law of 2008 reflect recent demands and improvements in the effectiveness and efficiency of international arbitration. This is the first basis for evaluating the DIFC arbitration law of 2008.

The above mentioned studies have been selected because they cover a number of essential aspects of commercial parties seeking to resolve international commercial disputes rapidly and at lower cost. Thus, it meets the recent agenda in international commercial arbitration for more effective and efficient arbitration proceedings.

1.7.2 Research Method

This research examines the core instruments of international arbitration law. It explores procedural issues affecting the effectiveness and efficiency of arbitration by comparing the DIFC arbitration rules of 2008 with the recent amendments to the arbitration rules of the ICC. The analytical approach taken in this thesis can be described as primarily a doctrinal one, combined with a secondary normative analysis. First, as a doctrinal study, it provides a systematic discussion of the DIFC arbitration rules that affect the issues of effectiveness and efficiency in conducting arbitration proceedings. It analyses and explains areas of difficulty and refers to relevant aspects through which the concepts of effectiveness and efficiency in international commercial arbitration have been interpreted.

Second, as a normative analysis, this thesis evaluates the inadequacy of the existing DIFC arbitration law of 2008, with a view to furthering the effectiveness and efficiency

of arbitration processes in Dubai. Moreover, it analyses the recent developments in the conduct of arbitration processes under the ICC arbitration rules and proposes changes in aid of making the procedural rules of the DIFC arbitration law more effective and efficient, and in compliance with the recent tendencies in conducting international commercial arbitration.

The thesis examines both primary and secondary materials. The principal primary materials include the DIFC arbitration law of 2008, the ICC arbitration law of 2012, the UAE Federal Law on Civil Procedure 1992, the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Riyadh Convention on Judicial Cooperation between states of the Arab League of 1983, and the GCC Convention for the Execution of Judgments, Delegations, and Judicial Notification of 1996, different UAE bilateral treaties dealing with arbitration and, where applicable, DIFC and ICC cases. The main secondary materials relied on include books, journal articles, working papers and reports, conference papers, theses, press releases, newsletters and newspaper articles.

This thesis incorporates a comparison of the arbitration rules of the DIFC and the ICC. The DIFC has jurisdiction over parties registered in the DIFC or who have entered into contracts in the UAE without a connection to the DIFC.⁵² It is also a new option for

⁵²On 31 October 2011 Law No 16 of 2011 amending law No 12 of 2004 (the 'Law') was enacted. Specifically, the Law (under Article 5) grants exclusive jurisdiction to the DIFC Court of First Instance to hear and determine: Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party; Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalized or performed within the DIFC or will be performed or is supposed to be performed within the DIFC or will be performed or is supposed to be performed within the DIFC pursuant to express or implied terms stipulated in the contract; Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within the DIFC and is related to DIFC activities; Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals; and Any claim or action over which the Courts have jurisdiction

those who have come to the Gulf Arab Region with the purpose of operating their businesses. In contrast, the ICC has a universal jurisdiction, and it is considered the most trusted institution for arbitration worldwide. Recently, in 2012, the ICC introduced new arbitration rules; therefore, it is useful to compare the DIFC's arbitration rules of 2008 with the new ICC arbitration rules of 2012. The ICC arbitration rules of 2012 are used as a model in this study to evaluate the effectiveness and efficiency of the DIFC arbitration rules of 2008. The comparison takes into account a number of fundamental legal principles, including the strength of the laws, the quality and legal competence of the arbitrators appointed, institutional supervision and procedural flexibility.

1.8 Structure of the Thesis

To investigate the topic of the ongoing debate on the effectiveness and efficiency of the procedural rules of institutional arbitration in solving international commercial disputes and the expectation of providing arbitration users with more effective and efficient arbitral proceedings, the chapters of the thesis are laid out as follows. Chapter 1 provides an introduction to arbitration in the Gulf Arab Region and Dubai. The chapter generally considers the historical context of arbitration in the Gulf Arab Region from the pre-Islamic period until the present. It attempts to show how Gulf Arab States have changed their attitude towards arbitration from one of scepticism (i.e. oil concession arbitration cases) to one of acceptance and support (i.e. accession to the New York Convention and adoption of the UNCITRAL Model Law). It also considers the UAE legal system and the old and new laws applicable to arbitration in the UAE, with a particular focus on the legal system and arbitration law of the DIFC jurisdiction.

in accordance with DIFC Laws and DIFC Regulations. In addition, the Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after a dispute arises, provided always that such agreement is made pursuant to clear and express provisions. See <<http://www.difc.ae/>>.

Chapter 2 provides a theoretical framework for the task of measuring the effectiveness and efficiency of dispute resolution mechanisms and the adequacy of arbitration law. It reviews a number of scholarly works in the field of international commercial arbitration. The chapter attempts to construct a conceptual basis for the effectiveness and efficiency of arbitration as a dispute resolution technique. Through this conceptual framework, the task of determining the effectiveness and efficiency of dispute resolution mechanisms and the adequacy of arbitration law in solving international commercial disputes can be managed.

To accomplish this, Chapter 2 analyses in detail the ongoing discussion and debate on the topic of effective and efficient dispute resolution methods in resolving international commercial disputes. The chapter focuses on whether arbitration is the most effective and efficient dispute resolution method in the international commercial context. It considers the literature on various dispute resolution mechanisms in law and analyses the arguments for and against various mechanisms, especially to understand and assess the strengths and weaknesses of these mechanisms.⁵³ The chapter also evaluates the advantages of dispute resolution methods in accordance with the criteria provided in Chapter 1, specifically to support and validate the main argument of the thesis that arbitration is the method best suited to resolving international commercial disputes. The resulting understanding of the arguments for and against the various mechanisms and the evaluation of the strengths and weaknesses of these mechanisms leads on to a discussion and analysis of the effectiveness and efficiency of the procedural rules of the

⁵³Analysing various dispute resolution mechanisms in law is relevant in this thesis as it helps in the evaluation of the strength and the weakness of these mechanisms. Also, it provides fundamental knowledge for parties conducting international business to plan their appropriate dispute resolution mechanism.

DIFC arbitration law of 2008, taking into account the recent changes to the institutional arbitral rules of the ICC and ACICA.

Chapter 3 discusses extensively the legal frameworks governing arbitration in the UAE. The chapter focuses on whether these existing legal frameworks are in line with international standards and best practices in dispute resolution processes.⁵⁴ It considers the historical problematic issues related to international commercial arbitration within the UAE, particularly in the Emirate of Dubai,⁵⁵ and the recent initiatives and proactive role that has been taken by both the UAE Government at the Federal level and the Dubai Government at the Emirate level in developing the legal frameworks of international commercial arbitration.⁵⁶ The chapter argues that, as a result of the recent trend towards more effective and efficient arbitration rules, the developments to the legal frameworks of international commercial arbitration in the UAE are steps in the right direction, and that this shows substantial progress; however, there is a need for further developments, especially the implementation of the proposed Federal arbitration law. This is a crucial development intended to fill gaps in the current law (i.e. UAE *Federal Law (No 11) 1992*) and remedy the fact that the UAE does not have a common arbitration law.

⁵⁴ Arbitration law is in line with the international standards and best practices if the law incorporates all of the features that legal practitioners would expect to find in a progressive international arbitration law. See Salomon, Duffy and Canning, above n12.

⁵⁵ The historical problematic issues related to international commercial arbitration within the UAE, particularly the Emirate of Dubai includes issues related to the involvement of Shari'a law in the process of arbitration, issues related to the existing legal frameworks particularly(*the UAE Federal Law 1992, No11 (UAE Federal Law)*), issues related to rules in various existing institutions engaged in arbitration (i.e. Dubai International Financial Centre arbitration rules of 2004(DIFC Arbitration Law No 8 of 2004) and Dubai International Arbitration Centre arbitration rules of 1994 and procedural issue related to the role of the local court in supporting dispute resolution process, and the unpredictability of enforcement legal rights. See Finizio and Christopher Howitt, 'When International Arbitration meets Sharia', *Commercial Dispute Resolution* March/ April 2013. 49.

⁵⁶ Ian Clarke and Charles Lilley, 'Arbitration in the United Arab Emirates' *The European, Middle Eastern and African Arbitration Review 2013*, Law Business Research Global Arbitration Review, <<http://globalarbitrationreview.com/reviews/50/european-middle-eastern-african-arbitration-review-2013/>>at15May2014; Smith and Ibrahim, above n 16; James Kwan, 'The New DIAC Arbitration Rules: Adopting International Best Practice In the Middle East' (2007) 22,12 *Mealey's International Arbitration Report*; Mark Beeley, 'Arbitration in the Dubai International Financial Centre: A Promising Law, But Will It Travel Well?' (2009) *International Arbitration Law Review*.

Chapter 4 discusses a number of significant changes to the arbitration rules in three international arbitral institutions, namely the DIFC, the ICC and ACICA. The chapter attempts to identify the reasons contributing to these changes to the arbitral rules in these three institutions or jurisdictions, especially in order to understand whether these institutions share similar objectives. It argues that the developments in the laws and practices of international arbitration in the DIFC and ACICA were necessary in order for these institutions to compete with other centres and promote their positions as venues for international commercial arbitration, particularly within the region.⁵⁷ In the case of the ICC, the developments to its laws and practices were important to maintaining and sustaining its position as a leading arbitral institution in the world. The main argument of this chapter is that these three institutions share one key motivation for changing their arbitration rules: to achieve an effective and efficient legal framework and mechanism capable of dealing with and solving complex commercial cross-border disputes.

Chapter 5 undertakes a comparative study of the procedural rules of three arbitral institutions: the DIFC arbitration law of 2008, the ICC arbitration rules of 2012 and the ACICA arbitration rules of 2011. The comparative study discusses a number of essential procurable issues that intend to make the arbitration process more effective and efficient. The chapter focuses on whether the procedural rules of the DIFC arbitration law of 2008 are achieving effectiveness and efficiency in the conduct of international commercial arbitration in Dubai. In measuring this effectiveness and efficiency, the chapter predominantly exploits its comparison to the recent amendments to the ICC arbitration rules of 2012. It also makes use of the criteria mentioned in Chapters 1 and 2

⁵⁷ See Simon Greenberg, Luke Nottage and Romesh Weeramantry, 'The 2005 Rules of the Australian Centre for International Commercial Arbitration- Revisited' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (2010) 79.

for measuring the effectiveness and efficiency of arbitration law. Based on these criteria and the comparative study of the procedural rules, the chapter argues that the procedural rules of the DIFC arbitration law of 2008 contain some deficiencies, and therefore require further changes to meet recent trends in the conduct of international arbitration for more effective and efficient arbitral proceedings in settling international commercial disputes.

Chapter 6 summarises the findings of all chapters, focusing on the main issues and recommendations discussed. The chapter concludes that, in considering the recommendations made in this thesis, the procedural rules of the DIFC arbitration law of 2008 could be made more effective and efficient in settling international commercial disputes in Dubai. Thus, the DIFC arbitration centre could gain more credibility as a hub for international commercial arbitration, in line with other leading international arbitral institutions. It points out that the recommendations can also be taken as examples for other regional arbitral institutions in the Gulf Arab Region aiming to become competitive and play a significant role in the field of international commercial arbitration. The chapter further argues that if these recommendations remain unremarked, the DIFC arbitration centre will face continued pressures from commercial parties and practitioners to overcome the deficiencies of the DIFC arbitration law of 2008 and improve the effectiveness and efficiency of arbitration proceedings.

1.9 Contribution of the Thesis

This thesis focuses mainly on the effectiveness and efficiency of international commercial arbitration in Dubai. In recent years, innovative changes have been made to the procedural rules and practices of many international arbitral institutions worldwide

in order to resolve international commercial disputes effectively and efficiently. These changes are instructive for the task of improving international arbitration proceedings in the Gulf Arab Region, particularly in Dubai. In this context, this thesis is relevant in articulating the procedural issues affecting effectiveness and efficiency in the conduct of international commercial arbitration in Dubai.

Generally, improving the effectiveness and efficiency of international arbitration proceedings has been a consistent theme in the literature, but given the recent trends in the conduct of arbitration, there is a need to propose suggestions on how the DIFC arbitration procedures can be made more effective and efficient in international commercial arbitration in Dubai.

Due to the competitive pressures facing arbitral institutions to make their rules more efficient and effective in solving international commercial disputes, a number of arbitral institutions, such as the ICC, have responded by enacting significant procedures to address the issues of cost and delay as well as the increases in the complexity and diversity of disputes. However, other arbitral institutions, such the DIFC, have retained their prior positions and have not yet responded to this challenge. This raises scepticism regarding the success of international commercial arbitration in Dubai.

Much of the literature on the effectiveness and efficiency of international commercial arbitration in Dubai has addressed this issue by questioning the enforcement of foreign arbitral awards⁵⁸ and the role of the Shari'a in the arbitration process.⁵⁹ The literature

⁵⁸ Julian D. M. Lew, 'The Recognition and Enforcement of Arbitration Agreement and Awards in the Middle East' (1985) 1 *Arab International* 161, pp. 172-175; Samir Saleh, 'The recognition and enforcement of foreign arbitral awards in the states of the Arab Middle East' in Julian D. M. Lew (ed), *Contemporary Problems in International Arbitration* (Arab Law Quarterly, 1987)340; Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, (1999)51-605; Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates*,(Kluwer Law International, 2003); Patrick

has also discussed the role of the UAE courts, particularly the Dubai Courts, in supporting arbitration, along with the need for a separate Federal arbitration law in the UAE, as up to the present time arbitration in the UAE has been governed primarily by minor provisions in the UAE's Civil Procedure Code of 1992.⁶⁰ The literature on the

Bourke, Bilal Ambikapathy et al., 'Chapter III: The Arbitration Procedure- Arbitration in the Gulf: An Overview in Christian Klausegger, Peter Klein et al (eds), *Austrian Arbitration Yearbook* (2008) 329-342; Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *N.Y. Int'l L. Rev.* 1, p.41; Muhammad Abu Sadah and Simon Norton, 'The Application of UNCITRAL Model Law Principles in the Middle East Region', (2008) 22 *Arab Law Quarterly*, pp. 219-269; Abd al-hamid Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 2011), pp. 777-830; 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; Gordon Blanke and Soraya Corm-Bakhos, 'Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure' (2014) 1 *DCDR International Arbitration Review* no.1, pp. 3-28; Gregory Mayew and Mark Morris, 'Enforcement of Foreign Arbitration Awards in the United Arab Emirates' (2014) 81 *Defense Counsel Journal* 279, pp. 280-287; Esaam Al Tamimi, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1 *BCDR International Arbitration Review*, Iss. 1, pp. 95-103.

⁵⁹ Peter D. Sloane, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 *Int'l L.* 3, pp. 743-766; William Ballantyne, 'The Challenge of Islamic Commercial Law in the Middle East' in William Ballantyne and Howard L. Stovall (eds), *Arab Commercial Law* (2002) 17; Charles N. Brower and Jeremy K. Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) Vol. 97 *The American Journal of International Law* No 3, pp. 643-656; Arthur J. Gemmell, 'Commercial Arbitration in the Islamic Middle East', (2006) Vol. 5 *Santa Clara Journal of International Law* Iss.1, 169-192; Nicholas HD Foster, 'Islamic Commercial Law: An Overview (I)' (2006) *Indret* 4, p.387; Quinn Smith and Omar Ibrahim, 'Arbitrating at the Crossroad of East and West: An Overview of Prominent Arab National Arbitration Laws', (2008) 24 *Int'l Lit. Quarterly* 3, 20; Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2010) Vol.1 *International Journal of Arab Arbitration* No 4, <<http://www.intljaa.com/english/issue.asp?contntid=254&IssueID=4>> at 15 August 2013; Steven Finizio and Christopher Howitt, 'When International Arbitration meets Sharia', *Commercial Dispute Resolution* March/April 2013. 49; In these states, for example, they may prohibit contractual provisions requiring an award of interest. See Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *N.Y. Int'l L. Rev.* 1, p.41. The level of influence of Shari'a law and Western legal system is vary between Muslim or/and Middle Eastern Countries. It can be divided into two groups. The first group is that countries have adopted Western civil law such as Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco and Tunisia. On the same group, there are some countries who have adopted Western common law such as Iraq, Jordan, Sudan and the UAE. The second group is that countries have more substantially adopted Shari'a law and principles these include Saudi Arabia, Qatar, Oman and Yemen.

⁶⁰ Jalal El-Ahdab and Ruth Stackpool-Moore, 'Arab Arbitration v. International Arbitration? The Case for a Reconciliation' (2008) 25 *Journal of International Arbitration Kluwer Law International* 2 pp. 275-288; Nadia Darwazeh and Ahmed S. El-Kosheri, 'Arbitration in the Arab World: An Interview with Professor Ahmed S. El-Kosheri', (2008) 25 *Journal of International Arbitration Kluwer Law International* 2, pp. 203-210; Ahmed Sadek El-Kosheri, 'Is there a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?' (1992) 8 *Int'l Congress & Convention Association*, Series 46, 48; Nathan J. Brown, *The Rule of Law in the Arab World*, (Cambridge University Press, 2006); Aymen Masadeh, 'The court's supportive role in Arbitration under the law of United Arab Emirates' (2013) Vol.1 *International Journal of Humanities and Management Sciences (IJHMS)* Issue 1; S R Luttrell, 'Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', (2008) 9 *Bus. Int'l* 254; See Matthew Marrone and George Anthony Smith, 'Recent Developments in Arbitration Law in the UAE', *Weinberg Wheeler Hudgins Gunn & Dial* 15 September 2010; Reza Mohtashami, 'Recent Arbitration-related Developments in the UAE' (2008) 25 *Arbitration International Kluwer Law International* 5, 631-640; Essam Al Tamimi and Emma Van Son, 'The DIAC Rules and the New UAE Arbitration Law' (2008) 25 *International Arbitration Kluwer Law International* 2, pp.211-217; Hassan Arab & Marwa El Mahdy, 'Dubai Cassation Court Emphasises its Strict Compliance to the New York Convention', *Al Tamimi Law updated*, February 2013

DIFC has addressed the issue by explaining some of the provisions of the DIFC arbitration law of 2008, but not all.⁶¹

This thesis addresses this gap by identifying the particular provisions of the DIFC arbitration law of 2008 that have a negative impact on the effectiveness and efficiency of the conduct of arbitration proceedings and proposing possible changes to make this conduct more flexible and arbitration-friendly. The originality of the thesis lies in its approach to contemporary procedural issues in international commercial arbitration, through a comparative study of the procedural rules of the ICC and DIFC. This thesis contributes to the existing literature by suggesting possible reformative issues, with emphasis on recent trends in the conduct of arbitration in solving large and complex international commercial disputes.

<<http://www.tamimi.com/en/magazine/law-update/section-5/february-4/dubai-cassation-court-emphasises-its-strict-compliance-to-the-new-york-convention.html>> at 15 February 2014; M. T. Abdullah, *Role of UAE courts in international commercial arbitration* (PhD thesis, University of Bedfordshire, 2013).

⁶¹ S.R. Luttrell, 'The Arbitration Law of the Dubai International Financial Centre' (2008) Vol.3 *Journal of International Commercial Law and Technology* 3, pp. 170-177; S.R. Luttrell, 'Commentary on the 2008 Arbitration Law of the Dubai International Financial Centre' (2009) Vol. 2 *Int. J. Private Law* No 1, pp. 31-45; Sam R. Luttrell, 'Arbitration in Dubai' (2009) 12 *Int'l Trade & Bus. L. Rev.* 140; Michael Black QC, 'Dubai: a regional arbitration centre? An introduction to the legal system in Dubai and the UAE, arbitration law and the need for reform,' (speech delivered at the American Bar Association Forum on the Construction Industry, Texas, 3 February 2012); Reza Mohtashami and Sami Tannous, 'Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East' (2009) 25 *Arbitration International Kluwer Law International* 2, 173-185; Damien P. Horgan, 'Consensual Jurisdiction of the DIFC Courts' Proceedings of 20th International Business Research Conference 4 - 5 April 2013, Dubai, UAE; Damien P. Horgan, *The New Adventures of the Common Law*, (2009) Vol. 1 *International Law Review Online Companion* No 5; Claudia T Salomon, J.P. Duffy and Tom Canning, 'The New Dubai International Arbitration Law' (2008) Vol 240 *New York Law Journal* No 97; Mark Beeley, 'Arbitration in the Dubai International Financial Centre: A Promising Law, But Will It Travel Well?', (2009) *International Arbitration Law Review*; Carlos Alberto Matheus Lopez, 'Comparative Analysis Between the Peruvian Arbitration Law and the Arbitration Law of the Dubai International Financial Centre' (2009) *Journal of Arab Arbitration* No 4; Ahmed M. Almutawa and A.F.M. Maniruzzaman, 'The UAE's Pilgrimage to International Arbitration Stardom' (2014) 15 *The Journal of World Investment & Trade*, pp. 193-244.

1.10 Introduction to Arbitration in the Gulf Arab Region and Dubai

1.10.1 What is the Gulf Arab Region?

Before considering the development of arbitration in the Gulf Arab Region, it is necessary to define what is referred to by 'Gulf Arab Region'. In this thesis, the definition of 'Gulf Arab Region' will rely on states' membership of the Gulf Cooperation Council for Arab States of the Gulf (GCC).⁶² In other words, if a state is located in the region and is a full member of the GCC, then it is considered a Gulf Arab State. According to the GCC, six states are considered full members, namely the UAE, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait.⁶³ Most importantly, all these states share similar economic, cultural, religious and political characteristics.⁶⁴

It is worth noting that, since the establishment of the GCC in 1981, there has not been any extension of its membership. However, there has recently been much consideration of making such an extension. On a geographical basis, there are a number of Arab States, such as Iraq, Jordan and Yemen, that have with borders and economic connections with GCC members, but still are not recognised as Gulf Arab States or

⁶²'The Gulf Arab States' hereafter refers to the six member states of the Gulf Cooperation Council for Arab States of the Gulf (GCC): the United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait.

⁶³The cooperation Council for Arab States of the Gulf, *Member States*, <<http://www.gcc-sg.org/eng/index.php?action=GCC>> at 10 of February 2012. See the Cooperation Council for Arab States of the Gulf, *Foundations and Objectives*, <<http://www.gcc-sg.org/eng/index.php?action=Sec-Show&ID=3>> at 10 February 2014. The unified economic agreement between the countries of the Gulf Cooperation Council was signed in 1981 (The GCC agreement). The objective of the GCC agreement was to 'effect coordination, integration and inter-connection between member states in all fields, strengthening ties between their peoples, formulating similar regulations in various fields such as economy, finance, trade, customs, tourism, legislation, administration, as well as fostering scientific and technical progress in industry, mining, agriculture, water and animal resources, establishing scientific research centres, setting up joint ventures, and encouraging cooperation of the private sector'.

⁶⁴Minas Khatchadourian, 'Arbitration and Mediation between Europe and the Gulf, (2008) The Sharm El-Sheikh International Arbitration Centre (SHIAC), <<http://shiac.com/Shiacimages/REPORT%20ARBITRATION%20EUR.pdf>> at 15 June 2014.

GCC members. Meanwhile, these countries are negotiating their accession to the GCC membership.

On the other hand, Morocco does not have any geographical borders with any of the Gulf Arab States or GCC members, but has nevertheless been invited by the GCC to become a member of the Council.⁶⁵ In the main, all the states mentioned have negotiated their capabilities to become full members of the GCC, and due to the geographical proximity, economic connections and strong relationships among these states, there is a substantial expectation that these states will eventually join the GCC. In light of this, it is reasonable to lay out a definition of the Gulf Arab Region in this thesis, because the current definition might change in the near future as a result of any extension of the GCC membership.

1.10.2 Recent Demand for the Development of Arbitration in the Gulf Arab Region

The expansion of the role of arbitration as a method of settling international commercial disputes in the world and the resulting interactions between Western and Arab investors—invoking differences in culture, customs, religion and language⁶⁶—has made it necessary for the Gulf Arab States to develop their arbitration rules and encourage the exercise of arbitration at the regional and international levels. To facilitate foreign investment and international trade in the course of promoting arbitration, the Gulf Arab States have been required first to modernise their arbitration legislation, and second to accede to the international conventions relevant to arbitration.

⁶⁵ Arab News, 'Morocco, Jordan inch closer to GCC', *Arab News*, 12 September 2011, <<http://www.arabnews.com/node/390696>> at 20 February 2014.

⁶⁶ A good example for this interaction is that in the Gulf Arab Region the proceeding of litigating and arbitrating are mainly in the Arabic language and it must be on the basis of written submission. Also, the fact that the adoption of arbitration laws differs from state to state in the region as they refer to relevant legislation including laws relating to arbitration, pleadings and civil and commercial procedure. See Kutty, above n 58.

Regarding this first requirement—the Gulf Arab States’ need to modernise and update their legislative frameworks regarding arbitration to reach the level of international best practice and to gain the confidence of foreign investors—a number of Gulf Arab States, such as Bahrain and Oman, have adopted the UNCITRAL Model Law of 1958. Moreover, the UAE has also recently adopted the UNCITRAL Model Law for its proposed Federal arbitration law. Most significantly, a number of arbitral institutions have been established within the region, and these institutions have begun to play a key role in international arbitration as they have advanced their arbitration rules in order to become competitive with major arbitral bodies in the globe. Specifically, joint ventures have arisen, for example, between the DIFC and the LCIA (DIFC–LCIA) in Dubai, and between the Bahrain Chamber for Dispute Resolution and the American Arbitration Association (BCDR–AAA) in Bahrain.

The second condition for creating a suitable arbitration environment, especially for foreign investors, has been accession to international conventions related to arbitration. An essential international arbitration agreement is the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. In fact, all Gulf Arab States are currently signatories of the New York Convention, as it is a requirement for these countries to participate on the international level.⁶⁷ Interestingly, the Gulf Arab States have acceded to another international agreement at the state level, which is the International Centre for Settlement of Investment Dispute (ICSID) Convention.⁶⁸ In

⁶⁷ Signatories of New York Convention, Kuwait: 27 July 1978; Bahrain: 5 July 1988; Saudi Arabia: 18 July 1994; Oman: 26 May 1999; Qatar: 30 March 2003; UAE: 19 November 2006.

⁶⁸ Signatories of International Centre for Settlement of Investment Dispute (ICSID) Convention, Kuwait: 4 March 1979; Bahrain: 15 March 1996; Saudi Arabia: 7 June 1980; Oman: 23 August 1995; Qatar: 20 January 2011; UAE: 22 January 1982. See International Centre for Settlement of Investment Dispute (ICSID), *List of Contracting States and other Signatories of the Convention*, <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>> at 8 November 2013.

general, the two points mentioned reflect the great consideration and acceptance that have been accorded to the implementation of international commercial arbitration within the region.⁶⁹

1.10.3 Recent Importance of the Development of International Commercial Arbitration in the Gulf Arab Region, Particularly in Dubai

The importance of the development of international commercial arbitration in the Gulf Arab Region is due to the fact that the Gulf Arab States (i.e. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE) are estimated as some of the fastest-growing markets in the world, and have become increasingly significant in the global economy.⁷⁰ According to a United Nations Foreign Direct Investment Report, there was a rapid increase in Foreign Direct Investment (FDI) flows in the countries of Western Asia in 2006. Excluding Iraq, the region recorded total net FDI inflows of USD \$55.6 billion in 2006, representing an estimated increase of 46 per cent on 2005 values, and approximately five times 2003 values. This evidence reflects the fact that Western Asia is the fastest growing destination for FDI flows globally.⁷¹

Focusing on the UAE, the Emirate of Dubai in particular is considered a leading investment destination in the Middle East in relation to investor confidence. According to a survey conducted by the Department of Economic Development of the Foreign Investment Office, Dubai received 28 per cent of investors' voices as it is expected to be a top destination for investment in the Middle Eastern region in the near

⁶⁹ Detailed information on the subject of the acceptance of the implementation of international commercial arbitration within the Gulf Arab Region will be discussed further in Chapter 3.

⁷⁰ United Nations, *Foreign Direct Investment Report: Economic and Social Commission for Western Asia (ESCWA)*, E/ESCWA/EDGD/2008/Technical Paper.1.

⁷¹ Ibid.

future.⁷² Further, the A T Kearney 2010 Foreign Direct Investment Confidence Index ranks the UAE as the 11th most-cited investment location worldwide and the top investment destination in the Middle East for the next three years.⁷³

The development of international commercial arbitration in the Gulf Arab Region is imperative, as it is a significant indicator of improvement in the global economy. This is because arbitration is the preferred method of dispute resolution for most businesses; hence local and foreign investors in the region will have the benefit of this development in a way that both parties would be able to settle their disputes effectively and successfully.

1.10.4 Historical Background to Arbitration in the Gulf Arab Region: Pre-Islamic Period to the 1970s

Alternative dispute resolution, particularly arbitration, has a long history that originates in ancient times.⁷⁴ The history of arbitration in the Gulf Arab Region can be divided into three time periods: the pre-Islamic period; the period spanning the advent of Islam, the founding of the Islamic schools and the continuation of Islamic philosophy; and the period between the World War II until the 1970s' 'oil concession'.

Arbitration, or *Thakim*, as it is known in the Gulf Arab Region, has been in use since the pre-Islamic period, and thus has a long history in the area. Although there was no

⁷²Government of Dubai Department of Economic Development the Foreign Investment Office, Dubai the FDI Destination of Choice, <http://vae.ahk.de/fileadmin/ahk_vae/FAQ/Business_Support/Foreign_Direct_Investment_-_Dubai.pdf> at 12 December 2013.

⁷³ Ibid; it is the author view that the UAE as Gulf Arab State seems to be the most proper state in the region has arbitration- friendly, open tendency and flexibility in favour of foreign investors.

⁷⁴David Spencer, *Essential Dispute Resolution*, (Cavendish, 1sted, 2002)1. Spencer mentioned that 'the history of dispute resolution properly goes back to dawn of time. Humans have been negotiating formally and informally well before historical journals recorded human endeavour in the field of dispute resolution'.

formal legal system of arbitration in the pre-Islamic Arab world, there was a form of tribal justice governed by the leader of the tribe.⁷⁵ Therefore, the leader of a tribe in Arab communities had a significant role, and if the parties referred their disputes to him, then his decision was often binding on the parties. For instance, in the Gulf Arab Region, the *ArabJahiliyah*⁷⁶ had experienced arbitration, and it was optional for parties.

Arbitration continued to be used in the Gulf Arab Region during the advent of Islam until the founding of the Islamic schools and the continuation of Islamic philosophy. The practices of arbitration were accepted arising from the first primary source of *Shari'a*, which is the *Qur'an*, especially in regards to family law. For example, if there was a disagreement between husband and wife, then each one had to appoint two arbiters, one from his family and the other from hers; if the arbiters wished for peace, God would cause their reconciliation.⁷⁷ Further, arbitration was also dealt with in the second primary source of *Shari'a*, which is *Sunnah*. This refers to the fact that the Prophet Mohammed resorted to arbitration, or *Thakim*, in his dispute with the *BanuQurayza* tribe.⁷⁸ There is a specific reference in Islamic history where a decision of an arbitrator was accepted by the Prophet Mohammed, and he advised others to arbitrate.⁷⁹ Overall, it can be recognised that ADR is an ancient method that has been accepted for a long time within the region.

Moreover, the practice of arbitration during the advent of Islam at the time of the Prophet Mohammed and his companions was familiar with other legal principles.

⁷⁵Kutty, above n 58.

⁷⁶ The term 'the Arab Jahiliyah' refers to Arab tribes in pre-Islamic period which actually means 'time of ignorance'. See I.Q. Rassooli, 'History of the Arabs: Pre-Islamic Age of Jahiliyah', Islam Watch, 15 May 2009 <<http://www.islam-watch.org/Rassooli/History-of-the-Arabs-Pre-Islamic-Age-of-Jahiliyah.htm>> at 25 September 2013.

⁷⁷Kutty, above n 58.

⁷⁸Ibid.

⁷⁹Ibid.

Although at that time Islamic law was the primary source that was followed in arbitration and litigation, the arbitrators also had opportunities to apply principles of law such as common sense and equitable law.⁸⁰ The literature provides evidence of the existence of ADR as an ancient method that was traditionally accepted in the Gulf Arab Region in pre-Islamic times, and formally accepted since the advent of Islam and in recent times.

Finally, in the period between the end of World War II until the 1970s 'oil concession', arbitration practices developed significantly. Several oil concession arbitration cases in the 1950s significantly affected the development of international commercial arbitration in the region. Islamic domestic laws faced difficulties and were undermined in the process, as Western laws were used in the oil concession disputes.⁸¹ Despite these discouraging outcomes, international commercial arbitration in the Gulf Arab Region has continued its progress. This experience can be seen as a stepping stone motivating

⁸⁰Essam Al Tamimi, (Lecture notes for Islamic Influences on International Arbitration, the 10th annual Clayton Utz International Arbitration Lecture supported by the University of Sydney, 8 November 2011). Full lecture is available at <https://www.claytonutz.com/ialecture/2011/transcript_2011.html>.

⁸¹ For example, in the case of *Petroleum Development (Trucial Coast) Ltd. v Sheikh of Abu Dhabi*, 18 International Law Reports I.L.R. 149 (1951), the award was held by a sole arbitrator who dismissed the application of the 'Shari'a' and applied the English law. The grounds of applying the English Law were that there was no general law of contract in the 'Shari'a'. Additionally, in the case of *Ruler of Qatar v International Marine Oil Company Ltd*, the arbitrator held that the appropriate law shall be followed in this case is Qatar law which is based on Islamic law. However, later the arbitrator stated that he was satisfied that the Islamic law does not contain any sufficient principle that would interpret this particular contract. A further case associated to the oil concession that had the same approach of disrespect to the national laws was the case of *the Government Saudi Arabia v Arabian American Oil Co.(Aramco)*, 27 I.L.R. 117, (ad hoc arbitration August 23, 1958). In this case the arbitral tribunal concluded with an award against the Saudi Arabian government, given that the legal system of concessions remain in the infancy form and that they do not contain particular rules that define mining concessions in general and petroleum concessions in particular. Accordingly, 'Saudi laws had to be interpreted by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence for the reason that ARAMCO's rights could not be secured in an unquestionable manner by the law in force in Saudi Arabia'. See *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 18 International Law Reports 149 (1951); *Ruler of Qatar v International Marine Oil Company Ltd*(1953); *Government Saudi Arabia v. Arabian American Oil Co.(Aramco)*, 27 I.L.R. 117, (ad hoc arbitration August 23, 1958); Ahmed El Kosheri, 'International arbitration and petroleum contracts', *Encyclopaedia of Hydrocarbons*, <http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Scienze_applicate/enciclopedia/inglese/inglese_vol_4/879-900_x13.3x_ing.pdf> at 30 October 2013; Muhammad Abu Sadah, 'International Arbitration Contract Principles: Analysis of Middle East Perceptions' (2010) Vol. 9 *Journal of International Trade Law and Policy* No 2 ,pp.148-174.

the Gulf Arab States to begin to acknowledge the need for changes and improvements to their legislation to reach international standards.

1.10.5 Development of Arbitration in the Gulf Arab Region: 1970s to the Present

1.10.5.1 Kuwait Arbitration Cases

After the undesirable experiences and decisions that occurred in the oil concession arbitration cases, two important cases were influential in convincing the Gulf Arab States to change their perceptions regarding international arbitration.⁸² The first is the case of *Kuwait v Sir Frederick Snow & Partners* in 1973,⁸³ in which an arbitral award was rendered in favour of the State of Kuwait against a British company. Significantly, at that time neither Kuwait nor the United Kingdom (UK) were parties to the New York Convention. As a result, Kuwait faced difficulty in enforcing the arbitral award in the UK until 1978, when Kuwait acceded to the New York Convention and was able to meet the reciprocity requirement by the UK; the latter had acceded to the New York Convention in 1975. The second case was between Kuwait and a United States (US) oil company called Aminoil.⁸⁴ In this instance, both parties proceeded to an *ad hoc* arbitration, as Kuwait had terminated the Aminoil concession contract in 1977 as a consequence of nationalising its oil sector. In this case, the arbitral tribunal applied Kuwaiti law to the substantive issue and held that the decision of Kuwait in terminating the Aminoil concession agreement was reasonable on the grounds of the changed circumstances. However, the decision involved a reasonable compensation in favour of Aminoil for its long-term interest in the concession.

⁸² Aida Maita, *Development of a Commercial Arbitration Hub in the Middle East: Case Study- The State of Qatar* (PhD Thesis, Golden Gate University, 2013) <<http://digitalcommons.law.ggu.edu/theses>>.

⁸³ *Kuwait v. Sir Frederick Snow & Partners* (1984) A.C. 426 (H.L.) (U.K.).

⁸⁴ *Kuwaiv. Aminoil* (1982) 21 I.L.M.976.

The two cases described above are examples that confirm the effectiveness of international arbitration as a mechanism for resolving international commercial disputes. Specifically, these cases contributed to a change in the perspective of Arab world towards international commercial arbitration as a viable mechanism for resolving international commercial disputes in the region and had a positive effect on the development of arbitration in the region.

1.10.5.2 Contribution of the United Nations Committee on International Trade Law (UNCITRAL) in the Development of Arbitration Globally and its Effect on the Gulf Arab Region

The United Nations has made considerable contribution to the development of arbitration through its Committee on International Trade Law.⁸⁵ First, in 1976, it published its UNCITRAL Arbitration Rules, which provided a comprehensive legal framework for procedural arbitral rules that could be put into operation simply for *ad hoc* arbitrations in many countries, regardless of their legal, social and economic systems.⁸⁶ The rules also provided guidelines for countries' domestic *ad hoc* arbitrations, and led to creation of local arbitral institutions such as the Dubai Centre for Arbitration and Conciliation at the Chamber of Commerce and Industry of Dubai, which is now known as the Dubai International Arbitration Centre (DIAC).⁸⁷ Later, the UNCITRAL issued its UNCITRAL Model Law, which provided guidelines on

⁸⁵ UNCITRAL takes into consideration in its contribution work the interest of all people, this include the developing States in the development of international trade. See Para.9 of General Assembly Resolution 22/05 (XXI) of 17 December 1966.

⁸⁶ The document states that 'Convinced that the establishment of rules for *ad hoc* arbitration that are acceptable in Countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations'. See *Resolution on the Development of International Law*, GA Res 31/98, UN GAOR the 30th sess, 99th PlenMtg, UN Doc A/Res 31/98 (1976), p. 182 <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/302/81/IMG/NR030281.pdf?OpenElement>>.

⁸⁷ Charles N. Brower and Jeremy K. Sharp, 'International Arbitration and Islamic World: The Third Phase' (2003) Vol. 97 *the American Journal of International Law* No 3, p. 645.

international arbitration regulation that could be adopted either entirely or partially by different countries into their own legal systems. The Model Law was intended to be an instrument for the harmonisation of international arbitration regulation that would be appropriate for all countries' legal systems.

The contribution of the UNCITRAL to international arbitration legislation was taken into consideration by several Arab Gulf States, such as Bahrain in 1994, followed by Oman in 1997 and Saudi Arabia in 2012. This is because the UNCITRAL Model Law was a deliberation resulting from global collaboration that covered fundamental aspects of the conduct of international arbitration.

1.10.5.3 Modern Arbitration and the Establishment of New Arbitration Centres in the Gulf Arab Region

Modern arbitration within the Gulf Arab Region was shaped in the early 1990s, with significant developments in the last two decades due to increased international business. As international transactions have seen a significant increase in the region, the use of international commercial arbitration has also increased to encourage further foreign investment. Several Gulf Arab States have acceded to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the ICSID Convention of 1966.⁸⁸

⁸⁸ Due to the growth in transnational trade and investment in the Gulf region, the economic boom and the fact that all of the Gulf States have become members of the World Trade Organization (WTO), there has been recognition by the leaders of the Gulf States, businesses and specialist that arbitration is the appropriate method for dispute resolution. As a result, the number of Gulf arbitration institutions significantly increased. According to the news archives of the International Chamber of Commerce, over the years there has been an increase of the acquisition of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention by a number of Gulf States. For instance, Kuwait led the way in 1978, followed by Bahrain in 1988, Saudi Arabia in 1994, Oman in 1999 and Qatar entered into the agreement in 2003. The most recent Gulf State that joined the New York Convention was the United Arab Emirates in 2006. See International Chamber of Commerce (ICC), Arbitration strengthens its position in the Gulf States, (2003) *News Archives* <www.iccwbo.org/court/arbitration/id4173/index.html> at 22 Oct 2011; Craig Shepherd, 'United

Recent years have witnessed an expansion of international commercial arbitration on account of the increased number of commercial disputes. In response, many Gulf Arab States have modernised their national arbitration law, and several arbitration centres in the region have been established⁸⁹ and amended their arbitration rules.⁹⁰ This is by way of dealing with the increased commercial disputes and sustaining the position of these states as foreign investment destinations.

1.11 The Legal Framework for Arbitration in the Gulf Arab Region

The current regulatory frameworks for arbitration in the Gulf Arab Region states differ from State to State. For example, a number of countries, such as the UAE,⁹¹ Qatar⁹² and Kuwait,⁹³ still do not have their own separate arbitration laws, and arbitration is instead governed by minor provisions of Civil Procedural Code. In contrast, other countries in the region, such as Bahrain,⁹⁴ Oman⁹⁵ and recently Saudi Arabia,⁹⁶ have their own separate arbitration laws.

Arab Emirates: Section 3: Country Chapters: The European & Middle Eastern Arbitration Review' (2010)*GlobalArbitrationReview*, <<http://www.globalarbitrationreview.com/reviews/22/sections/82/chapter/s/848/united-arab-emirates/>> at 22Oct 2013.

⁸⁹ There are a number of established arbitration centres in the Gulf States, including the Dubai International Financial Centre (DIFC), the Dubai International Arbitration Centre (DIAC) and Dubai International Financial Centre has joined the London Court of International Arbitration (DIFC–LCIA) in Dubai. Qatar has the Qatar International Conciliation Arbitration Centre (QICA) and Qatar International Court and Dispute Resolution Centre (QICDRC). In Bahrain, Bahrain Chamber for Dispute Resolution has joined with the American Arbitration Association (BCDR–AAA). See Michael Chilton, 'Arbitration in the Middle East', *Lexis Nexis Joined paper with Mayer Brown*, January 2013 <https://www.mayerbrown.com/files/News/e8ac863e-39f2-4583-b6fc-41abb24698bd/Presentation/NewsAttachment/a872cb8f-1755-46d1-bb66-41dfd222be9a/LexisNexis_2012_arbitration-in-Middle-East.pdf> at 15 February 2013.

⁹⁰ In Dubai, for example, after the current global financial crisis, the DIAC has amended its arbitration rules in 2007, following this amendments, the DIFC has amended its arbitration law in 2008. See Mohtashami, above n 11, pp. 631-640.

⁹¹ *the Civil Procedures Code 1992*, Art. 203-218.

⁹² *the Civil and Commercial Procedures Code 1990*, Art. 190-210.

⁹³ *the Civil and Commercial Procedures Code 1980*, Art. 173-188.

⁹⁴ For Domestic Arbitration: *the Civil and Commercial Procedures Code 1971*, Art. 233-243. For International Arbitration: *The 1994 International Commercial Law and Decree No 20 of 2009*.

⁹⁵ Law No 47 of 1997, Law 36/1998 and *the Civil and Commercial Procedures Code 2002*, Art. 353.

⁹⁶ Recently Saudi Arabia has enacted a new arbitration Law under the Royal Decree No M/34, 2012.

In the absence of specific arbitration laws, some countries use the general rules in their Civil Procedural Codes. With such use of the Civil Procedural Codes, the issue is that it does not clearly distinguish between domestic and international arbitration procedures, especially in the matter of enforcement.⁹⁷ Moreover, the codes contain a number of inflexible provisions that can affect arbitral procedures and cause delays and high costs. Also, a supportive role played by the judicial system in arbitration in some Gulf Arab jurisdictions is a key requirement; yet some judicial systems can be considered receptive to arbitration,⁹⁸ while others are considered unsupportive.⁹⁹ It remains the case that, despite these states being signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the judicial authorities in some states have limited acquaintance regarding public policy, as they apply their domestic public policy to refusing the recognition and enforcement of foreign arbitral awards. This limited understanding of international arbitration acts to discourage foreign investors seeking arbitration to be conducted within the region.

As examples of the progress of the Gulf Arab States in developing international arbitration, Bahrain can be considered a notable leader in the region. This is because Bahrain has progressively modernised its arbitration laws to become consistent with

⁹⁷ As stated by Smith and Ibrahim, 'the UAE Civil Procedure Code has proven inadequate in the context of modern international commercial arbitration'. See Smith and Ibrahim, above n 16.

⁹⁸ As stated by Al Tamimi, 'the UAE judicial authority is very independent and recognises the parties' agreement to arbitrate and the independence of the arbitration clause. The courts are very supportive of arbitration and willing to assist the arbitration, for example by granting applications for the attendance of witnesses or the examination of the documents'. See Essam Al Tamimi, 'United Arab Emirates' in Essam Al Tamimi (ed), *The Practitioner's Guide to Arbitration in the Middle East and North Africa* (2009) 483, 519.

⁹⁹ For example, Wakim described Saudi Arabia as a traditionally hostile to the recognition and enforcement of foreign arbitral awards. He also states that even with the accession to the New York Convention of most Middle Eastern countries, still these countries do not take greater advantage of the New York Convention, because they narrow the reading of the public policy. See Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) Vol. 21 *New York International Law Review* No 1, p. 44.

recent practices of international arbitration.¹⁰⁰ However, the UAE, particularly the Emirate of Dubai, has also become a major player in the area of international arbitration, as it realises the significance of international commercial arbitration in preserving international business relations. The following section provides a brief description and commentary on the legal framework of the UAE and the DIFC jurisdiction.

1.12 Introduction to the Legal System of the UAE and Dubai

1.12.1 The UAE Legal System, Courts System and Jurisdiction

The legal system of the UAE is governed by the Constitution of the UAE, which was signed on 18 July 1971.¹⁰¹ Under the Constitution, the UAE has sovereignty in all matters assigned to it. However, in terms of individual member Emirates, the Constitution gives each Emirate its own sovereignty and authority within its own territory to make determinations in all matters that are not subject to the UAE jurisdiction. As there are seven Emirates in the UAE, there are seven hereditary rulers, and each ruler has extensive control over his Emirate. The enactment of laws in an Emirate is officially established by a decree of the governor.¹⁰² The jurisdiction of the Federal Government can be found in matters such as foreign affairs, defence, health and education, whereas the individual Emirates have exclusive jurisdiction over regional matters. Similarly to the Gulf Arab States, the Constitution of the UAE specifies that

¹⁰⁰ It should be noted that Bahrain is considered as the first country in the region adopted legal framework on arbitration.

¹⁰¹ Al Tamimi, above n 58.

¹⁰² For example, in the Emirate of Dubai, in 2004, H.H. Sheikh Maktoum bin Rashid Al Maktoum, the ruler of the Emirate of Dubai and by his extensive power over his emirate, he enacts two new laws creating the Judicial Authority and the establishment of the DIFC Court System.

Islam is the official religion, the *Shari'a* is the primary source of legislation and Arabic is the official language.¹⁰³

The Federal Government is comprised of the Supreme Council, the Prime Minister and Cabinet of Ministers and the National Assembly, presided over by the President of the UAE.¹⁰⁴ The Supreme Council consists of the rulers of the seven Emirates and is considered the highest governmental authority in the UAE.¹⁰⁵ Regarding the Cabinet of Ministers, it has the power to administrate the Federal Government and consists of the Prime Minister and his Ministers.¹⁰⁶ The final authority of the Federal Government is the National Assembly, which consists of recommended citizens of each Emirate.

Pertaining to the UAE's judicial system, the UAE has seven Federation Emirates, all of which are part of the federal judiciary except for Dubai and Ras Al Khaimah, which have their own independent judiciaries. The UAE has two court systems, namely the Federal Courts and the Local Courts. The UAE Constitution provides each Emirate with the liberty and power to retain its own judicial system.¹⁰⁷ UAE Federal law, enacted by the Supreme Council, as well as local law and regulation, promulgated by the Ruler of

¹⁰³ *UAE Constitution 1971*, Article 7. This is also consistent with the objective of (the GCC agreement) which aims to have 'effect coordination, integration and inter-connection between member states in all fields, strengthening ties between their peoples, formulating similar regulations in various fields such as economy, finance, trade, customs, tourism, legislation, administration, as well as fostering scientific and technical progress in industry, mining, agriculture, water and animal resources, establishing scientific research centres, setting up joint ventures, and encouraging cooperation of the private sector'. See the Cooperation Council for Arab States of the Gulf, Foundations and Objectives, <<http://www.gcc-sg.org/eng/index.php?action=Sec-Show&ID=3>> at 10 of February 2014.

¹⁰⁴ Al Tamimi, above n 58.

¹⁰⁵ Ibid. It should be noted that the main objective of the Supreme Council is that it empowers its members to elect the President amongst them every five Years.

¹⁰⁶ Ibid. The Cabinet of Ministers is selected by the Prime Minister. The latter is authorised to select and nominate the members of the Cabinet and then it must be approved by the President.

¹⁰⁷ Ibid. The judicial system in the emirates of Abu-Dhabi, Sharjah, Ajman, Fujairah and Umm AlQuwain is considered as Federal judicial system because these emirates transferred their judicial system to the UAE Federal Judicial authority. Accordingly, the Ministry of Justice of the Federal Government has the power to administrate and supervises the judicial system of these Emirates. However, the judicial system of the Emirates of Dubai and Ras- AlKhaimah is considered as local judicial system since they retain their judicial system and did not transferred it to the UAE Federal authority. Consequently, the local Courts of the Emirates of Dubai and RasAlKhaimah have the determination of all matters within the borders of their Emirates and the Ministry of Justice of the Federal Government has no power to administrate and supervise the judicial system of the Emirates of Dubai and Ras- AlKhaimah.

the Emirate, are applied in both the Local and Federal Courts.¹⁰⁸ It is noteworthy that if there is a conflict between the Local and Federal law, the Federal law will prevail.

Equally, in the UAE, the Federal and Local Courts are divided into three main Courts: the Civil Court, the Criminal Court and the Shari'a Court.¹⁰⁹ In the context of this thesis, the Civil and Shari'a Courts will be discussed extensively. First, the Civil Courts have jurisdiction over civil matters such as private suits, debt recovery, banking, maritime, bankruptcy, intellectual property, company and insurance.¹¹⁰ In the Court of Appeal, the appeal is heard by three judges and determined by the majority or unanimously. The Court of Appeal accepts both oral arguments and written submissions; however, written submissions are the norm. The grounds of appeal should rely on factual or legal matters. Further evidence can also be submitted, and either party can request the Court of Appeal to call witnesses.

As mentioned above, the judicial systems in the UAE are either Federal or Local; accordingly, any judgments or orders determined by the Federal Courts of Appeal in the Emirates of Abu Dhabi, Sharjah, Fujairah, Ajman and Umm al-Quwain are subject to an appeal to the Supreme Court of Cassation located in Abu Dhabi. On the other hand, any judgments or orders determined by the Dubai Court of Appeal are subject to appeal in the Dubai Court of Cassation. Like the other Emirates, the Dubai courts system consists of three levels: the Court of First Instance, the Court of Appeal and the Court of

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. If the amount of the claim submitted to the court is AED100,000 or more, in that case, three judges will hear the claim, the other situation is where the amount of the claim is a lesser amount of AED100,000, then the claim will be heard by one judge. In the case of three judges hearing a claim, the judgment or order of the claim shall be determined by the majority or unanimously. Mostly, the written submissions or 'memoranda' are permitted as the way of argument presentation in the civil courts. In factual or/ and technical matters, either party has the opportunity to request the civil court to call witnesses or/and refer the matter to an expert for his opinion. Any judgment delivered by the civil court can be appealed to the Court of Appeal within 30 days starting from the next day of the judgment.

Cassation.¹¹¹ However, in the case of the Emirate of Ras Al Khaimah, the court system is quite different from the other Emirates, comprising only two court levels, the Court of First Instance and the Court of Appeal;¹¹² there is no Court of Cassation in Ras Al Khaimah. The right of appeal is automatic if the claim amounts to more than AED 10,000; if not, the leave of the court is required. The grounds of appeal to the Supreme Court of Cassation and the Dubai Courts of Cassation may only be based upon matters of law. The submission of further documents or evidence into court is not permitted; however, in very exceptional circumstances, the Court of Cassation may grant the parties leave to submit specific documents.¹¹³

Regarding the Shari'a or Islamic Courts in the UAE, these courts are principally liable for civil matters only among Muslims. Except for in the Emirates of Abu Dhabi, Sharjah and Ras Al Khaimah, Shari'a court jurisdictions can be found in the UAE. Indeed, examples of matters that can be heard by the Shari'a court are family matters including divorce, inheritance, custody, child abuse and guardianship of minors. In Shari'a Courts, all matters are heard by a sole judge, and the law applicable to these issues is the UAE Codified Law. The Islamic principles of Shari'a can be applied in the absence of any specific provision of the UAE Codified Law.¹¹⁴ The applicable Islamic Schools in the UAE are Maliki and the Hambali.¹¹⁵

¹¹¹ Bashir Ahmed, *The Dispute Resolution Review: United Arab Emirates* (Law Business Research, 3rd ed, 2011) Ch. 56, pp.835-845.

¹¹² Ibid.

¹¹³ Al Tamimi, above n 58, pp.11-12.

¹¹⁴ In Dubai, the structure of the first instance courts is divided into two courts specifically 'shari'a' courts and civil courts. Interestingly, the Dubai Courts Law 1970 subordinates 'Shari'a' to emirate law in the determination of civil matters. Under Article 14, a judge of civil Court must exercise his power in accordance with the following: The laws of Emirate of Dubai (which include the Federal code of Civil Procedure); The provisions of the Shari'a; the rules of custom and usage, provided the same not be in conflict with the laws or public order or morals; and the rules of natural justice, law and equity'. In fact, commercial disputes in Dubai are subject to 'Shari'a' law merely in two situations. First is in the situation where the laws of the emirate are found silent or incomplete in the coverage of the field. Secondly, in the situation where there is an issue associated to the public policy such as the application of enforcing a foreign award that rendered in non-Islamic Country. In most cases, Dubai seems to be predicted or more riskless than other emirates or other Gulf Arab States in applying 'Shari'a' principles or law. See Chris Mills, 'Litigation and Dispute Resolution in the UAE: better the devil you know? Not

The DIFC courts are another judicial body in Dubai that will be discussed further in this thesis. In exceptional circumstances in the UAE, Special Tribunals or Committees have been established by either the Ruler of an Emirate or the Minister of Justice to deal with specific matters. The decision made by the tribunal is final and binding, and there is no right of appeal. An example of a special tribunal in Dubai is the Dubai World Tribunal,¹¹⁶ which was established by Decree No 57 of 2009 and subsequently amended by Decree No 11 of 2010.¹¹⁷ The Dubai World Tribunal has jurisdiction over matters related to Dubai World and its subsidiaries. Under Decree No 57, the tribunal will hear and determine any claim submitted to Dubai World and its subsidiaries, except where the parties have an agreement to settle their dispute using arbitration.¹¹⁸ The tribunal consists of three prominent judges, namely the Chief Justice and Deputy Chief Justices of the DIFC courts, Sir Anthony Evans, Michael Hwang and Sir John Chadwick.¹¹⁹ The tribunal has an exclusive jurisdiction that prohibits the Courts of Dubai and the DIFC

always' (2007) *Clydeco*, <<http://www.clydeco.com/knowledge/articles/litigation-and-dispute-resolution-in-the-uae-better-the-devil-you-know-not-always.cfm>> at 10 July 2014; Sam Luttrell, Arbitration in Dubai (2009) *International Trade and Business Law Review* 12; See Dubai Courts Law 1970, Article 14.

¹¹⁵ The Islamic Schools of Shari'a which are applicable in the UAE are Maliki and the Hambali Schools. Article 1 of the UAE Civil Code provides that if there are no applicable principles in either the Maliki or Hambali Schools, then the Judge must turn to the Shafi School or Hanafi School. See Al Tamimi, above n 58, p.14.

¹¹⁶ There are other special tribunals and committees in Dubai, these include the Special Judicial Committees which has competence to hear claims brought against Amlak Finance PJSC and Tamweel PJSC (vide Decree No 61 of 2009). An additional special committee in Dubai is the Zabeel Special Committee which has jurisdiction over matters related to Zabeel Investments LLC and its subsidiaries and associates (vide Order of Ruler of Dubai dated 9 February 2011). Finally, there are special types of Rent Committees which has responsibility to deal with tenancy disputes in three Emirates namely Abu-Dhabi, Dubai and Sharijah. See Habib Al Mulla, Karim Nassif and Gordon Blanke, Dispute Resolution in 47 Jurisdiction Worldwide: United ArabEmirate, Getting the Deal Through- Dispute Resolution (2011) <<http://www.habibalmulla.com/Mediaresource/dcc0a244-a9e0-4c56-9a3d-1b2e038cc335.pdf>> at 12 May 2014.

¹¹⁷ Dubai World Tribunal, The Special Tribunal to Decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries, <<http://dubaiworldtribunal.ae/>> at 15 May 2013.

¹¹⁸ Ashley Painter, Chris Harrison and Michael Chong, Special Tribunal Established for Dubai World Disputes, (2009) <<http://www.clydeco.com/insight/articles/special-tribunal-established-for-dubai-world-disputes>> at 15 May 2014.

¹¹⁹ Ibid.

Courts from hearing or deciding any disputes considered to fall within its own jurisdiction.¹²⁰

1.12.2 Arbitration and the UAE's Unique Legal Structure Among the Gulf Arab States

The UAE has a unique legal structure among the Gulf Arab States, as it has both Federal and State laws.¹²¹ Until now, the UAE Civil Procedure Code (*Federal Law No 11 of 1992*) is the legal framework governing the conduct of arbitration in Dubai and the other Emirates within the UAE.¹²² Interestingly, Dubai also has another jurisdiction in the form of the DIFC, which provides for arbitration and it has its own arbitration law,¹²³ separate court system¹²⁴ and arbitration centre.

1.12.2.1 Federal Law Jurisdiction

Under the Federal law, arbitration is governed by minor provisions, specifically Articles 203–218 of the Civil Procedure Code (*Federal Law No 11 of 1992* as amended by *Law No 30 of 2005*). As mentioned earlier, these provisions have been broadly criticised as outdated and inadequate for resolving international commercial disputes.¹²⁵ The provisions were principally designed for domestic rather than international arbitration, and are not based on the UNICTRAL Model Law.

¹²⁰ Ibid.

¹²¹ State Laws in the UAE is well known as Emirate laws as the UAE is consist of seven Emirates and each has its own separate laws.

¹²² Other Emirates within the UAE are Abu Dhabi, Fujairah, Ras al-Khaimah, Sharjah and Umm al-Quwain.

¹²³ The DIFC Arbitration Law No 1 of 2008.

¹²⁴ The DIFC Courts. Detailed information about the legal foundation, the structure and jurisdiction of the DIFC will be delivered in the following section.

¹²⁵ The issue of these provisions is that they gives they local courts an extended power to intervene the arbitration process, especially in reviewing the arbitral wards at the stage of enforcement. Also, it permits the local court to dismiss an arbitrator, hear preliminary issues, grant interim measures and others. See Luttrell, above n 15.

Arbitration under the Civil Procedure Code is still in effect and is used to solve commercial disputes for domestic arbitration in the UAE. This is because there is a preference for arbitration over litigation in the local courts, as the majority of the Dubai population are immigrants, who can thereby avoid the lengthy procedures of litigation.

The difficulty of conducting domestic arbitration in the UAE, particularly in Dubai under the Civil Procedure Code, was addressed by the creation of the DIAC. An important centre, the DIAC provides for both domestic and international arbitrations operated under the Federal jurisdiction.¹²⁶ One main reason for the attractiveness of DIAC is the availability of experienced arbitrators as well as the ability to use the English language in the conduct of arbitration proceedings. Therefore, the DIAC has become a well-recognised alternative arbitral centre in Dubai and in the region.

1.12.2.2 State Law Jurisdiction and DIFC Law Jurisdiction

Recently, 'free zones' have rapidly developed in Gulf Arab Region. These zones provide an exceptional legal status that encourages international investment and trade. The UAE, for example, has a number of 'offshore' free zones; a key one is the DIFC, which was established to attract more international investment and trade to Dubai.¹²⁷ The DIFC is a financial free zone, providing its registered entities with freedom from tax on income and profit, 100 per cent foreign ownership and duty-free foreign exchange transactions. The DIFC was founded in 2004 by the Government of the Emirate of Dubai with the intention to promote Dubai as a recognised hub for

¹²⁶ DIAC experienced an increased number of domestic and international arbitration cases, for example, in 2010, 182 new arbitration cases filed within the DIAC, with a value in disputes of approximately \$626 Million. Also, in 2012 the registered arbitration cases increased to 379 arbitration cases. See John Everington, 'Arbitration Cases Rise on Introduction of New Rules at ADCCAC in Abu Dhabi', *The National Business*, UAE, 19 July 2014 <http://www.thenational.ae/business/industry-insights/economics/arbitration-cases-rise-on-introduction-of-new-rules-at-adccac-in-abu-dhabi> at 12 November 2014.

¹²⁷ The DIFC is the first financial free zone in Dubai. See Horigan, above n 41.

institutional finance and commerce, and comprises an autonomous judicial system. The main activities of the DIFC are based on financial services such as banking and brokerage, capital markets, wealth management, reinsurance and Islamic finance. However, it also provides its registered residents with ancillary services that include legal, accounting and consulting services.¹²⁸

The unique feature of the DIFC in comparison to other arbitration centres in the Gulf region is its independent judicial system. In other words, the DIFC has its own courts system that is separate from the UAE courts, applying the DIFC's own laws and regulations.¹²⁹ More importantly, the DIFC's courts system is based on the English model, which can be seen as familiar and accessible for common law practitioners.¹³⁰ With its unique regulatory framework, the DIFC generates its own laws, courts and arbitration centre. The DIFC Courts are common law jurisdictions that are principally derived from the court systems of England and Wales, presided over by proficient common law judges.¹³¹ The DIFC has adopted a series of laws to facilitate its implementation. These include the *DIFC Law No 6 of 2004* on contract law, *DIFC Law No 6 of 2005* on implied terms in contracts and unfair terms and *DIFC Law No 7 of 2005* on damages and remedies.¹³² However, the main DIFC law discussed in this thesis is the *DIFC Arbitration Law No 1 of 2008*. This law is based on UNCITRAL Model Law.

¹²⁸ Mohtashami, above n 11, pp.631-640.

¹²⁹ Salomon, Duffy and Canning, above n 12.

¹³⁰ Beeley, above n 56; Arbitration Law, DIFC Law No 1 of 2008.

¹³¹ The Courts of the DIFC are led by the Chief Justice Sir Anthony Evans, a former English Court of Appeal judge and the Deputy Chief Justice, Michael Hwang, a former Judicial Commissioner of the Supreme Court of Singapore and a world well-known arbitrator.

¹³² Gordon Blanke and Muhammed Syamsulfaiz Zainuddin, 'Litigating in the DIFC some initial guidance for the unaware' *Habib AlMulla & Company (The In-House Lawyer)*, UAE, 14 December 2009, <<http://www.inhouselawyer.co.uk/index.php/united-arab-emirates/7680-litigating-in-the-difc-some-initial-guidance-for-the-unaware>> at 20 January 2013.

1.12.2.3 Legal Foundation of the DIFC

The DIFC faces a range of requirements and necessary amendments to promote an attractive and investment-friendly environment with a firm legal basis. These requirements can be divided into two stages: requirements at the Federal level and requirements at the Emirate level.

At the Federal level, the stepping stone for the legal foundation of the DIFC is visible in an amendment to the UAE Constitution. Article 121 of the UAE Constitution tackles the division of powers between Federal and Emirati authorities, creating the condition where the Federation can enact a Financial Free Zone Law. Consequently, a particular Emirate is permitted to create a financial free zone.¹³³ Further, specific additional legislative acts were required for the establishment of the DIFC, namely the *Federal Law No 8 of 2004*¹³⁴ and *Federal Decree No 35 of 2004*.¹³⁵ *Federal Decree No 8 of 2004* is a critical piece of legislation, as it permits any Emirate of the UAE to establish a financial free zone; it also gives an exemption for financial free zones from all federal, civil and commercial laws. *Federal Decree No 35 of 2004* officially launched the DIFC in Dubai as an Emirate of the UAE. These Federal Decrees were necessary to build a new investment climate in Dubai, and thus perhaps contributed to putting the Emirate of Dubai on the level of other major financial zones globally.

¹³³Dubai Financial Service Authority, Legal Framework, <<http://www.dfsa.ae/Pages/LegalFramework/LegalFramework.aspx>> at 25 Aug 2013.

¹³⁴Federal Law No 8 of 2004 Regarding the Financial Free Zone, <<http://www.dfsa.ae/Documents/Federal%20Law%20No%208%20of%202004.pdf>> at 25 August 2013.

¹³⁵ Federal Decree No 35 of 2004 regarding the establishment of the DIFC as a Financial Free Zone in the Emirate of Dubai, <<http://www.dfsa.ae/Pages/LegalFramework/LegalFramework.aspx>> at 25 August 2013.

The second stage of the legal foundation of the DIFC—that of its appearance at the Emirate level—occurred via Dubai’s *Law No 9 of 2004*,¹³⁶ which is recognised as the law of the DIFC. This law was conceded by the Dubai Government, leading to the formation of the DIFC as an independent body that mirrors Dubai’s legal frameworks. In other words, the DIFC created its identity as a free zone, an independent judicial system and an international arbitration centre by achieving these stages.¹³⁷

1.12.2.4 Structure and Jurisdiction of the DIFC Courts

It is appropriate to begin with the structure of the DIFC body, followed by the structure and competences of the DIFC courts. First, the DIFC has three independent bodies: the DIFC Authority (DIFCA), the Dubai Financial Services Authority (DFSA) and the DIFC Judicial Authority (DJA). The principal mission of the DIFCA is the operation and administration of the DIFC.¹³⁸ The DFSA is another independent authority of the DIFC. Indicating its main responsibility, the DFSA is liable for ‘the authorization, licensing, registration and supervision of institutions and individuals who wish to conduct financial and ancillary services in or from the DIFC’.¹³⁹ The DJA is the third independent body of the DIFC. It holds responsibility for administering and enforcing the civil and commercial laws of the DIFC, and explains the jurisdictional independence of the DIFC courts.

¹³⁶ Dubai Law No 9 of 2004, ‘The Law Establishing the Dubai International Financial Centre’ is a Dubai Law that recognises the financial and administrative independence of the DIFC.

<<http://www.dfsa.ae/Pages/LegalFramework/LegalFramework.aspx>> at 25 August 2013.

¹³⁷ Mohtashami and Tannous, above n 14, pp. 173-185.

¹³⁸ The (DIFCA) mission contains ‘developing overall strategy and providing direction; promoting of the DIFC; attracting licensees to operate in the Centre, in addition to other public administration related activities’. It has also additional responsibilities to develop laws and regulation that are not regulated by the DFSA these include employment law, contract law, company law and real estate law, amongst others. See Dubai International Financial Centre (DIFC), ‘The Structure of the DIFC—three independent bodies’,

<http://www.difc.ae/difc/sites/default/files/ChangestoAMFRInfo_0.pdf> at 25 August 2013.

¹³⁹ Ibid.

Regarding the DIFC courts' structure, the DIFC courts are composed of two levels. First, the Court of First Instance has a liability to hear all disputes raised before the DIFC Court by a single judge in the first instance.¹⁴⁰ The second level is the Court of Appeal, which has its responsibility to hear appeals raised in opposition to judgments, awards or orders that have been made by the Court of First Instance. It also has the capacity to interpret any provision regarding the DIFC laws in the case that it receives a request or submission from any of the DIFC's bodies or establishments. The Courts of Appeal should consist of three judges as a minimum for official and effective operation.

The Constitution of the DIFC courts stipulates that the DIFC courts shall consist of at least four judges, one of whom shall be the Chief Justice. Being a holder of high judicial office in any jurisdiction recognised by the Government of the UAE or having significant experience as a qualified lawyer or judge in the common law system are the requirements for being a judge in the DIFC courts. There are a number of local and international judges in the DIFC courts, in which they are appointed by a decree issued by the Ruler of Dubai. These judges include the Chief Justice of the DIFC courts, Justice Michael Hwang, SC (Singapore), Deputy Chief Justice Sir Anthony Colman(UK), Justice Sir John Chadwick(UK), Justice David Williams(New Zealand), Justice Tan Sri Siti Norma Yaakob (Malaysia), Justice Omar Al Muhairi (UAE) and H E Justice Ali Al Madhani(UAE). It can be said that the requirements of being a judge in the DIFC courts are sophisticated in favour of all parties and the reputation of the DIFC courts.

¹⁴⁰ According to the DIFC's website, 'the Court of First Instance shall be comprised of a single Judge and shall have exclusive jurisdiction over Civil or commercial cases and disputes involving the DIFC, any of the DIFC's bodies or any of the DIFC's establishments, Civil or commercial cases and disputes arising from or related to a contract that has been fulfilled or a transaction that has been carried out, in whole or in part, in the DIFC or an incident that has occurred in the DIFC, Objections filed against a decision made by the DIFC's bodies, which are subject to objection in accordance with the DIFC's laws and regulations and Any application over which the Courts have jurisdiction in accordance with the DIFC's laws and regulations'. Dubai International Financial Centre (DIFC), 'Courts' Structure', <http://www.difccourts.ae/about_the_courts/structure/> at 25 August 2013.

The DIFC courts are considered an independent common law judiciary in the presence of jurisdiction relating to civil and commercial disputes in or relating to the DIFC. Previously, the 2004 DIFC arbitration law was limited in the capacity of arbitration in which one the parties, or the dispute itself, should be related to the DIFC.¹⁴¹ However, the DIFC has extended its jurisdiction so as to permit any parties, even those not incorporated within the DIFC, to use the DIFC courts to resolve commercial disputes, on the condition that the parties have an agreement to arbitrate at the DIFC. This means that parties should agree to incorporate the jurisdiction of the DIFC courts into their contracts prior to commencing the dispute in the DIFC courts.

As any arbitration institution must be, the DIFC arbitration centre is independent of the DIFC Courts; however, the new rules of the DIFC ‘[recognise] that the DIFC courts will exercise the “curial”, or supervisory, role that in all systems of law is exercised by the relevant national Court’.¹⁴² In this context, however, the executive judge of the Dubai Courts has no jurisdiction to review the merits of any judgment, award or order of the DIFC courts. The arbitral award, once approved by the DIFC Court, is theoretically enforceable with no challenge in the Dubai courts.¹⁴³ According to Evans:

there is express provision in Dubai law for the enforcement of DIFC Awards, both within the DIFC and throughout Dubai, and in UAE Federal Law for enforcement in other Emirates forming part of the UAE. There are corresponding provisions regarding the enforcement within the DIFC of awards from Dubai outside the DIFC, or from other Emirates, or from other States.¹⁴⁴

¹⁴¹Helou, above n 9.

¹⁴²Anthony Evans, ‘The Future for Arbitration in Dubai’ (2008) *Chief Justice of the DIFC Courts*, <http://difccourts.complinet.com/net_file_store/new_rulebooks/d/i/difcc_ja_arbitration.pdf> at 25 August 2013.

¹⁴³Raid Abu-Manneh, ‘Dubai: A Regional Arbitration Centre?’, (2009) *Mayer Brown LLP*, <<http://www.mayerbrown.com/publications/articles.asp?id=7383&nid=6>> at 25 Aug 2013.

¹⁴⁴Evans, above n 142.

This indicates the straightforward enforceability of arbitral awards, not only in the DIFC but also in Dubai generally.

In accordance with the independence of the DIFC courts and pursuant to Article 42(1) of the DIFC Court Law, an award that has been ratified by the DIFC courts will be directly enforceable.¹⁴⁵ Therefore, the enforcement of arbitral awards within the DIFC is straightforward. Additionally, there has been much work that has been undertaken by the Dubai Courts and the DIFC Courts in relation to the enforcement of arbitral awards. The Protocol of Enforcement between the Dubai Courts and the DIFC Courts is an explicit example of the pro-investment policy of the Dubai Government. In line with the memorandum, the ratification procedure of the arbitral awards has become pure.¹⁴⁶

The DIFC courts have attempted to ensure the certainty and efficiency of their mission by applying the highest international standards of legal procedure. An example of the DIFC's efficiency can be found in the new charter clarifying the role and responsibilities of the DIFC Courts Users' Committee. The DIFC Courts Users' Committee has a responsibility as a part of its function in evaluating the efficiency, fairness and integrity of the DIFC courts and attempting to make sure that the Courts' users are afforded a high standard of service in line with their expectations.¹⁴⁷

¹⁴⁵ Richard Bell and Laura Chicken, 'Enforcement of Arbitral Awards in the UAE- Part II: Enforcing DIFC/LCIA Arbitral awards' (2011) <<http://www.clydeco.com/knowledge/articles/enforemnt-ofarbitral-awards-in-the-uae>> at 25 Aug 2013; See DIFC Court Law, DIFC Law No 10 of 2004; Art. 42(1) available at <https://www.difc.ae/sites/default/files/DIFC_Court_Law_2004_0.pdf> at 15 June 2013.

¹⁴⁶ Ibid; a detailed discussion on the topic of the enforcement of foreign arbitral awards in the UAE will be developed in Chapter 3.

¹⁴⁷ See The DIFC Courts 'Users' Committee, about the Courts, available at <<http://difccourts.ae/courts-users-committee/>>.

1.12.3 Reasons to Choose International Commercial Arbitration in the UAE, Particularly the DIFC Arbitration Law

The primary motivation for selecting the DIFC from among other institutions in the UAE and Gulf Arab Region is that the DIFC arbitration rules of 2008 have conceptual similarities with the Western concept of arbitration, regarding its nature, scope, certainty of rules, substantive law applicable and extent of judicial review and enforcement. All these issues were taken into consideration by the DIFC lawmakers at the time of drafting the DIFC arbitration rules of 2008; the primary sources for the DIFC arbitration rules can be found in the UNCITRAL Model Rules, the English Arbitration Act (1996) and the Arbitration Rules of the LCIA. Most importantly, in contrast to other arbitration centres in the Gulf region, the DIFC has an independent judicial system. It has its own courts system, separate and distinct from the UAE courts, that acts on the provisions of the DIFC laws and regulations.¹⁴⁸ This ideally places the DIFC arbitration rules of 2008 in comparison to other arbitration rules in the region.

1.12.4 Old and New Laws Applicable to Arbitration in the UAE

1.12.4.1 Old Laws Applicable to Arbitration in the UAE

Arbitration has been recognised in the region as a legitimate method of dispute resolution since ancient times. The practical application of arbitration in the region has been influenced by Islamic law as well as French and Roman law.¹⁴⁹ As an example, in Islamic law:

the practice of arbitration was found in the family law, so if there was disagreement between husband and wife, then each one had to appoint two arbiters, one from his family, and the other from hers; if they wish for peace,

¹⁴⁸Salomon, Duffy and Canning, above n 12.

¹⁴⁹ Nathan J. Brown, *The rule of law in the Arab world: Courts in Egypt and the Gulf*, (Cambridge University Press, 1997) 2.

God will cause their conciliation; for God hath full knowledge, and is acquainted with all things.¹⁵⁰

However, the influences of French and Roman law were imported via Egyptian codes, after which many Gulf Arab States adopted the legal system of Egypt.¹⁵¹ Therefore, arbitration legislation in the Gulf Arab Region seems to have an assortment of legal sources. A good example is the proposed UAE arbitration law, which is chiefly comparable to the Egyptian law *No27 of 1994*, and draws inspiration from the UNCITRAL Model Law.¹⁵²

In the 1990s, arbitration in the UAE was still in its formative years. At that time, there were two arbitration centres: the Abu Dhabi Commercial Conciliation and Arbitration Centre, established in 1993 by the Abu Dhabi Chamber of Commerce and Industry, and the Dubai Chamber of Commerce and Industry Commercial Conciliation and Arbitration Centre, established in 1994.¹⁵³ Both centres introduced rules and procedures for conducting domestic and international arbitrations, as well as a schedule of costs.¹⁵⁴ Regarding the arbitral tribunal or arbitrators in the UAE, there were no restrictions on the identity or nationality of the tribunal. In other words, those who delivered the arbitration awards could be Muslims or non-Muslims, citizens or non-citizens. Also, the subject matter of arbitration was not restricted unless it referred to labour and commercial agency disputes, so the possibilities of arbitration in these cases were rare.

Enforcing foreign arbitral awards in the UAE before the accession to the New York Convention was very difficult, for the reason that the UAE had no international rules

¹⁵⁰ Kutty, above n 58. Another example could be the fact that Prophet Mohammed resorted to arbitration in his dispute with 'Banu Qurayza' tribe and others.

¹⁵¹ Mary B. Ayad, 'Harmonization of International Commercial Arbitration Law and Sharia' (2009) 4 *Macquarie Journal of Business Law*, pp.93-118.

¹⁵² The arbitration law Sultanate of Oman No 47/1997 and the amended law No 3/2007 has adopted the Egyptian law, however; in the case of Bahrain, the Bahraini Law No 9/1994 has inspired fully by the UNCITRAL model law for international arbitration with no modifications.

¹⁵³ Al Tamimi, above n 58, p.147.

¹⁵⁴ Ibid.

governing the enforcement of foreign arbitral awards. At that point, the local law and procedure (i.e. the Civil Procedure Code of 1992) applied to the enforcement of foreign arbitral awards. The ultimate enforceability of arbitral awards prior to the ratification of the New York Convention was a fundamental issue facing foreign investors in the UAE. This is because the scope of application of the provisions of the UAE Civil Procedure Code (i.e. Articles 203–213) was to control the process of recognising arbitral awards. In this regard, it was not certain whether these provisions were subject to foreign arbitral awards or only to domestic awards. The doubt that the provisions of the UAE Civil Procedure Code (i.e. Articles 203–213) might apply to international arbitral awards was a major issue for foreign investors. This is because it would give the defendant party the opportunity to invalidate the arbitral award on various grounds.¹⁵⁵

1.12.4.2 New Laws Applicable to Arbitration in the UAE

The UAE's position regarding arbitration has shifted to one of an international arbitration-friendly hub. In the UAE, arbitration is continuing to develop as an essential and favoured method of solving international commercial disputes between parties from different legal jurisdictions.¹⁵⁶ Currently, the laws applicable to arbitration in the UAE

¹⁵⁵There are well-known examples of the difficulty to enforce an arbitral award in the UAE, before the accession of the New York Convention. First example is that an arbitral award was not enforced because it was not signed in all pages. In fact, the documents were signed at the end page and initialled on every page. Another example of the difficulty to enforce an arbitral award in the UAE before the accession of the New York Convention is where the court decided that, although the parties had agreed what oaths the witnesses should swear before the hearing, because the oaths administered were not exactly the same oaths as those used in the UAE courts, the award was invalid. See Gordon Blanke and Soraya Corm-Bahhos, 'Enforcement of Foreign Awards in the UAE: A U-Turn Ahead?' *The In House Lawyers* Habib Al Mulla & Company, UAE, 8 November 2011 <<http://www.inhouselawyer.co.uk/index.php/united-arab-emirates/9657-enforcement-of-foreign-awards-in-the-uae>> at 08 May 2013.

In Dubai, for instance, the courts and the judges have to deal with an increase number of complex disputes involving regimes that were greatly unknown. Consequently, much effort has been made by Dubai Government to reform and improve its legal system.

¹⁵⁶To understand the foundation of the arbitration developments in Dubai, it is significant to look at Dubai Strategic Plan of 2005 regarding the economic developments and its plan to achieve the aim for security, justice and safety. On the subject of the economic development, Dubai plans to improve its economic laws and regulation to be in line with international best practice and standards. The other aim of Dubai Strategic plan is to achieve the aims for security, justice and safety, Dubai aims to ensure access to justice and eliminate all economic, geographical, legal and procedural barriers that restrict access to procedural

have resulted from developments undertaken by the UAE Federal Government and the Government of Dubai.¹⁵⁷

At the Emirate level, the first development introduced by the Dubai Government following the financial crisis was the new arbitration rules of the DIAC. These rules were enacted in May 2007 and replaced the Dubai Chamber of Commerce and Industry's (DCCI) arbitration rules of 1994.¹⁵⁸ The new norms of the DIAC are derived from the UNCITRAL rules and also incorporate some elements of the LCIA, ICC, WIPO and the Stockholm Chamber of Commerce Arbitration Rules.¹⁵⁹ In practice, during the global crisis, the DIAC has played an important role in solving disputes related to the construction industry.¹⁶⁰

The second development was that the 2008 DIFC arbitration law replaced the 2004 arbitration rules of the DIFC.¹⁶¹ The basis of the DIFC arbitration law is derived from the UNCITRAL Model Law and the common law (i.e. LCIA rules and *UK Arbitration*

or justice. This can be done by improving legislation and laws, increasing awareness of rights and duties and facilitating resolution mechanisms. See Highlights Dubai Strategic Plan 2015, available at <<http://www.sclgme.org/Dubai%20Strategic%20Plan%20-%20English.pdf>> at 12 May 2013.

¹⁵⁷Matthew Marrone and George Anthony Smith, 'Recent Developments in Arbitration Law in the UAE', *Weinberg Wheeler Hudgins Gunn & Dial* 15 September 2010, < <http://www.wwhgd.com/newsroom-news-71.html>> at 12 May 2013.

¹⁵⁸ Al Tamimi and Van Son, above n 10, pp. 211-217. The grounds of adopting the new arbitration rules of the DIAC can be referred to two aspects contained by the previous rules specifically, the previous rules of the (DCCI) was not appropriate to meet the need of modern international arbitration and the best practice as well as it does not addressing the issues contained in the rules of world-class arbitral institutions.

¹⁵⁹Kwan, above n 56, p.12.

¹⁶⁰Dubai Real States Crisis occurred in Nov 2009. The reason behind this crisis is that when Dubai announced that it would request creditors of Dubai World to agree to postpone debt repayments for six months. 'Some commentators are of the view that banks that have lent money to Dubai World could suffer significant losses if the company were to default on all or part of its \$59 billion debt. Duabi's total debt stands at \$80 billion. If creditors were to reject proposals to postpone debt repayments for six months, the Dubai government could be forced to hold a fire sale of its international real estate assets'. Frank Shostak, 'What's Behind the Dubai's Financial Crisis?' *24hGold*, 1 December 2009 < <http://www.24hgold.com/english/news-gold-silver-what-s-behind-the-dubai-s-financial-crisis.aspx?contributor=Frank+Shostak&article=2483783304G10020&redirect=False>> at 11 May 2013.

¹⁶¹Reed Smith, 'Dubai Opens Gate to International Arbitration', *Reed Smith Client Alter* 08-165 (London), October 2008, < http://m.reedsmith.com/files/Publication/85353f17-98c1-4b19-a70b-52e6e7e3d168/Presentation/PublicationAttachment/9b863b62-975a-4680-9961-24b20570af9f/Dubai_Opens_Gate_to_International_Arbitration.pdf> at 11 May 2013.

Act 1996). Most important was the creation of the DIFC, along with a joint venture with the LCIA, as an arbitration centre in Dubai.¹⁶²

At the Federal level, there have been two important recent developments. First, the UAE acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2006. Second, the UAE Government proposed a Federal arbitration law in 2008 to replace the UAE *Federal Law No 11 of 1992*. The proposed Federal arbitration law is based on the UNCITRAL model.¹⁶³

Since the UAE's accession to the New York Convention in 2006, there has been an international law governing the enforcement of foreign arbitral awards in the UAE. The UAE has applied the Convention principles in recent cases in which the UAE courts have complied with Article 5 of the Convention.¹⁶⁴ These outcomes demonstrate the new approach of the UAE's Courts and the UAE's commitment to applying the New York Convention.¹⁶⁵ These considerable developments are indicators that verify the UAE's evolution regarding international commercial arbitration. The current situation

¹⁶² Beeley, above n 56 ; See Arbitration Law, DIFC Law No 1 of 2008. In 2008, the DIFC has had a joint venture with the well-known arbitral institution the LCIA. As a result, the DIFC/LCIA has taken place and the arbitration rules of the DIFC have remodelled to be similar to those rules applied in the LCIA. As mentioned above, the DIFC/LCIA can be distinguished than other arbitral institution in the region as it has its own court, laws and arbitration centre. The system of the DIFC's Courts is based on the English model which can be seen as a familiar and accessible for common law lawyers.

¹⁶³ *The UAE Federal Law 1992, No11* (UAE Federal Law).

¹⁶⁴ Article 5 states that the UAE Courts should enforce foreign arbitral awards provided that the subject matter can be arbitrated under the UAE law and such enforcement would be not offend public policy'; See International Arbitration Bulletin May2011- Enforceability of foreign arbitral awards-UAE. <<http://www.hfw.com/publications/bulletins/international-arbitration-may-2011/international-arbitration-bulletin-may-2011-enforceability-of-foreign-arbitral-awards-uae>>at 15 May 2013.

¹⁶⁵ The Dubai Court of the First Instance has delivered its decision by recognises and enforces a London Arbitration Award under the New York Convention. Although, the defendant party in this case has arguments based on the provisions of the UAE Civil Procedure Code (i.e. Article 203-213), the court held that Articles 203-213 of the UAE Civil Procedure Code are only subject to local arbitration award not foreign arbitration awards. Therefore, the defendant's arguments were dismissed. Another case shows the new approach of the UAE's Courts is the ruling of the Fujairah Federal Court of First Instance. In this case, the court enforced two awards delivered by a sole arbitrator in London under the Rules of the London Maritime Arbitration Association (LMAA). The decision made by the Fujairah Court was 'Up on review of the arbitration clause pursuant to which reference was made to arbitration agreed on by the parties and two awards the subject of the ratification claim; we found that there is no impediment for execution of the judgment', See Blanke and Corm-Bahhos, above n 155.

indicates that the national courts and legal practitioners have become more receptive to international arbitration. Relevantly, and subsequent to the accession to the New York Convention, the role of the national courts has shifted to one that is more supportive of international arbitration.¹⁶⁶

To summarise, the practice of international arbitration in the Gulf Arab Region has undergone several stages of progress since the 1990s. This explains the changes and developments in laws applicable to arbitration in the Gulf Arab States, particularly the UAE.¹⁶⁷ At present, international commercial arbitration is accessible in most Gulf Arab States, particularly as a consequence of the adoption of the Model Law (UNCITRAL) and Western arbitration models.¹⁶⁸ Moreover, all the states of the Arab world are signatories to the New York Convention. Therefore, it is fair to say that the culture gap in the practice of international commercial arbitration has largely been bridged. However, further developments are needed to achieve greater effectiveness and efficiency in the conduct of international commercial arbitration within the region. Before embarking on a detailed study of the UAE arbitration regime and comparing it to the international regimes, it is necessary to examine in detail the theoretical arguments in regard to arbitration as a means of dispute resolution in the following chapter.

¹⁶⁶ Ibid. In Dubai, for example, the national courts have recognized a variety of legal principles related to international arbitration such as the principle of *competens- competens* and separability. Moreover, the local courts presently have limited grounds to review the subject matter of such dispute.

¹⁶⁷ A distinguish example of the progress engagement in the international arbitration in the Gulf Arab Region specifically the UAE (i.e. Dubai) is that a common law has been implemented by the DIFC arbitration centre in Dubai as an international arbitration law. The author submits that the implementation of the common law in Dubai is substantial step in the developments of international arbitration laws in the region which reflects the remarkable efforts has been taken by UAE (i.e the Dubai Government) as a Gulf Arab State.

¹⁶⁸ Altamimi, above n 58.

Chapter 2:

An Analysis of Various Dispute Resolution Mechanisms in Law: Theoretical Frameworks for Measuring the Effectiveness and Efficiency of Dispute Resolution Mechanisms and the Adequacy of Arbitration Law

2.1 Introduction

Mechanisms for the settlement of disputes are available in all countries. Once a dispute arises between private commercial parties, they usually have access to the competent courts in either party's country. Alternatively, they can agree to choose another available dispute resolution method that might be effective and appropriate in solving their conflicts. Recently, the alternative dispute resolution method of arbitration is increasingly being used in solving international commercial disputes. This chapter aims to provide an understanding of various dispute resolution mechanisms including arbitration. A clear understanding of the arguments for and against these different mechanisms of alternative dispute resolution (ADR) is necessary to evaluate their relative strengths and weaknesses. Such an evaluation will enable a discussion of which dispute resolution methods are likely to be the most effective and appropriate for settling disputes in international commerce. It is argued that arbitration is likely to be more effective than litigation and other dispute resolution methods in the context of international business conflicts.¹

¹For a number of reasons, international arbitration may be the best choice for resolving your dispute; indeed arbitration may be the only viable choice in certain circumstances. Arbitration offers a number of advantages over litigation, most notably a neutral forum, flexibility of process and freedom to choose the decision-

The discussion is divided into two parts. The first (Section 2.2) provides an understanding of significant terms and concepts relating to the law and practices governing ADR. It considers the literature on various dispute resolution mechanisms in law and analyses the arguments for and against these various mechanisms, especially in order to understand and assess their strengths and the weaknesses. The second part (Section 2.3) compares and evaluates the advantages and disadvantages of dispute resolution methods in accordance with criteria for measuring their effectiveness and efficiency in solving international commercial disputes. It provides theoretical reasons for choosing arbitration as an effective dispute resolution method.

2.2 An Analysis of Various Dispute Resolution Mechanisms in Law

2.2.1 Relevant Terms to Dispute Resolution

In understanding dispute resolution, a number of substantive definitions should be considered, including ‘dispute’, ‘international dispute’, ‘alternative’ and ‘alternative dispute resolution’. ‘Dispute’ can be defined essentially as follows:

a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counterclaim or denial by another. In broadest sense, an international dispute can be said to exist whenever such a disagreement involves government, institutions juristic person (corporations) or private individuals in different parts of the world.²

A number of terms, including ‘problems’, ‘grievances’ or ‘claims’, should be distinguished from the term ‘dispute’.³

maker.’ Douglas Earl McLaren, ‘Effective Use of International Commercial Arbitration: A Primer for In-house Counsel’ 19 *Journal of International Arbitration* 473.

²J. G. Merrills, *International Dispute Settlement*, (Cambridge University Press, 4thed, 2005)1.

³ ‘Problems are troubles that affect the human lot, such as damage from storms or sudden illness. Grievances are those problems the affect a particular person, but which may or may not have particular person or group as

The options for disputants who seek a binding mechanism for resolving disputes with the help of a third party are different in domestic and international contexts.⁴ For example, in the domestic context, the parties have two options: they can take their dispute to the national public court (litigation), or to private arbitration. In the international context, however, the option of an international public court does not exist.⁵ Accordingly, the international private disputant would resort to a national public court (litigation), or to alternative mechanisms, including international commercial arbitration, mediation and conciliation.

The term ‘domestic dispute’ can refer to domestic matters that are governed by national law. The domestic nature of a dispute can be established in several ways. First, a dispute is domestic if the dispute and the subject matter of a contract take place in a particular state; alternatively, the merits and procedures of the dispute can be governed by the law of that state.⁶ ‘International dispute’ can refer to the resolution of a dispute relating to a cross-

the cause of the distress. When the sufferer asks the person thought to be causing the grievance to forbear, the grievance has become a claim or complaint. But a dispute arises only when the one against whom the complaints is lodged fails to respond satisfactorily to the aggrieved party. And a ‘legal’ dispute arises only when the claim is grounded in a legal entitlement’. See Jethro K. Liebermant and James F. Henry, ‘Lessons from the Alternative Dispute Resolution Movement’, (1986) 53 *U. Chi. L. Rev.* 426; See William Felstiner, Richard Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming: Blaming Claming...’ (1981) 15 *Law. & Soc. Y Rev.* 631.

⁴Walter Mattli, ‘Private Justice in a Global Economy: From Litigation to Arbitration’ (2001) 55 *International Organisation* 4, pp.919-947.

⁵‘Mattli also points out that in the international context such a choice does not exist because there are no international public courts that handle international commercial disputes involving only private parties’. Moreover, there is who mentioned that as there is no truly international court of arbitration, national courts will always play an essential role in enforcing arbitration agreements and awards, and supporting the arbitral process by appointing arbitrators and compelling evidence necessary. See J. Martin Hunter, ‘International Commercial Dispute Resolution: The Challenge of the Twenty –first Century’, (2000) 16 *Arbitration International Kluwer Law International* 4, pp. 379-392; Howard Holtzmann, *Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards in The Internationalisation of International Arbitration*, (The Hague, Kluwer, 1995) p.109.

⁶Hans Smit, ‘A- National Arbitration’ (1989) Vol 63 *Tulane Law Review*, pp.629-645.

border transaction.⁷ Just as domestic disputes can be identified by their subject matter, the international character of a dispute can be recognised by a number of elements, including the nature of the dispute, the nationality of the parties or other relevant criteria.⁸ For example, for an arbitration to qualify as international requires that the nature of the dispute involve an international transaction or international contract, or that the dispute is submitted to international arbitration institutions such as the ICC, LCIA or ICSID. A further relevant element is the diversity of the nationalities and places of business or residence of the parties to the arbitration agreement. In light of that, regardless of the nature of their identity as either individuals or corporations, the parties could yet belong to different jurisdictions. Finally and pursuant to Article 1(3) of the UNCITRAL Model Law, arbitration is international in three circumstances:⁹

The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or one of the following places is situated outside the States in which the parties have their places of business: the place of arbitration if determined in, or pursuant to, the arbitration agreement 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 mostly closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.¹⁰

Before defining alternative dispute resolution, perhaps it is useful to briefly consider the meaning of the term ‘alternative’. The question to be asked in this context is: ‘alternative’ to what? As stated by Sander, the term ‘alternative’ can be understood to refer to a

⁷RashdaRana and Michelle Sanson, *International Commercial Arbitration*, (Thomson Reuters, 2011) 7.

⁸ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, 4th ed, 2004).

⁹See Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003) 60.

¹⁰*The UNCITRAL Model Law*, art, 1(3).

substitute for court adjudication and/or the traditional dispute resolution mechanism (the court).¹¹ It is this understanding that is applied in the following discussion.

ADR refers to a process that can be used to settle an existing dispute or to prevent a dispute from developing.¹² It can also refer to ‘amicable dispute resolution’ that to certain extent involves a third party who helps to facilitate such a resolution.¹³ It can be defined as any resolution mechanism for a dispute that does not involve court proceedings.¹⁴

¹¹ Frank E.A. Sander, ‘Alternative Dispute Resolution Symposium: Alternative Methods of Dispute Resolution: An overview’ (1985) 37 *University of Florida Law Review* 1, p.1. ‘Hence, the argument for ‘alternative’ is not based on the need to find a substitute for court adjudication. Rather, it is based on the need to gain a better understanding of the functioning of these alternative mechanisms and processes’. As described by Liebermant and Henry, ADR considered as a set of practices that are truly alternatives to the courts for the resolution of disputes. He states that ‘ADR can be ‘alternative’ in one of two senses: because the parties privately choose to avoid litigation (or to terminate it short of judgment), or because legal rules require or permit the courts to send the dispute elsewhere (as on court-annexed arbitration)’. See Lieberman and Henry, above n 3.

‘What is ADR? Traditionally, ADR stands for ‘Alternative Dispute Resolution’. However, this raises some difficulties as the term ‘alternative dispute resolution’ is difficult to pin down. The obvious question is ‘Alternative to what? One possible answer is to say ‘alternative to litigation’. This answer makes the definitional problem easy. Anything other than litigation is a form of alternative dispute resolution. However, this is hardly a useful definition as it is an exclusionary definition and is liable to be too all encompassing. Another possible answer is ‘alternative to the main forms of dispute resolution’ (presumably of which litigation is one). This definition is also susceptible to the criticism that it is an exclusionary one. Further it seems to allow for the situation where a particular form of dispute resolution process is ‘alternative’ at one point of time and not ‘alternative’ at later point merely because it has become more accepted as a form of dispute resolution’. He also suggests that it would better to replace the word ‘alternative’ to be ‘appropriate’. The word ‘appropriate’ in his point view is more accurate as it reflects the present state of affairs. Moreover, it will overcome the problem of categorizing something as ‘alternative’. See Joel Lee Tyebeng, ‘ADR Movement in Singapore’ in Kevin YL Tan(ed), *The Singapore Legal System* (Singapore University Press, 1999)114,115. ADR also is known as additional dispute resolution. See Kenneth Cumbiner, ‘An overview of Alternative Dispute Resolution’ in Nancy F. Atlas and (ed/s), *Alternative Dispute Resolution: The Litigator’s Handbook* (American Bar Association, 2000)1.16. ‘

¹² See Liebermant and Henry, above n3, p.424.

Also see Doug Rendleman, 27 Wm. & Mary L. Rev. 443 (1986) (reviewing Jethro K. Lieberman, ed., *The Role of Courts in American Society: The Final Report of the Council on the Role of Courts* (1984)).

¹³ I.R. Scott, ‘Book Review- ADR: Principles and Practice, Arbitration International’ (1995) Vol. 11 *Kluwer Law International* Iss. 4, pp.459-461.

Liebermant and Henry provide a working definition of ADR. They define ADR as ‘a set of practice and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to courts’. Regarding this definition however, it can be argued that some ADR processes can be costly and delayed comparing to litigation. See Liebermant and Henry, above n 3.

¹⁴ Richard Bell, ‘Dispute Resolution In Abu Dhabi part 1- Litigation is not the only way’(2011) *Clyde &Co LLP*, <<http://www.mondaq.com/article.asp?articleid=151498&print=1>>at 25 April 2014.

It has been said that ‘ADR has not had a uniform definition’.¹⁵ Brunet divided ADR into two types: technical and functional.¹⁶ However, others have defined ADR as ‘dispute resolution processes that involve a third-party intervenor with no authoritative decision-making power whose function is to assist the parties to reach a consensual resolution of their dispute’.¹⁷ Under this understanding, ADR processes can refer to mediation and conciliation, but not to arbitration. Nottage stated that ADR represents two distinct definitions. The first definition is that ‘ADR is the general term for processes by which disputes are resolved outside the court system’.¹⁸ This definition refers to the ideas of Sylvia Emmett, and it is considered as an expansive definition of ADR. The second definition comes from the President of LEADR (Lawyers Expert in ADR), who ‘argue that ADR is restricted to interest-based resolution of disputes by agreement without any element of

¹⁵ This is because ‘some define it broadly to include anything other than formal litigation. Binding arbitration would fall under this definition. Others define ADR more narrowly to refer to voluntary and nonbinding techniques using the assistance of a neutral third party to help resolve disputes between parties. Under such a concept, ADR is a structured settlement process’. See Thomas J. Kelleher, Brian G. Corgan and William E. Dorris, *Construction Dispute: Practice Guide with Forms*, (Aspen Publishers, 2nd ed, 2002) 569. Lieberman and Henry as well claimed that ‘ADR has no generally accepted abstract or theoretical definition’. See Lieberman and Henry above n 3.

Others such as the leading critics of ADR namely, Professor Owen Fiss has defined ADR as the creation of incentives or pressures that force litigants to settle. See Owen M. Fiss, *Out of Eden*, (1985) 94 *Yale L.J.*, 1669-1670.

¹⁶ A technical definition would list and describe the various mechanisms now embraced as alternatives to a conventional trial; under this approach, each ADR mechanism would be considered individually. Such an approach is realistic since ADR is not a unitary concept; for example, arbitration differs greatly from mediation. A technical approach would consider many extra-judicial devices such as mediation, conciliation, negotiation, arbitration, private judging, and mini-trials. Some of these procedures have a lengthy history and have existed as alternatives to court dispute processing for some time. They can operate without direct involvement of the court system. In contrast, the mushrooming concept of court-annexed ADR involves compulsory alternate processes after a lawsuit is filed. Court-annexed ADR often uses the same procedures that characterize voluntary, extra-judicial ADR. These include arbitration, mediation, summary jury trial, mini-trials, and fact-finding by neutral experts. These too would be considered individually under a technical approach to defining ADR’. On the other hand, the functional definition of ADR can represent a reaction to some of the attributes of conventional litigation. See Edward Brunet, ‘Questioning the Quality of Alternative Dispute Resolution’ (1987) 62 *Tul. L. Rev.* 10.

¹⁷ Bobette Wolski, ‘Part I: International and Comparative Aspects of Alternative Dispute Resolution: Recent Development in International Commercial Dispute Resolution: Expanding the Options’ (2001) 13 *Bond Law Review* 2, p. 246.

¹⁸ Luke R. Nottage, ‘Is (International) Commercial Arbitration ADR?’ (2002) 20 *The Arbitrator and Mediator*, pp. 83-92.

third-party determination of legal rights, thus excluding arbitration processes'.¹⁹ More specifically in the context of Islamic legal history, the terms *Sulh* and *Tahkim* refer to forms of ADR such as mediation and arbitration; these concepts have similar objectives to other forms of ADR, that is, to reach a settlement or an agreement between disputants.²⁰

2.2.2 Forms of ADR

There are many different forms and procedures encompassed under ADR, as well as various scholarly categories and classifications of ADR.²¹ For example, Radford divided ADR methods into two categories: first, ADR methods that are designed to replace litigation, such as negotiation and settlement, arbitration, mediation and the use of private judges; and second, ADR methods that are designed to streamline litigation, such as early neutral evaluation, mini-trial, summary jury trials, committees and status conferences.²² Similarly, Carver and Vondra classified ADR procedures into two types: the first is arbitration, which they described mostly as litigation; the second type encompasses a

¹⁹Ibid.

²⁰ Aida Othman, '“And Amicable Settlement Is Best”: *Sulh* and Dispute Resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64-90. The term (*Sulh*) is a settlement grounded upon compromises negotiated by the disputants themselves or with the help of a third party. However, in (*Tahkim*), parties subject themselves to a decision of a third party.

²¹ See Douglas H. Yarn, *Alternative Dispute Resolution: Practice and procedure in Georgia*, (Harrison Co, 2nd ed, 1997 & Supp. 1998-2002). Professor Yarn draw attention to the possible problems that may arise in attempting to classify and define ARD processes because these different methods or techniques may overlap; See also Damien P. Horigan, 10 June 2009, International Commercial Arbitration in the Arabian Peninsula, American University in Dubai, SBA Working Paper 09-004. Horigan includes in his article a number of definitions regarding ADR forms, firstly he states that negotiation consists of the parties to a dispute negotiating to find a settlement either directly or with the help of advisers such as lawyers. Secondly, he mentioned that mediation involves a neutral third-party guiding the parties towards a settlement. Thirdly is arbitration which is normally based on a contractual provision, entails the parties bringing a dispute before an arbitral tribunal consisting of an arbitrator or a panel of arbitrators (usually with three members) that then decides the case in the form of an award, which resembles a judgment from a court. Finally, he described Dispute Review Boards (DRBs) as a neutral with relevant technical expertise will decide a particular issue for the parties. He conclude that the most common forms of ADR for international commercial disputes in the Arabian Peninsula countries would be negotiation and arbitration while mediation seems less common.

²² Mary F. Radford, 'An introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters' (1999-2000) 34 *Real Property, Probate and Trust Journal* 603.

number of forms, including mediation, settlement conferences, summary jury trials and mini-trials.²³ It should be noted that Carver and Vondra proposed an additional category of ADR that they termed ‘hybrids’. An example of the hybrid category is mediation/arbitration (Med/Arb).²⁴ Another approach to categorisation is to identify ADR techniques: for example, techniques that are oriented towards settlement (i.e. mediation) and those that provide an ultimate decision (i.e. arbitration).²⁵ Additionally, another category of ADR techniques encompasses extrajudicial methods, including mediation, arbitration case evaluation, summary jury trials or ‘intra-judicial case management techniques’.²⁶

In tribal Arab society and Islamic legal history, amicable settlement or conciliation (*Sulh*) has been exercised as an ethical and religious method by which disputants can resolve their disagreements. Initially, ‘Within the framework of tribal Arab society, chieftains (*Shaykhs*), soothsayers and healers (*Kuhha’n*), and influential noblemen played an indispensable role as arbiters or mediators in all disputes within the tribe or between rival tribes’.²⁷ However, since the establishment of Islamic policy, the role of the chieftains has been diminished.

²³ Todd B. Carver and Albert A. Vondra, ‘Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does’ (May- June1994) *Harvard Business Review*, p.122.

²⁴ Ibid, p.122. (Mediation/Arbitration) is an ADR form contains two stages, the first stage is mediation and the second is arbitration. If the dispute cannot be settled through mediation then binding arbitration will be the method for resolution. Other examples of ‘hybrid’ methods are nonbinding arbitration, bracketed arbitration, final-offer arbitration and med-arb. See Francisco Orrego Vicuna, ‘Arbitration in a new international alternative dispute resolution system’ (2002) 57 *Dispute resolution journal* 2, p.64.

²⁵ Carrie Menkel-Meadow, ‘Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR’ (1997) 44 *UCLA L. Rev.* 1613.

²⁶ Penny J. White, ‘Yesterday’s Vision, Tomorrow’s Challenge: Case Management and Alternative Dispute Resolution in Tennessee’ (1996) *U. MEM. L. Rev.* 958. ‘The recommendations of the Commission demonstrated that consideration of alternative means for resolving disputes must focus not only on popular extrajudicial methods, such as mediation, arbitration, case evaluation, and summary jury trials, but must include intra-judicial case management techniques as well’.

²⁷ Othman, above n 20, pp. 64-90. She explains that ‘(*Sulh*) is a legal instrument that intended not only for the purpose of private conciliation among individuals and groups in lieu of litigation; it is also the procedural option that could be resorted by a (*Qadi*) within the context of his courtroom, for judges can defer disputants to mediation before trying their case or at any stage of trial’. The term (*Qadi*) in Islamic legal system is referring to a judge.

The authority of people and their customs to solve disputes has been shifted onto the hand of the representative of the central Islamic government. A good example of this shift in arbitral authority is the report that appears in a number of early sources in the Islamic legal tradition: ‘Two men brought their dispute to *Ubayda* and he said: Do you appoint me as a ruler (*Tu’ammirana*) over both of you? They said yes. He then judges between them.’²⁸

Leaving aside arbitration itself, parties can benefit from ADR forms or procedures for two reasons. The first reason is that, as long the parties have agreed, the parties are not required to include in their contract a provision to settle their dispute using ADR. The second reason is that the ADR can be used at any time or any stage of a dispute. ‘However, if the parties wish to insist on ADR as a pre-condition to arbitration or litigation, there must be a specific clause in the contract to that effect’.²⁹ This leads to the so-called Med/Arb formula, where parties agree that their dispute will be resolved through mediation and then arbitration.³⁰ This formula can be implemented in either direction: it can begin with mediation, and if unsuccessful, move to arbitration; or it can begin with arbitration and mediation can be used during some stage of the process.³¹ The mediator appointed by the parties can act

²⁸ Ibid, pp. 64-90, ‘Ibn Sirin(d.110/728) remarks at the end of his report in the *Tabaqat of Ibn Sa’d* that it was as if ‘Ubayda’ viewed the amir (ruler) as having an authority or jurisdiction in this matter that neither the (Qadi) nor anyone else had’.

²⁹ Bell, above n14.

³⁰ Mauro Rubino-Sammartano, *International Arbitration Law and Practice*(Kluwer Law International, 2nded, 2001).

³¹ Paul E. Mason, ‘The Arbitrator as Mediator, and the Mediator as Arbitrator’ (2011) 28 *Journal of International Arbitration (Kluwer Law International)* 6, p.541-551; Also See David C Elliott, Med/Arb: Fraught with Danger or Ripe with Opportunity?,(1996) 62(3) J. Chartered Inst. Of Arb.‘He described the potential forms of hybrid as follows: An increasing number of variations on med/arb process are emerging: mediate first and if mediation fails, arbitrate; start arbitration proceedings and allow for mediation at some point during the arbitration; mediate some issues and arbitrate others; mediate, then arbitrate some unresolved issues, then return to mediation; mediate, if unsuccessful ask for an ‘advisory opinion’ by the mediator which is binding as an award unless either party vetoes the opinion within a limited period of time. Another med/arb variation growing in popularity is mediation, if unsuccessful, followed by a final offer by each side, coupled with limited argument, following which the mediator turned arbitrator must choose one or other of the offers’.This quotation can also be found in Oghigian’s article,The mediation/arbitration Hybrid, (2003) 20 *International Arbitration Kluwer Law International* 1, pp.75-79.

subsequently as the arbitrator. Parties can benefit from Med/Arb because the time spent on mediation, in fact, is not wasted in the event that one party has to resort to arbitration.

Another widely used term, related to a certain extent to Med/Arb, is *Medaloo*.³² In this regard, if the results of Med/Arb are unsuccessful, then each party should submit to the mediator its final offer. Each offer should include, first, an authorisation for the mediator to choose one of the offers provided by the parties, and, second, an agreement that the parties will be bound by the mediator's selection.³³

2.2.3 Issues in ADR

While a wide range of ADR mechanisms are used by practitioners to settle disputes, the forms of dispute are also various. For example, they can include neighbourhood, family, business, consumer, employment and community disputes. Selecting a type of ADR process is dependent to a large extent on the nature of the dispute.³⁴ According to Astor and Chinkin:

Occasionally, disputants choose an ADR process or a combination of ADR processes; however, the important thing is to find the type of ADR that is most likely to resolve the dispute. As stated by Astor and Chinkin, there are a number of factors shall be considered when selecting a process including the nature of the dispute; the timing of the dispute and whether there is a need for a speedy determination or for greater flexibility over a longer time frame; the value of the claim; the factual or legal complexity of the dispute; the need or desirability for an authoritative ruling with precedential effect; the objectives of the parties; the

³²'Medaloo' is a short for mediation and last offer arbitration. See Winston Stromberg, 'III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes' (2007) 40 *Loy. L.A. L. Rev.* 1337; and see James T. Peter, 'Med-Arb in International Arbitration', (1997) 8 *AM. REV. INT'L ARB.* 83.

³³*Ibid*, p.83.

³⁴See Hilary Astor and Christine M Chinkin, *Dispute Resolution In Australia*, (Butterworths, 1992) 188.

'A correct diagnosis followed by an appropriate intervention will lead to productive dispute resolution management at worst, and effective dispute resolution at best. An incorrect diagnosis leads to a non-productive outcome at least, and destructive conflict at worst'. See David Spencer and Tom Altobelli, *Dispute Resolution in Australia Cases, Commentary and Materials*, (Law Book Co, 2005) 45.

nature of the relationship between the parties, including any power imbalance between them; the ability of the parties to negotiate without third party assistance; resources available for resolution of the dispute; the number of parties to the dispute; whether or not the parties have a continuing relationship; the need or desirability for privacy.³⁵

Nevertheless, a number of issues, both ethical and legal, are raised in the scholarship. The following discussion uses mediation as the typical form of ADR, and it must be emphasised that not all the issues raised will be equally relevant in all types of ADR. However, most of the literature in this area also uses mediation as its representative example of ADR. The following discussion relates to issues of confidentiality, the liability and immunity of a neutral third party and the enforceability of the settlement agreements or clauses.

The first legal issue involving the ADR process is the extent to which the confidentiality of ADR proceedings is protected by the non-disclosure of documents and statements. In mediation, for example, a number of reasons underlie the importance of confidentiality. First, confidentiality could be an essential factor for the parties engaged in the ADR process, especially if the dispute is related to trade secrets. Confidentiality could also be a significant factor in assessing the effectiveness of an ADR process. Consequently, the failure to respect confidentiality might cause the parties to doubt the mediators' neutrality and impartiality and discourage them from disclosing relevant facts or interests.³⁶ Thirdly, a mediator might not proceed in conducting the process, particularly in a situation where he or she is required to disclose his or her statements during the mediation process.

³⁵Ibid, p. 188.

³⁶Ibid, p.179. Parties expect that the information disclosed in an ADR process shall not be use subsequently in the courtroom otherwise; they will not be encouraged to participate in such procedures.

However, others have advanced persuasive arguments against the maintenance of the confidentiality of the process. It has been said that confidentiality might affect the third party's interests.³⁷ Further, if confidentiality is safeguarded, there is a high probability that misconduct on the part of a mediator would be prevented and not investigated. Finally, the level of effectiveness of the service provider organisation's ADR process can be affected in the situation that they must maintain strict confidentiality.³⁸

Other problems also can be associated with confidentiality in mediation and need to be answered, such as the commencement of mediation, whether the mediation will involve preliminary conference or discussion, when the mediation will conclude, and whether there will be a follow-up procedure in case of failure of mediation. In general, it is argued that in some forms of mediation, confidentiality is too complex and challenging to be an absolute requirement; moreover, there are no statutory requirements for confidentiality.³⁹

³⁷Ibid, p.179. 'For example, information may emerge at mediation of the commission of criminal offences, or of a situation adverse to health or safety of party or third party'.

³⁸Process and problems facing mediator or a member of staff shall be discussed with well experienced organization member for the purpose of the development of best practices and policy.

³⁹Astor and Chinkin, above n 34, p.181. 'Claims for disclosure of what took place during mediation may be countered by statute or Rules of Court, common law principles of evidence, tort or contract, or codes of conduct. The piecemeal growth of mediation through the different courts at both state and federal level and its application in particular types of dispute means that there is no single blanket statutory provision and the extent of confidentiality is a matter of construction and interpretation of the applicable statute'.

'This mediation is confidential in so far as the law allows'. See Tania Sourdin, *Alternative Dispute Resolution*, (Thomson, 3rd ed, 2008) 241. For examples of statutory provisions and Rules of Court in Australia see section 53B of the Federal Court Act 1976(Cth) and section 110P of the Supreme Court Act 1970(NSW). Both statutes provide that 'evidence of anything said, or of any admission made, at a conference conducted by an approved mediator acting as such mediator, is not admissible in any court or in any proceedings'. The purpose of section 53B and 110P is to meet the desire to maintain confidentiality of mediation and to limit the disclosure of any information that can be presented in any further procedures. However, the difficulty to maintain confidentiality can appear on confidentiality in family case specially if there is ill-treatment or risk of harm to children. Another issue is in the case where parties enter into a contract to a dispute resolution process with confidentiality clause in the agreement. In this situation, a question raises that whether these agreements can be enforced? The answer can be found in arbitration case of *Esso Australia Resources Ltd v Plowman*. See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

Another controversial legal issue regarding dispute resolution concerns the liability and immunity of the mediator or arbitrator (the neutral third party). In this regard, a neutral third party has immunity protecting him or her from being sued. However, this immunity is not absolute, which means that there is a likelihood that proceedings will be brought against the third party in a situation of breach of contract or negligence. The basis of the neutral third party's immunity can be provided by statute or contract.⁴⁰ Because there are grounds to the proposition that the neutral third party should have immunity, it seems appropriate that participants should have the right to proceed against the neutral third party in certain circumstances, particularly misconduct.⁴¹ On the contrary, the level of immunity for arbitrators is high, and is supported by public policy. Thus there is no possibility that proceedings will be brought against an arbitrator for either negligence or breach of contract; however, an arbitrator can be sued for fraudulent behaviour.

A further legal concern regarding ADR procedures is the enforceability of the settlement agreements or clauses. Two issues can be raised in this context: first, the enforcement of the agreement or clause by the court,⁴² and second, the level of certainty that must be included

⁴⁰Ibid. For instance, s19 of the *Family Law Act 1975*(Cth) provide that family and child mediator or an arbitrator, when performing those function, has the same protection and immunity as a judge of the Family Court. However, it should be noted that this extensive immunity can be limited according to some other legislation that limits mediator immunity. Therefore, mediators have protection or immunity for acts done in good faith in the performance of their legislative duties. Additionally, contractual immunity can be guaranteed for neutral third party when he/ she enter into a mediation agreement with the parties prior to the commencement of mediation.

⁴¹For more information regarding the debate and argument for and against mediator immunity, see Astor and Chinkin, above n.34, pp.190-192. One main argument against mediator immunity is that mediators do not make binding decisions like a judge or an arbitrator does, therefore, there should be no need for immunity.

⁴²'There have been a number of cases where settlement agreements resulting from a dispute resolution process have sought to be overturned'. See David Spencer, *Principles of Dispute Resolution*, (ThomsonReuters, 2011)293.

within such a clause.⁴³ These two questions result from the uniformity of the model clauses provided by a number of dispute resolution institutions, as will be discussed later on.

The broad diversity of the practices of ADR and those who participate in the field—either users or practitioners—can raise issues of ethical standards.⁴⁴ There have been a number of debates about the need for standards or guidance concerning practitioners' competences⁴⁵ in different jurisdictions, such as Australia, the US, Canada and the UK.⁴⁶ Focusing on the mediation process and the mediator, two main issues need to be addressed: the first is related to the practice of mediation, and the second is about mediator behaviour.⁴⁷ A significant ethical issue concerns conflict of interest due to a prior relationship between the mediator and disputants.⁴⁸ According to Astor and Chinkin,

conflicting interests are usually ascertainable as a threat to neutrality when they involve a current relationship between the mediator and a party, for example, a pecuniary relationship where the mediator is an associate of any legal counsel

⁴³Ibid, p. 242. It should be noted that in the situation that there is a vague or uncertain term in an agreement with regard to its meaning, it is possible that the court may declare that the term does not give rise to a binding agreement.

⁴⁴ Spencer and Altobelli defined ethics in relation to ADR process as 'moral principles that is, what is right and what is wrong, whereas practice standards encompass practical responses to moral principles'. See Spencer and Altobelli, above n 34, p.456.

⁴⁵Ibid, p.471. 'A mediator must not mediate unless the mediator has the necessary competence to do so and to satisfy the reasonable expectations of the parties. A person who agrees to act as a mediator holds out to the parties and public the public that she or he has the competence to mediate effectively'.

⁴⁶ The standards of ADR can be developed in several ways including qualifications, completion of a training course and having accreditation scheme. The aim and objective of the standards is to have a better quality mediator and mediation practice. For example, in Australia, The Mediator Standards Board (MSB) has liability to develop a mediator standards and implement the National Mediator Accreditation System (NMAS). For more discussion about the need for standards for mediator and mediation practice, See Astor and Chinkin, above n 34, pp.204-205; Spencer, above n 42, pp. 203-220; See Sourdin, above n 39, p.241.; See Spencer and Altobelli, above n. 34, p.45; National Alternative Dispute Resolution Advisory Council (NADRAC), *The development of Standards for ADR: Discussion Paper*, 2000, NADRAC, Canberra; see also National Alternative Dispute Resolution Advisory Council (NADRAC), *Report to the Commonwealth Attorney-General: A Framework of ADR Standards*, 2001, NADRAC, Canberra; also National Alternative Dispute Resolution Advisory Council (NADRAC), *Primary Dispute Resolution in Family Law: A Report to the Attorney General on Part 5 of the Family Law Regulation*, 1997, NADRAC, Canberra at 8.

⁴⁷ The first issue in relation to the practice can include the requirement of confidentiality, costs and fees disclosure, information participants about the nature of mediation and the role of the mediator, conflicts of interest and independent advice and counsel. However, the second issue in relation to the mediator behavior can include neutrality, fairness and impartiality. See Astor and Chinkin, above n 34, pp.224-231.

⁴⁸Ibid. For instance, mediator and parties who live in small and remote areas have more chances of such relationship and limited choices of mediators.

retained by either of the party. Prior relationships are also included. For example, none of the parties should have been a client of a lawyer, social worker or counsellor-mediator; nor should either of the parties have had a previous business or social contacts with the mediator. Some future relationships may also be prohibited. Certainly some codes specify that the mediator must not use the mediation to solicit or encourage future professional services from a party.⁴⁹

Most ethical guidelines have requirements regarding conflicts of interest and prior relationships with a mediator; an equally important requirement is that the mediator must be impartial.⁵⁰ This means that the mediator must be independent and have no interest in the outcome. It would be rare that a mediator would enter into a mediation process without any experiences that might touch her or his position on the dispute and the parties.⁵¹

Another associated issue is fairness. In this regard, some codes of ethics require the mediator to keep his or her eye on the fairness of the process and also the fairness of the

⁴⁹Ibid, pp. 226-227.

SPIDR's Ethical Standards provide that 'The neutral must refrain from entering or continuing any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interests and any circumstances that may reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation throughout the process'. See, SPIDR, *Ethical Standards of Professional Responsibility*, 1996; SPIDR, *American Bar Association and American Arbitration Association, Model Standards of Conduct for Mediators*, 1994.

The Law Council of Australia's Ethical Standards provide that 'Before the mediation begins, the mediator must disclose all actual and potential conflicts of interest known to the mediator. Disclosure must also be made if conflicts arise during the mediation. After making disclosure the mediator may proceed with the mediation if all parties agree and the mediator is satisfied that the conflict will not preclude the proper discharge of the mediator's duties. After the mediation the mediator must not behave in such a manner as to raise legitimate questions about the integrity of the mediation process'. The NSW Law Society Guidelines stipulates that 'In particular a mediator who is a partner or an associate of any legal counsel retained by either of the parties should not act as the conciliator or mediator without the fully informed consent of all the parties'.

⁵⁰ Impartiality has been defined by New South Wales Law Society Guidelines and the 1986 SPIDR Standards as 'freedom from favoritism or bias in word or action and that the mediator must maintain a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement. Neutrality requires the mediator to withdraw if the mediator believes or any of the parties' states, that the mediator's background, personal experiences or relationship would prejudice the mediator's performance or detract from her or his impartiality'. See Astor and Chinkin, above n 34, p.228.

⁵¹Ibid, p. 228. A good example is in the case of *Koppen v The Commissioner for Community Relations* (1986) EOC 92-173. However, it has been said that the neutrality and impartiality of a mediator can be tested in the situation that there is a significant power imbalance between parties. Whether or not the mediator perceives that a power imbalance exists may depend on her or his opinion and attitudes.

agreement.⁵² These requirements however, impose two contradictory ethical principles of impartiality and fairness. It has been said that the most challenging ethical issues in mediation are those where there are competing ethical principles and the mediator must decide which should take priority.⁵³

To sum up, ADR procedures such as mediation involve a number of legal and ethical issues that can affect its effectiveness and efficiency as a dispute resolution mechanism in solving international commercial disputes. The following section will briefly assess various dispute resolution methods, including litigation, mediation and arbitration, to determine which is likely to be most effective and appropriate in solving international commercial disputes.

2.2.4 The Modern ADR Movement and the Need for More Efficient and Effective Alternatives to Litigation

The purpose of the contemporary movement in favour of ADR is to influence business and legal decision makers in their perceptions of the best ways to resolve legal disputes.⁵⁴ For instance, the movement towards ADR initiated in the US in the 1970s occurred in response to a need to find more efficient and effective alternatives to litigation.⁵⁵

⁵² Georgia Rules of Court Annotated, Alternative Dispute Resolution Rules, 1997; Kansas Court Rules, Relating to Mediation, Rule 903, Ethical Standards for Mediators.

⁵³ Bernard Mayer recognises a significant element of this problem- where there is a conflict between an ethical principle of mediation and the interests of third parties or society: The ethical dilemma that faces mediators working in a number of different areas is how to maintain the integrity of the mediation process which is based on the assumption of mediator neutrality, without letting the process be used to violate important interests of the community or of interested but unrepresented parties'. See Astor and Chinkin, above n 34, p.230.

⁵⁴ Deborah R. Hensler, 'Our Courts, Our Selves: How the Alternative Dispute Resolution Movement Is Reshaping our Legal System' (2003) 108 *Penn State Law Review*, 166.

⁵⁵ Amy J. Cohen, 'Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal' (2006) 11 *Harv. Negot. L. Rev.* 295.

The modern ADR movement has seen a series of different positions taken by judges, scholars and business professionals. For example, judges have accepted ADR as a way to reduce court delays; scholars have been attracted to ADR because it is an appropriate means of providing access to justice;⁵⁶ and business professionals prefer ADR because of the delays and high costs of litigation.

2.3 Criteria for Determining the Effectiveness of Dispute Resolution Processes

2.3.1 Introduction

There are various methods of solving international disputes that fall under the category of ADR, of which litigation, arbitration and mediation are only three examples.⁵⁷ For reasons of space, it is not possible to discuss them all here; instead, only these latter three selected examples are analysed and compared. The comparative analysis will rely on a number of features of what constitutes an effective dispute resolution method. As stated above, the argument of this chapter is that arbitration is the most effective method of resolving international business disputes, but to substantiate this claim it is necessary to first articulate what is meant by the term 'effective'.

⁵⁶ Peter S. Adler, 'The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement' in Sally Engle Merry and Neal A. Milner(ed), *The possibility of Popular Justice: A case Study of Community Mediation in the United States* (University of Michigan Press, 1995)67. On the other hand, there is who argue ADR is not well defined therefore it appears that some people have joined the ADR movement, without regard for its purposes or consequences. Edwards claims that some people joined ADR because they look at it as a fast and sometimes interesting way to make a buck; they promote it as a way to serve the poor etc. He conclude that 'if the ADR movement prominently reflects such thinking then it is unclear whether the movement is a panacea for, or is anathema to, the perceived problems in our traditional courts systems'. See Harry T. Edwards, 'Commentary: Alternative Dispute Resolution: Panacea or Anathema?' (1985) 99 *Harv. L. Rev.* 668-669.

⁵⁷ In this thesis I will use ADR in broader sense which means that it will include any dispute resolution methods other than a court proceedings(litigation). It includes binding dispute resolution methods such as arbitration and non-binding dispute resolution methods such mediation.

As stated by Okekeifere, ‘an effective dispute resolution method is one that produces result, not just well-conducted or well-favoured proceeding or formula’.⁵⁸ Accordingly, Okekeifere specified that an effective dispute resolution method shall have the following features: speed of proceedings, affordability, possibility of expert adjudication, flexibility and certainty, confidentiality, aiding of international business, accommodation of third-party interests, aiding the growth of the law, public policy restrictions and ease of enforcement.⁵⁹ Similarly, Wang claimed that in order to determine whether ADR methods are superior to litigation in settling international disputes, it is important to take into consideration a number of factors, including costs, speed of resolution, confidentiality, best interests for both parties, flexibility, perceived fairness, effectiveness and impact on continuing business relations.⁶⁰

The criteria mentioned above for effective dispute resolution may assist in determining the effectiveness and thus the choice of a particular dispute resolution method. The arguments for and against various ADR mechanisms and the factors that contribute to effective dispute resolution will be applied to the comparative analysis of different dispute resolution mechanisms to substantiate the claim that arbitration is likely to be the most effective dispute resolution method in the resolution of international commercial disputes. The following section will first compare arbitration with litigation, then with mediation. The factors used in this comparative assessment will be speed of proceedings, affordability, possibility of expert adjudication, flexibility and certainty, confidentiality, aiding of

⁵⁸ Andrew I. Okekeifere, ‘Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a myth?’, (1998) 15 *Journal of International Arbitration* (Kluwer Law International), pp.81-106.

⁵⁹ Ibid.

⁶⁰ Margaret Wang, ‘Are Alternative Dispute Resolution Methods Superior to Litigation In Resolving Dispute in International Commerce?’ (2000) 16 *Arbitration International* (Kluwer Law International) 2, pp. 198-212.

international business, accommodation of third-party interests, aiding the growth of the law, public policy restrictions and ease of enforcement.

2.3.2 Comparing Arbitration and Litigation

2.3.2.1 Speed of Proceedings

It is a common desirable feature of conducting any business that disputes are resolved speedily. Therefore, speed is a necessary feature of effective and efficient dispute resolution methods. This logically means that any dispute resolution method that involves delays would be considered ineffective, as such delays can cause economic or commercial losses. Since its early development, arbitration has presented the advantage of being a very rapid process and thus a natural choice for disputants, while litigation has been accompanied by the concern of delay.⁶¹ For example:

In most jurisdictions (especially those where trials are held without a jury), once a judge sitting over a case alone dies or is transferred, the entire proceeding, however far it had gone, starts *de novo* to enable the new judge to observe the witnesses, etc. Most arbitrations are conducted by more than one arbitrator (i.e. by a tribunal), and if a member of the tribunal dies or is removed, proceedings may not need to be repeated.⁶²

A number of arbitral institutions, such as the ICC and the American Arbitration Association (AAA), permit in their procedural rules the continuance of arbitration proceedings and the arbitral tribunal's activities if the tribunal is truncated.⁶³ Arbitration proceedings can be

⁶¹ Stephen A. Hochman, 'Judicial Review to Correct Arbitral Error- An Option to Consider', (1997) 13 *OHIO ST. J. ON DISP. RESOL.* 103-104; see also Bashar H. Malkawi, 'Using Alternative Dispute Resolution Methods to Resolve Intellectual Property Disputes in Jordan', (2012) Vol. 43 *California Western International Law Journal* No. 1, p. 145.

⁶² Okekeifere, above n 58.

⁶³ For example, Article 15 (4) of the ICC 2012 stipulates that 'When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal'. Also, Article 15 (5) provides that 'Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the

continued with a majority of the arbitrators, which can solve the critical issue of delays and offers an advantage to both the parties and the tribunal in saving the time, and to the parties in saving the cost of repeating the proceedings.

Another consideration in choosing ADR is the delays involved in litigation, as the courts may have a huge number of cases. In California, '[i]t has been estimated that, extrapolating current rate of growth in the number of cases being filed in the federal courts, by the year 2010 we can expect over 10 million cases to be commenced in the federal district courts each year'.⁶⁴ Therefore, arbitration as an alternative dispute resolution method is considered as an option for reducing the heavy caseload of the courts.⁶⁵ For instance, it has been submitted that arbitration is one proposal for reducing the civil caseload in Colorado.⁶⁶ While this example shows the benefit of arbitration to the state authorities rather than to the business entities that may be parties to a dispute, it also indicates that it would be impractical for commercial parties to resort to a method such as litigation that has the feature of delay and may cause them economic or commercial losses.

In favour of the speed of proceedings, arbitration rules in most countries prescribe time frames within which arbitration proceedings must be concluded. For example, the UNCITRAL Model Law along with most international, institutional and/or ad hoc arbitration rules stipulate six months from the commencement of the arbitration

Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances'. See The ICC Arbitration Rules 2012, Art. 15 (4) and (5).

⁶⁴ See F. Sander, 'Varieties of Dispute Processing: Proceedings of the Pound Conference', (1976) 70 *F.R.D.* 79.

⁶⁵ Di Jiang- Schuerger, 'Perfect Arbitration=Arbitration+Litigation?' (1999) 4 *Harv.Negot. L. Rev.* 231.

⁶⁶ For instance, it has been submitted that arbitration is one proposal for reducing the civil caseload in Colorado. See Thomas E. Cronin and Robert D. Loevy, *Colorado Politics & Government: Governing the Centennial State*, (University of Nebraska Press, 1993) 248. The proposal for reducing the civil caseload in Colorado can be observed in other regions or countries as well.

proceedings. In most arbitrations, the time frames prescribed by the rules can be achieved in practice, while the time frames of litigation proceedings can last up to two years or more.⁶⁷

In summary, the issue of delay in arbitration has been taken into consideration in most current arbitration rules; therefore, arbitration proceedings, particularly institutional arbitrations, are less time-consuming than court proceedings.⁶⁸ In contrast, delays in procedures are considered a feature of litigation, which makes arbitration a more effective method of dispute resolution.

2.3.2.2 Affordability

Costs of dispute resolution are dependent on a number of factors, and may include court fees, lawyer fees and additional costs beyond a party's control.⁶⁹ Parties to a dispute can sometimes pay substantial legal fees; this raises the issue of affordability.⁷⁰ The proceedings of litigation and arbitration require disputants to pay either court fees or arbitration fees on top of their lawyer fees. In most countries, especially developed countries, litigation is expensive due to the high costs of initiating the proceeding and the high rates charged by lawyers.⁷¹

⁶⁷ As stated by Solomon, 'litigation is governed by rigid procedural rules that foster delay'. See Gus J. Solomon, 'Alternative Methods of Dispute Resolution' (1984) 2 *Preventive L. Rep.* 181.

⁶⁸ Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration*, (Oxford University Press, 2nd ed, 2010) 130.

⁶⁹ For example, if the losing party decide to submit an appeal.

⁷⁰ Okekeifere, above n 58.

⁷¹ 'The procedural aspects of a case can take months and even years, and because a substantial element of lawyer's fee is the time expended and the difficulty of the issues involved, lawyers normally have no incentive to simplify the necessary to achieve an early decision'. See Solomon, above n 67, p. 181.

There are a number of issues associated with the difficulties and costs of litigation, including, among others, the court's jurisdiction and the language of the court. In litigation, the court usually has a limited jurisdiction over which its authority extends; therefore, it can be difficult to move proceedings away from their original venue if required, because the jurisdiction of the court cannot be extended.⁷² Moreover, the language of the court can sometimes result in an expensive or difficult litigation, especially if the litigating parties are from different jurisdictions. A foreign party will be required to translate any documentation originally in a language other than that of the court, costing that party additional expense and time. In the Gulf Arab Region, for example, investors in developed countries involved in litigation may face difficulty and additional costs because they are required to translate their documents or submissions into Arabic, the official language of the region, while the citizen party may not face these same additional costs.

Arbitration proceedings, however, are less expensive than court fees for litigation.⁷³ Arbitral institutions have taken into consideration the issues of difficulty and cost in proceedings. Arbitral institutions have as their main goal to provide an alternative to litigation to reduce the costs of dispute proceedings, as well as to facilitate arbitration proceedings. For instance, Article 22(1) of the 2012 ICC rules 'imposes on the arbitral tribunal and the parties a new duty to make every effort to conduct the arbitration in an

⁷² The laws relating to jurisdiction of courts in a country are not made keeping in view the transnational disputes. Normally, they are designed to resolve domestic disputes, that is, disputes arising between two citizens of the same country. See Vinod K. Agarwal, 'Alternative Dispute Resolution Methods', No 14 Paper written following a *UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution* (Harare, Zimbabwe 11 to 15 September 2000).

⁷³ 'A less costly alternative to court is arbitration in other words, private adjudication. Like court, arbitration is a rights procedure in which the parties (or either representatives) present evidence and arguments to a neutral third party who makes a binding decision. Arbitration procedures can be simpler, quicker, and less expensive than court procedures. Formal rules need not be followed, strict time limits can be agreed to, and restrictions can be placed on the use of lawyers and of expensive evidence discovery procedures. Arbitration has long been used to settle a variety of disputes'. It has been argued that arbitration settle even international disputes. See William L. Ury, Jeanne M. Brett and Stephen B. Goldberg, 'Designing an Effective Dispute Resolution System' (1988) Vol. 4 *Negotiation Journal* Iss. 4, pp. 423-424.

expeditious and cost-effective manner, having regard to the complexity and value of the dispute'.⁷⁴ The duty of the parties is confirmed by Article 37(5), which specifically authorises the arbitral tribunal to consider in its decision the extent to which each party has complied with its general duty.⁷⁵

Moreover, arbitration has two distinct advantages related to the issue of difficulty and affordability. First, there are no appeals in arbitration, and thus the order is final, saving the time and costs associated with this process in contrast to litigation.⁷⁶ Second, arbitration allows parties to agree on the language or languages of arbitration proceedings and awards. Therefore, there is no possibility for parties to argue against the procedures and/or awards on that basis.⁷⁷ This reduces the cost of arbitration proceedings in comparison to court proceedings. Overall, arbitration is more affordable than litigation, especially in solving international commercial disputes.

⁷⁴The ICC Arbitration Rules 2012, Art.22 (1). Also, there are other provisions in the ICC arbitration rules of 2012 which aim to reduce the cost of arbitration process. These provisions will be discussed in detailed in Chapter 5.

⁷⁵ The new rules of ICC of 2012 have introduced new procedural mechanisms and principles, including case management techniques focused on time and costs. There are new provisions regarding the appointment and availability of arbitrators; several updates and additions relating to the conduct of the proceedings to make them more efficient and cost-effective, including provisions on which arbitrators will be able to rely to sanction a party's delaying tactics when allocating costs between the parties; and Indication of the timescale for the issuance of the award. See, Frederic Gillion, 'Impact of the new ICC Rules (2012) on the management of construction arbitration cases', *Fenwick Elliott*, No date, <http://www.fenwickelliott.com/files/fred_gillion_-_eic_june_article.pdf> at 15 May 2013.

⁷⁶ The principle of finality of arbitration is an important aspect that contributed significantly in enhancing its popularity. It is widely accepted in most of the institutional rules globally. However, the only way to against an international arbitral award is to submit an application to set aside the award. See Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2010)23.

⁷⁷In most arbitral institutions the provision of the language of arbitration agreed that the arbitral tribunal shall determine the language or the languages of the arbitration in the absence of parties' agreement, taking into consideration all circumstances, including the language of the contract. See the ICC Arbitration Rules 2012, art. 20.

2.3.2.3 Possibility of Expert Adjudication

Another consideration favouring the use of arbitration is that parties to arbitration have the right to appoint their arbitral tribunal.⁷⁸ Most international arbitral institutions have pre-existing lists of experts and qualified arbitrators. In practice, arbitral institutions favour the appointment of lawyers; the arbitral tribunals chosen by arbitral institutions usually are lawyers for the reason that the arbitration process involves the determination of essential legal issues such as jurisdiction and interpretation. However, in a situation that involves technical or industry knowledge or expertise that the lawyer-arbitrator would not possess, and where this knowledge is required, this can be resolved by the appointment of expert witnesses. Therefore, the members of the arbitral tribunal appointed by the parties may be specialists in the relevant field or fields who would be able to identify the problem and achieve a reasonable and satisfactory resolution of the dispute. In comparison, parties in court litigation are not able to appoint their judges for the simple reason that it is the court's right to do so. Judges who belong to non-specialist courts are not necessarily

⁷⁸*Ad hoc* or institutional arbitration offers a wide range of options to its users. In *Ad hoc* arbitration, parties can have full control over the arbitration proceedings. Moreover, they can choose rules that allow them to appoint their arbitrators. On the other hand, institutional arbitration, such as the ICC and the LCIA, offer rules of the appointment of the arbitral tribunal. For example, in the ICC, parties can appoint their arbitrator, but unless they agree on the contrary the chair person will be appointed by the institution. In this regard, it should be mentioned that 'the ICC Rules provide that chairpersons are appointed by the institution. Yet, on the 337 chairs appointed in 2009, 21 were selected by the parties and 172 by the co-arbitrators, representing 57% of the total of appointments. The percentage of chairs appointed by the parties or the co-arbitrators (as opposed to those appointed by the Court) was 58.7% in 2007 and 57.3% in 2008. In almost 60% of the cases, the parties therefore agreed to depart from the default rule providing for an institutional appointment, which seems to indicate a strong willingness to retain some degree of control over the constitution of the arbitral tribunal. The LCIA is equally interesting, as its rules provide for the appointment of all arbitrators by the LCIA Court. Its figures are all the more telling that the LCIA is well-known for the high quality of its appointments. During the course of 2009, the LCIA Court made a total of 502 individual appointments to a total of 220 tribunals. Of these 502 individual appointments, 199 were made by the parties, 54 chairs were appointed by the co-arbitrators, and the remaining 249 were made by the LCIA Court: in more than 50% of the cases, the parties thus agreed to depart from the institutional appointment in spite of the impeccable reputation of the institution'. See Alexis Mourre, CastaldiMourre & Partners, 'Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration', *Kluwer Arbitration Blog*, 5th October 2010, <<http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>> at 18 June 2013.

knowledgeable in dealing with certain cases, especially cases that involve technical issues. Indeed, it is evident that a judge cannot be knowledgeable in all fields; therefore, it would be unrealistic for a judge alone to be able to achieve a satisfactory resolution in a technical or complex dispute.⁷⁹

The decision of choosing the arbitral tribunal in arbitration proceedings is a very significant one. Indeed, in a number of arbitration cases, parties have failed to prescribe clear and relevant qualifications for their likely arbitrators. Therefore, in order to benefit from this potential advantage of arbitration, it is recommended that parties should include in their arbitration agreement and/or clause clear and relevant prescriptions for the qualifications of their likely arbitral tribunal.⁸⁰

2.3.2.4 Flexibility and Certainty

A significant requirement for an effective dispute resolution method is its flexibility, which can be seen to be a feature of arbitration but not litigation. There are many circumstances in which arbitration provides its users with great flexibility. These include the flexibility to choose the substantive and the procedural laws, the flexibility to choose the place or seat of

⁷⁹‘Modern business-to-business dealings involve increasing complex interactions coupled with many technical and sophisticated subject areas. Judges are wonderful generalists and are indeed capable of learning about a case in a short period of time. Still, the advantage of having a neutral mediator or arbitrator, expert in the field, with years of experience on the subjects involved in the dispute is obvious’. See The National Arbitration Forum (FORUM), *Business-to-Business Mediation/Arbitration vs. Litigation: What Courts, Statistics & Public Perceptions Show About, How Commercial Mediation and Commercial Arbitration Compare to the Litigation System*, (2005).

⁸⁰ As stated by Salomon, the selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding. There are five factors should be considered at the time of selecting an arbitrator in an international arbitration, which are choose an arbitrator with legal and professional expertise, choose an impartial but known party-appointed arbitrator and a neutral presiding arbitrator, choose an arbitrator who manages people well, choose an arbitrator who demonstrates communicative proficiency and juridical open-mindedness and choose an arbitrator with a manageable caseload. See Claudia T. Salomon, ‘Selecting An International Arbitrator: Five Factors To Consider’ (2002), 17 *MEALEY’S International Arbitration Report* 10, pp.1-4.

arbitration and the flexibility to choose the language of the proceedings.⁸¹ An additional example of the flexibility of arbitration is the ability of parties to alter the procedural, discovery and evidentiary rules in certain circumstances.⁸²

The flexibility of arbitration can also be found in its potential for saving unnecessary time and expenses. For instance, a number of expensive processes can be limited in arbitration, including the process of discovery, the number of witnesses and the time taken for the hearing.⁸³ In litigation, however, flexibility is not used to its full extent as an important feature of an effective dispute resolution method.⁸⁴ Litigating parties are obliged to follow the designed procedural rules of the court, so they do not have the ability to choose foreign rules to conduct their proceedings. The seat of litigation cannot be changed or extended, because the court usually has limited jurisdiction in which it can exert its authority. Therefore, it would be difficult to move proceedings away from their original venue.⁸⁵ This can be inconvenient for parties and witnesses, as the procedures should be designed to

⁸¹‘The ability to choose the governing law(substantive and procedural)and the seat of the arbitration largely solves the problem of forum shopping which results when, in litigation, the courts of two or more different countries have jurisdiction over the dispute in question. While a single arbitral proceeding can resolve such a matter, if litigation is resorted to several concurrent proceedings in different jurisdictions (with the possibility of reaching different conclusions) may result. Such a situation does not only result in enormous costs but also works in avoidable delays’. See Okekeifere, above n 58.

⁸² See, McLaren, above n 1.

⁸³‘Another examples of parties’ ability to cut corners, including the ability to resolve dispute by ‘documents only’ in appropriate cases, the ability to decide what is fair or equitable, as oppose determining the dispute strictly according to a recognised system of law, the ability to make a provisional award of money without being tied to the rigid constraints of certain procedures, the ability to include compound interest on any amount awarded where the courts can only award simple interest(unless a party is successful in a claim for special damages and the possibility of excluding rights of appeal to ensure absolute finality’. See, Wang, above n 60.

⁸⁴ See William G. Paul, *Arbitration vs. Litigation in Energy Cases*, Presentation at the First Annual Energy Litigation Program (November 7-8, 2002) <<http://www.adrforum.com/articles/pdfs/Paul-pdf.pdf>> at 15 May 2014.

⁸⁵ Venue of trial cannot be shifted in some jurisdictions, except for a visit to the *locus in quo*. See Okekeifere, above n 58.

protect their interests. According to Paul, ‘traditional litigation is not flexible, and it has been described as a “one size fits all” model’.⁸⁶

As mentioned earlier, the language of the court can occasionally create expenses or difficulties in litigation, simply because the foreign party is required to translate any documentation originally in a language other than that of the court. This costs the foreign party additional expense and time. In the main, arbitration as a dispute resolution technique appears to be more flexible than court litigation.

2.3.2.5 Confidentiality

Confidentiality is considered one of the crucial features of effective dispute resolution. Confidentiality requires that the involved parties not to disclose the information related to the proceedings, addresses, documents and evidence or transcripts of the hearings to any other third parties. This implies that the arbitral proceedings of the arbitration are closed to third parties from expressing the consent and interests of the parties. Confidentiality is often confused with privacy of the proceedings thus the need for a crucial distinction between the two.⁸⁷ Therefore, privacy is the ability of the uninvited parties to get access to the proceedings of the process and disclose them without the consent of the involved parties whereas confidentiality is the ability of the involved parties (arbitrators, witnesses, and the parties themselves) to disclose information about the proceedings to the public during the process. However, in consideration of confidentiality in arbitration, another distinction

⁸⁶ See Paul, above n 84.

⁸⁷ Confidentiality and privacy are different concepts. Confidentiality refers to the right of the parties to have those who are present at the proceedings not disclose the content or nature of the proceedings, however; privacy refers to the right of the parties to limit or prohibit the presence of strangers at the proceedings. See the footnote at Alexis C. Browen, ‘Presumption Meets Reality: An Exploration of the International Commercial Arbitration’, (2001) 16 *U. Int’l L. Rev.* 972.

must be made between disclosures to third persons and to institutions during the proceedings. Disclosures to third parties may include disclosures to family friends, business partners, and competitors which are in the private realm. Therefore, the law permits the parties to regulate these disclosures by the law of contact which is well developed. Disclosures in the realm of formal proceedings may include disclosures in testimony during a trial, deposition or response to a request, legislatures, and grand juries. Disclosures to third parties implicate private interests while those in formal legal proceedings implicate public interests.

The parties to an international commercial arbitration could be surprised when they realize that the assumption of confidentiality is not always as valid as they thought. Over the past several decades, scholars have paid attention to the principle of confidentiality in the arbitration process. Therefore, a number of competing values compete and need to be reconciled for the general principles to be established. The fundamental reason parties resolve to arbitration rather than litigation is to ensure that privacy and confidentiality are observed to the greatest extent possible. Arbitration is the process through which parties resolve their disputes privately and appoint their arbitrators and rules. Therefore, there are no reasons why disputes in international businesses should not be resolved privately and in a confidential manner.

Therefore, during the disclosures of the information about the proceedings, a concurrent and overriding interest in confidentiality should be recognized. However, the following circumstances may necessitate the lifting of the confidentiality cloak.

- i) The subject matter of the dispute needs to be reported since it might be material to the financial health of a public corporation.
- ii) Disclosures may be required by the partners, shareholders, creditors, or other parties that may have an interest in affairs of the involved parties.
- iii) A conclusion by one of the involved parties that their commercial interests will be enhanced by disclosing the information.
- iv) The parties may be finding it necessary to disclose the evidence from the proceedings in other arbitration proceedings.⁸⁸

In consideration of the above competing values, it is doubtful that any one solution that has been legislated will be effective in resolving the issue of confidentiality in all circumstances. Therefore, the arbitral institutions have formulated rules concerning confidentiality. The rules are intended to foster privacy and confidentiality in the proceedings in relation to the parties and balance them with other compelling or competing values about disclosure. Additionally, not all such enacted rules refer to confidentiality.⁸⁹ Therefore, the question of confidentiality is best left to the parties, subject to their arbitration agreement. Therefore, it is crucial to have a written arbitration agreement with relevant clauses regarding confidentiality, before the occurrence of any dispute, since it will be difficult to reach an agreement when a dispute has occurred. In case the agreement does not address confidentiality, the disputing parties would have to address it with the tribunal at the preliminary stage during the administrative conference.

⁸⁸ Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French law* (Springer Science & Business Media, 2010).

⁸⁹ Dirk Lehmkuhl, *Transnational Commercial Arbitration* (Handbook of Transnational Governance, 2011).

Since arbitration is a private mechanism for resolving disputes, third-party persons are excluded from the process. It follows that, the confidentiality of the proceedings will be affected if they are included.⁹⁰ Moreover, when third parties are included, they are not bound to the duty of confidentiality like the original disputing parties. The information will also be disclosed if the evidence is heard consecutively in separate proceedings or is stipulated into the records of the second proceeding. During these proceedings sensitive information from the first proceeding would be revealed in the second proceeding. These circumstances may arise in multiparty contractual disputes where the contracts contain arbitration agreements. Therefore, it is important and efficient if disputes with the same facts and parties were to be heard together or the documents used to be introduced into another proceeding. ??

In some cases, confidentiality is necessary to protect trade secrets and preserve relationships between businesses. Although confidentiality is an important aspect of international commercial arbitration, many scholars have argued that all the aspects of the process must be confidential for it to be valuable. Confidentiality has become the main concern in the international commercial dispute resolutions due to the importance that immaterial assets have and the amount of sensitive information that is exchanged during the proceedings. Therefore, a dispute between international businesses may prove to be damaging to their immaterial assets and therefore they call for confidentiality between the parties. Arbitration is the most favoured dispute resolution mechanism in part due to the growing need for confidentiality.⁹¹

⁹⁰ Stavros Brekoulakis, 'Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room' (2009) Vol. 113 *Penn State Law Review* Iss. 4, pp. 1165- 1188.

⁹¹ For example, in intellectual property agreements or when business information and trade secrets are involved, confidentiality is necessary. The World Intellectual Property Organization (WIPO) arbitration and

It has been observed that confidentiality is an important expected reason for why disputants choose arbitration. Regardless of its popularity in resolving disputes in the international markets, arbitration has many other advantages that has drawn people to it rather than going to the judicial courts. Any consideration of using arbitration as a dispute resolution mechanism raises questions of confidentiality, i.e. is the process confidential; what is the nature of any promised confidentiality; what are the avenues for legally enforcing the obligations for confidentiality in case they are breached. Some of these issues are discussed in the literature but the underlying issue is that participants are concerned about protecting their assets and commercial interests.

Despite all other strengths of arbitration confidentiality seems to be the real core of it as what the parties are most worried about is keeping certain matters private, with differing emphases on the scope of confidentiality, depending on the particular nature of the dispute that needs to be resolved.⁹² Articulating the legal basis of confidentiality is one way of

mediation rules are very strict regarding confidentiality. Parties may have varying concerns about the confidentiality of arbitration. Disclosure of arbitral materials that reveals trade secrets, for example, can be of particular concern. Parties may also wish to prevent the public disclosure of arbitral material that implicates business strategies or even the party's position in prior arbitration proceedings if inconsistent with the party's current stance on the issue. Indeed, in some instances, a party may wish to shield from disclosure the very existence of a pending proceedings or prior arbitration proceedings. See Richard C. Reuben, 'Confidentiality in Arbitration: Beyond the Myth' (2006) 54 *Kansas Law Review*, p. 1255. Also it can be found in University of Missouri-Columbia School of Law Legal Studies Research Paper No 2006-23.

The greater confidentiality afforded by arbitration may in itself be a goal of the parties involved, who may prefer to shield their business dealings from competitors and the public. It may also be valued as a means of protecting an ongoing commercial relationship from possible harm due to a publicized dispute. See Steven C. Nelson, 'Alternatives to Litigation of International Disputes' (1989) 23 *Int'l L.J.*, 198.

However, there are several arguments against the duty of confidentiality in international arbitration including first, protecting the confidentiality of arbitral proceedings can produce inconsistent resolution of disputes arising out of the same transaction. Second, protecting the details of arbitral proceedings and final awards can be inefficient for the reason that many international commercial arbitrations involve common issues of law or fact. For more argument against the duty of confidentiality in international arbitration. See Browen, above n 87, pp.1017-1020.

⁹²Parties desire confidentiality because that it allows them to control the flow of information, avoid the damage of publicity from an adverse award, and mitigate the potential for a flood of 'copycat' litigation'. See Philip Rothman, 'Pssst, please Keep it Confidential: Arbitration Makes it Possible' (1994) 49 *SEP DISP. RESOL. J.* 69; Stefano Azzali in his article Confidentiality vs. Transparency in Commercial Arbitration: A False Contradiction to Overcome, he asked whether Confidentiality: is a real interest?, the answer of his

delineating its scope in an objective manner. The main question is, who is bound to maintain confidentiality of the process of arbitration. There are three parties in the arbitral process who should uphold the value of confidentiality: arbitrators; witnesses; and the parties who present the dispute.⁹³ It is noted that even though the arbitrators are bound to maintain confidentiality the witnesses are not bound to this duty. The parties that present the dispute are also bound to the duty of confidentiality but their duties significantly vary depending on the tribunal and the applicable procedures, as well as the information about the issue at hand and how the information is to be used.

With this background context next it can be stated as a general statement that in arbitration, disputants can resolve their disputes privately, as these proceedings are not permitted to be a part of the public exercise.⁹⁴ In arbitral proceedings, all participants in whatever capacity have responsibility for ensuring that all proceedings and awards are confidential and protected from the public view.⁹⁵ Unlike arbitration, traditional litigation proceedings are

question is as followed: it seems to me that there is no real basis in stating that most of the parties choose arbitration because of its confidential nature. Whenever such interest is essential for the parties, they can expressly state the confidentiality requirement in the arbitration agreement, exactly as they do for the other crucial 'rules of the game'. Queen's Mary College survey shows that 62% of corporate counsel interviewed considers confidentiality not the essential reason for recourse to arbitration, although 'very important'. Several reasons could explain this. See Queen's Mary College, the 2010 International Arbitration Survey: Choices in International Arbitration, p.29, <<http://www.arbitration.qmul.ac.uk/docs/123290.pdf>> at 12 June 2014.

It should be noted that there are those who find that 'in certain cases, it may be more effective to take the case to the public and seek the support of public organisation or nongovernmental organisation. A degree of publicity may at times assist in negotiation a settlement'. See Eun-Joo Min, 'Alternative Dispute-Resolution Procedures: International View' in A Krattiger, Rt Mahoney, L Nelsen, et al (eds), *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practice* (MIHR: Oxford, 2007) 1415.

⁹³Priya Ranjan and Jae Young Lee, 'Contract Enforcement and International trade' (2007) Vol. 19 *Economics & Politics* Iss. 2, pp. 191-218.

⁹⁴ It should be noted that 'confidentiality depends upon the discretion of all parties. Moreover, public companies or regulated entities may be obligated to disclose details to their constituencies. Disclosure may also be required in order to enforce an arbitration award in court'. See McLaren, above n 1, pp. 473-490.

⁹⁵ For example, Article 6 of the ICC rules (the international court of arbitration) stipulates that the work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meeting of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its

open to the public. This means that any evidence, information or judgments given in litigation proceedings can be used by any member of the public. For example, trade secrets of a party that are given in evidence or pronounced in the judgment become publicly available, and therefore available to competitors.⁹⁶ As many businesses are concerned about their trade secrets, when it comes to selecting a resolution method for their dispute, it is clear that arbitration would be preferred over litigation because it keeps the proceedings and the awards confidential prevents them being used by the public.⁹⁷

Confidentiality is regarded as one of the hallmarks of commercial arbitration and is among the top strengths that are explored before the disputing parties decide which method they should use to resolve their dispute. From the discussion above it is evident that international businesses highly value the confidentiality that is guaranteed by arbitration in comparison to the other forms of settling disputes. This is because the arbitral proceedings protect the secrets of the parties and may protect the public reputation of the companies whereas litigation would release information to the public that would cause damage to the commercial interests of the company. Therefore, the benefits of taking an approach to confidentiality in arbitration that takes into consideration all the aspects of the process have the potential of benefiting the international commercial arbitration.

Secretariat. See Article 6 of the Statutes of the International Court of Arbitration 2010. In practice the ICC applies confidentiality very strictly and it does not even give the parties' names and facts of their disputes if the publication can do any harm to any of the parties; There are many cases where the judicial authority held a penalty fine for the breach of confidentiality; one example is in the case of *Aita V. Ojje* (1986). For more discussion about the framework of the confidentiality debate, see Brown, above n 87.

⁹⁶ See Okekeifere, above n 58.

⁹⁷ Litigation as a formal dispute resolution method can be the preferred option in some situations including when the disputants wish to publish the dispute and where the dispute involves public agencies or is affected with a public interest. See Wang, above n 60, pp. 198-212.

2.3.2.6 Aiding International Business and the Growth of the Law

One possible scenario that can occur is that the two parties are not familiar with the laws of each other's countries. In this situation, arbitration gives the two parties the right to decide on a 'neutral' country with which both parties and/or their representatives are familiar as the law that will govern the relationship. Therefore, arbitration offers its users familiarity with laws and procedures that provide a comfortable infrastructure and environment to govern the business relationship. It is evident that the law differs from state to state; therefore, a lack of familiarity with the law on the part of parties and/or their representatives could cause conflicts that can arise in litigation.⁹⁸

An excellent example assisting familiarity with arbitration law is the UNCITRAL Model Law (the UNCITRAL Arbitration Rules). Arbitration aids parties in dealing with each other and settling their disputes by straightforward means by providing legal and procedural familiarity in which both sides can be confident in governing their relationship. An additional example of how arbitration can aid international business is that arbitration can settle, in one proceeding, one dispute or a number of disputes between the same disputants, even where the disputes are stretched across different jurisdictions.⁹⁹

⁹⁸ In the case of *USA Corp.vDevelco*, the contract between the two companies has no arbitration clause. Therefore, conflict of law problems rose. The outcome of this conflict cause the *USA Corp* damages on its reputation in that particular country and risk its chances in obtaining future contracts in that country. For more detailed information about the fact of this case, see Arden C. McClelland, 'International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes' (1977) 17 *VA. J. Int'l L.* 729.

⁹⁹ It should be note that settling several disputes in more than one country can be the most useful for companies and business organisations that have subsidiaries in several countries. See Okekeifere, above n 58.

2.3.2.7 Accommodation of Third-Party Interests

Another significant difference between litigation and arbitration can be seen in the possibility of the participation of interested or non-contractor third parties in the arbitration proceedings.¹⁰⁰ In litigation, for example, interested third parties who might be affected by the court's decision have the right to intervene in or even join the court proceedings. In other words, litigation has the ability to accommodate the interests of a third party because it is not based only on a contract.¹⁰¹ However, arbitration can also cope with the issue of accommodating third-party interests in arbitration proceedings.¹⁰² Accommodating third-

¹⁰⁰The term *multi-party arbitration* is an umbrella term, used to reflect the fact that there are more than two parties involved in one arbitration proceeding. As a rule, when speaking about *multi-party arbitration* the focus is not (or is no longer) on who is a party to the arbitration, but rather on the method of appointing the arbitral tribunal and conducting the multi-party arbitration proceedings. The term *joinder* is commonly used in the context of multi-party arbitration. In more recent literature, the term is limited to situations where a third party is asked to join pending arbitral proceeding. More precisely, the term *joinder*, in this Report, covers a situation where a notice of arbitration, which determined the 'original' parties to the arbitration, has already been filed. A request for joinder exists when the respondent wants to file a counterclaim either against the claimant and a third party, or solely against a third party (*counterclaim* or *claim against a third party*). A joinder can also cover a situation in which the claimant decides *at a later stage* of the proceedings that a third party should become an *additional* respondent. A joinder is primarily a *procedural issue* and deals with the question of who can participate in a given arbitration.

It does not, per se, provide for any answers to the separate issue of whether or not there is a valid arbitration agreement. Sometimes, the wording used in the context of joinder is not 'third party', but *third person*. On the one hand, in a technical sense, this wording is more correct, since the third person to be joined is not yet a party to the arbitral proceedings. On the other hand, if a third person has implicitly consented to the arbitration agreement, it should automatically be a party to the arbitral proceedings. This logic endorses the use of the term 'joining of a *third party*', which is more often used than 'third person' in the context of joining. This Report will, for reasons of convenience and uniformity, use the term *third party* in connection with joinder. The term *extension* is most often used in the context of non-signatories to an arbitration agreement. A person or entity may be bound by an arbitration agreement, even though he is not expressly named in the agreement. Thus, the term 'extension' always refers to a party who falls within the personal scope of an arbitration agreement'. See Nathalie Voser and SchellenbergWittmer, 'Multi-party Disputes and Joinder of Third Parties' (2009) *International Council for Commercial Arbitration Congress* series no. 14, (*Kluwer Law International*) pp. 343 – 410; It should be noted that Continental scholars sometimes refer to 'extending' the arbitration clause. Lawyers in Anglo-American traditions tend to speak of 'joining non-signatories.' See originally William W. Park, 'Non-signatories and International Contracts: An Arbitrator's Dilemma', in *Multiple Party Actions in International Arbitration* 3 (2009); See, e.g. Pierre Mayer, *Extension of the Arbitration Clause to Non-signatories under French Law*, in this volume at p. 189; See generally, Alan Scott Rau, 'Consent' to Arbitral Jurisdiction: Disputes with Non-signatories, in this volume at p. 69; John M. Townsend, *Non-Signatories in International Arbitration: An American Perspective*, ICCA Congress Series no13, p. 359 (*Kluwer Law International* 2007).

¹⁰¹Marinne B. Culhane, 'Limiting Litigation Over Arbitration In Bankruptcy' (2009) 17 *ABI Law Review* 493.

¹⁰²Brekoulakis suggests that at the stage of drafting arbitration agreement, parties have the best time to deal with multi-contract arbitration. Thus, the first way to deal with this problem is that the parties may provide for a single framework arbitration agreement that expressly covers any dispute that might arise out of the several

party interests in arbitration proceedings has become increasingly common as the complexity of its contractual arrangements increases.¹⁰³ Most modern institutional arbitral rules take third-party interests into consideration and deal with issues concerning multiple parties, multiple contracts, joinders and consolidation in arbitration.¹⁰⁴ The benefit of accommodating third-party interests in arbitration proceedings can be seen in that all matters implicated in a dispute will be dealt with in the same proceedings, rather than across a number of separate proceedings. Accordingly, this saves time and money as well as avoiding the probability of conflicting decisions on the same issues involved in the dispute.¹⁰⁵

interrelated contracts between the parties. Also, they may insert an identical arbitration agreement in each of the several contracts, which expressly refers to the possibility for consolidating the several disputes. Another way for the parties to deal with multiparty arbitrations is to adopt institutional rules that provide for consolidation of the several claims arising out of the several contracts. Such rules include the ICC Arbitration Rules, Art. 4(6). Noteworthy, a number of legal practitioners take into consideration third party interests when they drafting arbitration agreement so the third party in this case will have the ability to involve in the arbitration proceedings. All cases outlined above shows the capability of arbitration to cope the issue of accommodating third party interests, hence; arbitration seems an effective means to resolve international disputes even with multi-party or contracts. See Stavros Brekoulakis, 'Multiparty and Multi-contract Arbitration' (2009)*The QFINANCE*, pp.107- 111, <<http://www.financepractitioner.com/operations-management-best-practice/multiparty-and-multicontract-arbitration?page=2>> at 12 June 2014; see also, Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multi-contract, Multi-Issue and Class Actions* (Kluwer Law International, 2005); This book explains the problem of Multiparty, Multi-contract with more detailed information; see Lew, Mistelis, and Kröll, above n 9, pp. 377-408.

It should be noted that consolidation is an approach that allowing tribunals to hear all connected claims at the same time in one proceeding. See Lara M. Pair and Paul Frankentein, 'The New ICC Rule on Consolidation: Progress or Change?' (2011) 25 *Emory Int'l L. Rev.* 1061.

¹⁰³ Firstly, multi-party can be referred to the situation where multiple parties have dispute with each other, and this disputes may arise from the same facts, while multi- contract deal with disputes arising from the same facts, but involving different contracts between different parties. Secondly, a joinder is, for example, when party A commences arbitral proceedings against party B with respect to an arbitration agreement between both parties. However, party B wishes to involve party C into the arbitration on the grounds that party C must cover party B for such loss. Finally, consolidation of arbitration means that multiple arbitrations before different arbitral tribunal can be heard and determined in one arbitration and, of course, one arbitral tribunal. See Rana and Sanson, above n 7, pp.94-95.

¹⁰⁴ Ibid, p.95. There are two ways for parties involving in arbitration to accommodate the third party interests or the issue of multiple parties, multiple contracts, joinder and consolidation in arbitration, first is to adopt a carefully drafted arbitration clause which consider these issues, second is to adopt arbitral institutional rules, especially those provide for multiple parties, multiple contracts, joinder and consolidation in arbitration. In regard to the first way or suggestion, it should be noted that the IBA Guidelines for Drafting International Arbitration Clauses suggested an arbitration clause which deal with the issue of multiple parties, multiple contracts, joinder and consolidation in arbitration. Also see the IBA Guidelines for Drafting International Arbitration Clauses, available at <<http://www.ibanet.org/search/Default.aspx?q=drafting>>.

¹⁰⁵ Normally, only parties who have signed an arbitration agreement may participate in the proceedings, the hearings are private, there is little or no explanation of the award, there are far fewer mechanisms for

2.3.2.8 Public Policy Restrictions and Ease of Enforcement

For public policy reasons, not all types of disputes are allowed to be subject to arbitration. Even in these cases, however, such restrictions are flexible.¹⁰⁶ In contrast, in the case of litigation, public policy considerations do not differentiate between domestic and international litigation. In other words, parallel public policy considerations in litigation can be applied to both national and international judgments.¹⁰⁷

A definite system of enforcing the outcome of a dispute, such as a judgment or an arbitral award, is a fundamental aspect of an effective dispute resolution. If a judgment or arbitral award, once delivered, cannot be enforced, then the proceedings as a whole have had no

intervention and the grounds for refusing enforcement of the award are extremely limited. While these features of arbitration are seen as advantages by the parties to an arbitration agreement, the same features make it difficult for non-parties who did not consent to arbitrate to protect themselves from awards that may nevertheless adversely affect them'. See Culhane, above n 101, p.493.

¹⁰⁶ The differences between the public policy considerations in domestic and international arbitration can be found in the application of challenging an arbitral award. In some jurisdictions, in domestic arbitration, the local courts might adopt formalistic approach such as the signature of the award, the capacity and authority to enter into an arbitration agreement or the witness oath taking. See Karim J Nassif, Gordon Blanke, and Soraya Corm-Bakhos, 'Arbitration under UAE law: towards a modern legal framework?' (2010) *Habib Al Mulla & Co.*

'One important foundation of the law of recognition and enforcement is that the requested court will not normally review the foreign judgment either under its own law or some other law (no 'révision au fond'). In consequence, foreign judgments are recognized even when a domestic court would have decided differently. However, there are limits to this liberal approach: all legal systems and virtually all more recent conventions allow States to deny recognition to foreign judgments that violate the enforcing State's public policy. Some regimes contain specific applications of the defence. Some regimes specify the source of the public policy. For example, the Middle Eastern conventions from 1983 and 1995 allow Member States to refuse recognition to foreign judgments that are contrary to Islamic Law; this can, if read literally, become a broad restriction. Some regimes name specific kinds of judgments that are barred from recognition: for example, many conventions and domestic laws contain specific exceptions to judgments on punitive damages. Finally, some States deny enforcement of judgments regarding vitally important domestic industries, for example South Africa for its mining industry and British Columbia for its asbestos industry. Given that no general duty exists to recognize foreign judgments at all, such exceptions are generally compatible with international law unless treaty law provides otherwise'. See Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments' (2009) *Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press.*

¹⁰⁷ Okekeifere, above n 58.

useful outcome. In other words, it is inadequate to have a judgment or arbitral award without enforcement or execution.

To compare litigation with arbitration regarding the matter of enforcement, it is necessary to distinguish between domestic and international disputes. In a domestic dispute, a court judgment is easier to enforce than an arbitral award. As soon as a judgment of a court is delivered, there is no further procedure to be taken, as the presiding judge only needs to sign the court order for it to be legally enforceable. For a domestic arbitral award to be enforceable, however, it must be referred to the court by the winning party for further procedures. Therefore, the winning party would still have to initiate proceedings in court to enable the court to enforce the award.

In international disputes, the enforcement system of a judgment or arbitral award is different. Enforcement of a court judgment will depend on the existence of statutory provisions for reciprocal enforcement in the implicated countries.¹⁰⁸ However, in practice, enforcement of an international arbitral award is a simpler matter than in international litigation, because many countries have acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which is considered an enormously effective treaty. All member states must implement the terms of the New York Convention in order to align their obligations.¹⁰⁹ Therefore, any arbitral award rendered in any member country is enforceable in the courts of the other member states.

¹⁰⁸ Ibid. 'A party who obtains a judgment in one country would have to relitigate the matter again and prove that judgment as a fact in the second country'.

¹⁰⁹ *The New York Convention on the recognition and enforcement of foreign arbitral awards (1958)* articles I, II and V.

This section has compared the relative strengths of arbitration and litigation. The following section compares arbitration and mediation.

2.3.3 Comparing Arbitration and Mediation

A comparison between arbitration and mediation is necessary, as in some circumstances, both methods share some of the features of effective dispute resolution methods. This comparative analysis between arbitration and mediation will take into account similar features that have been used in the assessment of arbitration and litigation. As in Section 2.3.2 above, the main aspects that will be discussed are speed of proceedings, affordability, possibility of expert adjudication, flexibility and certainty, confidentiality, aiding of international business, accommodation of third-party interests, aiding the growth of the law, public policy restrictions and ease of enforcement. Again, the aim of this discussion is to decide on the more effective dispute resolution method in international commercial matters.

2.3.3.1 Speed of Proceedings and Resolution

One attribute shared by arbitration and mediation is the speed of proceedings or speed of resolution. The estimated duration for resolving international commercial disputes by mediation is 30 to 60 days, while for arbitration the duration is estimated at 90 to 180 days. Accordingly, mediation seems more time-effective in comparison to arbitration. However, in certain circumstances, mediation can also be time-consuming; for example, as argued by Okekeifere, ‘for instances when one of the parties adopts a difficult disposition. The traditional first phase of creating trust in the parties, defusing hostility and distrust, can take a long time if one party is in a position of greater strength and adopts a take-it-or-leave-it

approach’.¹¹⁰ On the other hand, in some cases, arbitration cases can be concluded in a short period. For example, ‘a recent multi-million dollar ICC arbitration dealing with the redetermination of a commodity price in a long-term supply agreement was brought to conclusion in only two months’.¹¹¹ It seems that the speed of proceedings in either process can depend on the parties and whether they are serious about expediting the case.¹¹² Thus, both arbitration and mediation processes can provide speedy resolutions to international commercial disputes, but still the success of either process will depend heavily on the collaboration of the parties.

2.3.3.2 Affordability

While it is clear that ADR methods including arbitration and mediation are less expensive than litigation, the difference is not as pronounced between arbitration and mediation, as both are relatively inexpensive. For example, arbitration and mediation through institutions such as the ICC and World Intellectual Property Organisation (WIPO) offers a broadly similar cost for both services (i.e. arbitration and mediation). This is because the two types of proceedings are correspondent in nature, and involve very similar procedures (i.e. evidence procedures).¹¹³ However, it should be noted that a complex international dispute can take a great deal of time and money to resolve, even by using arbitration or mediation. In arbitration, for instance, this can happen in the case when a party rejects the outcome of the proceeding or seeks to set aside the arbitration award, while in mediation, this outcome

¹¹⁰ However, once the trust between parties is achieved then the mediation process can go smoothly. See Okekeifere, above n 58.

¹¹¹ Christian Buhring-Uhle, *Arbitration and Mediation in International Business*, (Kluwer Law International, 1996) 110. This refers to ‘Fast-Track Arbitration’. Some argue that the fast-track arbitration is an exceptional case vis-à-vis the majority of arbitration cases and awards rendered or reached. This means that in exceptional cases the arbitration process can be concluded in a short period.

¹¹² Ibid.

¹¹³ Okekeifere, above n 58.

could arise if a party is not willing to compromise in any way. Again, achieving cost efficiency in either process would depend on the cooperation of the parties in settling the dispute.

2.3.3.3 Possibility of Expert Adjudication

Arbitration and mediation provide the best opportunities for the use of expert adjudication. The expert adjudicator, or specialised decision maker, is in fact a substantial component of ADR methods. This role can be carried out in two forms: the first is as a specialist in the field or industry (i.e. the subject matter of the dispute), while the second is as an expert on the ADR process (i.e. the particular ADR method involved). In the case of arbitration, it is clear that arbitration permits the employment of an expert adjudicator who has the necessary knowledge or level of technical and commercial proficiency to assess the matter.¹¹⁴ Likewise, in mediation, experts can also be employed to address issues that raise technical questions.¹¹⁵ Therefore, it is concluded that the use of expert adjudication as a feature of effective dispute resolution is equally represented in both arbitration and meditation.

¹¹⁴The arbitral process also reduces the need for counsel to familiarize themselves with the details for judicial procedures in the various jurisdictions in which their companies do businesses. See McLaren, above n 1, pp.473-490.

¹¹⁵There are two prominent ways of the use of experts in mediation namely technical experts and early neutral evaluators. The technical experts can be used in many areas of specialized expertise such as knowledge of custom in the trade in the particular industry or ability to build a damage analysis. The expert in the first instance serves to educate the parties as to the respective positions of the parties and the basis for those positions. The second way is the early neutral evaluators. For example, if the parties are struggle on a particular issue of fact or law that is absolutely blocking the ability to move towards settlement, a single independent expert can be brought in to provide either a binding or a non-binding opinion on that point. See Edna Sussman, 'How To Use Experts in Mediation' in Patricia Barclay(ed), *Mediation Techniques* (International Bar Association, 2010)93. In contrast, it should be noted that alike mediation, the member or members of the arbitral tribunal appointed by the parties can be lawyer or lawyers who has or have the ability to solve any legal issue arise between parties as well an expert or experts in the relevant field or fields who would be able to identify the technical problem and achieve a reasonable and satisfactory resolution on the particular technical issue. See Salomon, above n 80, pp.1-4.

2.3.3.4 Flexibility and Certainty

Parties and arbitrators have flexibility regarding the ways in which procedural matters can be conducted during the course of arbitration. The arbitration process is regulated by rules of procedure that have been agreed upon and adopted by the parties and the arbitral tribunal. Therefore, the parties and arbitrators have a high degree of flexibility to choose the rules of the proceedings of their arbitration.

However, in mediation, there is no set code of rules or procedures required for the mediation to be conducted.¹¹⁶ Mediation is more flexible than arbitration in terms of evidence, procedure and formality. Mediation can be used in an attempt to resolve a whole dispute or only part of a dispute. A good example that distinguishes between arbitration and mediation in regards to flexibility is that a party in mediation has greater flexibility to terminate the mediation at any time if he or she believes that the process is not practical or constructive. On the other hand, in arbitration, the parties individually have no right to terminate the proceedings; if they wish to do so, they must reach joint approval to terminate.¹¹⁷

Thus, it appears that both processes are generally flexible, but the level of flexibility in mediation seems more attractive than that in arbitration. Further, both arbitration and mediation are attractive to parties for the reason that they have rights to participate in these proceedings more effectively than they would in litigation proceedings.

¹¹⁶Campbell Bridge SC, 'Mediation and Arbitration- Are they Friends or Foes?' (Paper presented at the Bani/Rodyk and Davidson Conference, Jakarta 1st November 2012.

¹¹⁷Alessandra Sgubini, Mara Frieditis and Andrea Marighetto, 'Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective' (2004) *Bridge Mediation* <<http://www.mediate.com/articles/sgubinia2.cfm>>at 20 May 2014.

2.3.3.5 Confidentiality

As mentioned above, confidentiality is an important motivation to choose arbitration as a dispute resolution method, especially if the dispute involves trade secrets.¹¹⁸ In fact, in arbitration processes, confidentiality is implied, even if the parties do not specify confidentiality in their agreements; thus confidentiality in arbitration appears to be automatic.

However, regarding the confidentiality component of mediation, a number of rules and further guidance must be obtained. For example, in Australia, section 53B of the Federal Court Act 1976(Cth)¹¹⁹ and section 110P of the Supreme Court Act 1970(NSW)¹²⁰ both provide that ‘evidence of anything said, or of any admission made, at a conference conducted by an approved mediator acting as such mediator, is not admissible in any court or in any proceedings’.¹²¹ The purpose of sections 53B and 110P is to maintain the confidentiality of mediation and to limit the disclosure of any information that can be presented in any further procedures.¹²² Alternatively, prior to the commencement of a mediation, the parties may have the opportunity to enter into a confidentiality agreement. The agreement should acknowledge that all statements made during the mediation and

¹¹⁸For example, in English law, confidentiality is implied even when the parties do not stipulate to a confidentiality clause in their agreements. According to the rules of LCIA and Singapore International Arbitration Centre, parties cannot reveal any facts about the arbitration, including their participation. Therefore, confidentiality can be a good reason for parties to choose arbitration; it is easier in arbitration to keep secret out of the press and competitors. In arbitration, it is more likely that secret information will remain confidential. Specifically in patent validity disputes, parties are more likely to keep silent to maintain their technology advances’. See Wei-Hua Wu, ‘International Arbitration of Patent Disputes’ (2011) 10 *J. Marshall Rev. Intell. Prop. L.* 403.

¹¹⁹*the Federal Court Act 1976(Cth)* s53B.

¹²⁰*the Supreme Court Act 1970(NSW)* s110P.

¹²¹ David Spencer and Michael Brogan, *Mediation Law and Practice*, (Cambridge, 2006) 312.

¹²²*Ibid*, p. 312.

documents prepared for the mediation should be confidential and excluded from other parties in any subsequent proceeding (e.g., litigation).¹²³

Although it seems possible to protect confidentiality in mediation, a number of questions remain regarding this. These include the legal limitations on confidentiality and the extent to which the courts consider the circumstances of a particular claim, the commencement of mediation, whether the mediation incorporates preliminary conference or discussion, when the mediation terminates, and finally whether there is any follow-up procedure in the event of failure of mediation.

In the final analysis of confidentiality in arbitration and mediation, it can be observed that, while arbitration implies absolute confidentiality as the rules of arbitration are very strict and certain in this regard, confidentiality in mediation appears more complex and challenging, because there are uncertain statutory requirements of confidentiality.¹²⁴

2.3.3.6 Aiding of International Business and the Growth of Law

It is clear that arbitration provides its users with familiar laws and procedures, facilitating settlement for companies and business organisations that have subsidiaries in several

¹²³Ibid, p. 312.

¹²⁴Claims for disclosure of what took place during mediation may be countered by statute or Rules of Court, common law principles of evidence, tort or contract, or codes of conduct. The piecemeal growth of mediation through the different courts at both state and federal level and its application in particular types of dispute means that there is no single blanket statutory provision and the extent of confidentiality is a matter of construction and interpretation of the applicable statute'. See Astor and Chinkin, above n 34, p. 181. 'This mediation is confidential in so far as the law allows'. See Sourdin, above n 39, p.241. However, the difficulty to maintain confidentiality can appear on confidentiality in family case specially if there is ill-treatment or risk of harm to children. Another issue is in the case where parties enter into a contract to a dispute resolution process with confidentiality clause in the agreement. In this situation, a question raises that whether these agreements can be enforced?The answer can be found in arbitration case of *Esso Australia Resources Ltd v Plowman*. See *Esso Australia Resources Ltd v Plowman*(1995) 183 CLR 10.

countries and preserving the business relationship. In this way, arbitration can be said to aid international business and the growth of the law. Mediation, on the other hand, aids international business, but not as well as does arbitration.¹²⁵ In regard to aiding the growth of the law, it can be argued that mediation does not contribute to the growth of the law simply because it does not produce reports or public cases, as can be obtained from arbitration cases.¹²⁶

2.3.3.7 Accommodation of Third-Party Interests

It has been acknowledged that interested third parties can be involved in arbitration proceedings, provided that the main agreement expressly refers to their participation in any dispute that might arise out of the several interrelated contracts between the parties. The adoption of institutional rules is another possible tactic for accommodating interested third parties in arbitration proceedings, as these regulations provide the option to consolidate several claims arising out of several contracts.¹²⁷ In mediation, however, the view is expressed in the scholarly literature that

multiparty mediation can be beneficial because it can bring both more resources and more third parties capable of devising a settlement to the conflict. Multiparty mediation, by bringing more actors into the process, also raises the risk of miscommunication, buck-passing, and forum shopping.¹²⁸

In conclusion, there is a higher possibility of danger in accommodating the third-party interest in mediation than in arbitration processes.

¹²⁵Okekeifere, above n 58.

¹²⁶ Some could argue that production of reports or publicity cases in mediation with the purpose of aiding the growth of law, could affect the confidential nature of mediation which is possibly one of the most important factors by parties seeking to mediate. See Martin Deutsch, 'Using mediation to resolve leasing and property disputes', *CBP Lawyers* (Australia), 23 August 2013, < <http://www.cbp.com.au/Updates/Using-mediation-to-resolve-leasing-and-property-di>> at 15 May 2014.

¹²⁷ See for example, the ICC Arbitration Rules 2012, Art. 7, 8, 9 and 10.

Article 7 (Joinder of Additional Parties), Article 8 (Claims between Multiple Parties), Article 9 (Multiple Contracts) and Article 10 (Consolidation of Arbitrations).

¹²⁸J. Michael Greig and Paul F. Diehl, *International Mediation*, (Polity Press, 2012)189.

2.3.3.8 Public Policy Restrictions

It has been mentioned above that the public policy considerations in international arbitration are flexible, and that most disputes can be arbitrated. Similarly, in mediation, many types of disputes can be mediated. However, the outcomes of both processes in some jurisdictions can be unenforceable due to public policy considerations.¹²⁹ Another point is that the success of both processes is dependent on the parties. If one party, for instance, is not willing to compromise, or decides to behave in a challenging manner, then the outcome of the entire proceeding can be unsuccessful.

2.3.3.9 Ease of Enforcement

The enforcement of an arbitral award is a simple matter if a country has a national arbitration law and is a member of the New York Convention (1958). In contrast, mediation generally has no enforcement mechanism. There is no international convention or national provisions for the recognition and enforcement of outcomes of mediation. The results of mediation proceedings normally involve a simple agreement between disputants. The results of mediation, or the agreement reached by the parties, must be implemented fully; otherwise, there is no agreement. The difficulty in mediation is that if any issue arises, the

¹²⁹ In some Muslim countries, some certain types of contracts are prohibited, for example, the sale of alcohol. Therefore, the outcome of the resolution process of this type of contract will be unenforceable. See Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration', (2010) Vol.1 *International Journal of Arab Arbitration* No 4, <<http://www.intljaa.com/english/issue.asp?contntid=254&IssueID=4>> at 15 August 2014.

only solution is to repeat the process or resort to another dispute resolution method, such as arbitration or litigation.¹³⁰

2.3.4 Assessment of the Comparison of Effective and Appropriate Dispute Resolution Mechanisms

From the preceding analysis, it is evident that arbitration is a superior method of dispute resolution compared to both litigation and mediation. In comparison to litigation, the advantages of arbitration are its confidentiality and the ability of parties to appoint the arbitral tribunal.¹³¹ Arbitration is a private mechanism where parties, their representatives, the arbitrator, any appointed experts and, if applicable, the institution governing the proceedings are subject to the obligation to maintain the confidentiality of the proceedings and the resolution of the case.¹³² Moreover, arbitration gives the parties the opportunity to nominate the arbitral tribunal that will resolve the dispute. In this regard, the subject matter of a dispute plays a significant role for the parties in their selection of litigation or arbitration as a dispute resolution mechanism. For example, in cases involving complex or technical subject matter, judges of the national court are not expected to be experts in every subject field, while in arbitration, the parties can appoint an arbitral tribunal that has expertise in their particular subject matter. Finally, arbitration is more cost-effective than litigation.

¹³⁰The absence of enforcement mechanism is a problematic in mediation. For instance, if a party refuses the decision the agreement reached by parties then the decision or agreement is not binding.

¹³¹Clair Clutterham, 'Methods of Dispute Resolution Series-Arbitration' (2010), *Al Tamimi Newsletter*, Issue 232, <<http://www.altamimi.newsweaver.ie/Newsletter/17o1ygs0now>> at 10 of February 2014. Also see Wang, above n 60, pp. 198-212.

¹³²Arthur Mazirow, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' (2008) Presented to the Counselors of Real Estate, <http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf> at 10 of February 2014.

In comparison to mediation, arbitration also has the following advantages. In terms of process, arbitration is considered a legal process, while mediation is a communication or negotiation process.¹³³ Further, the final outcome of an arbitration is a legally binding award that can be enforced in a national court. This means that an arbitrator has the power to take a decision and bind the parties to carry out the specified actions. In contrast, a mediator will help the parties to reach and sign an agreement. Once the parties have done so, the outcome of the mediation takes the form of a binding contract. A mediator has no further capacity to oblige the parties to do anything, but rather helps the parties to settle their arguments by an agreement rather than an adjudication.¹³⁴

A further difference between arbitration and mediation relates to its focus in time. Generally, arbitration focuses on past events, whereas mediation is more concerned with the present and future relationship between the parties.¹³⁵ The central point of arbitration as a means of dispute resolution is the parties' legal rights and positions, while mediation is more focused on the parties' best interests and the achievement of these via a negotiation process.¹³⁶

Arbitration and mediation provide significant benefits to parties and may share some features of effective dispute resolution. The preceding discussion identified examples of

¹³³Mason, above n 31, pp.541-551; 'the goal of arbitration is the handing down of a final decision on the dispute as enforceable arbitral awards; the goal of mediation as a process of conflict management is a voluntary and responsible agreement between the parties, reached and facilitated with the help of an independent third party via a clear negotiation structure ('principled negotiation')'. See Klaus Peter Berger, 'Integration of Mediation Elements into Arbitration' (2003) 19 *Arbitration International* (Kluwer Law International) 3, pp.387-403.

¹³⁴Markham Ball, 'The Essential Judge: the Role of the Court in a System of National and International Commercial Arbitration', (2006) 22 *Arbitration International* 1, p.73.

¹³⁵Mason, above n31, pp. 541-551.

¹³⁶Berger, above n 133, pp. 387-403. He also includes other differences between arbitration and mediation. For example, he states that 'Arbitration is subject to the arbitration law of its seat; mediation is often not subject to any domestic procedural law, instead the process is carried out at the direction of the neutral third party according to the instructions given by parties'.

effective features that both arbitration and mediation share. First, both have the ability to be time-efficient in resolving international commercial disputes. Second, both are relatively inexpensive. Third, they provide the best opportunity for the use of 'expert adjudication', as well as being generally flexible. Finally, arbitration and mediation aid international business and accommodate third-party interests.

Despite these similarities, arbitration and mediation have a number of differences. Arbitration offers absolute confidentiality, as the rules of arbitration are very strict and certain, while confidentiality in mediation is too complex a matter to be an absolute guarantee, because its statutory requirements are uncertain. Additionally, mediation aids international business, but not quite as effectively as arbitration. Mediation does not aid the growth of the law because it does not produce reports or publicity cases as arbitration does. Although mediation accommodates third-party interests, it nevertheless raises some risks. Arbitration has an enforcement mechanism in the form of the New York Convention (1958), whereas mediation has no such enforcement mechanism; there is no international convention or national provisions for the recognition and enforcement of the outcomes of mediation.

As a result of the factors discussed above, arbitration as compared to litigation and mediation seems to be the most effective method for resolving international commercial disputes. This is because it frequently meets the objectives of effective dispute resolution by resolving disputes in a manner that protects trade secrets, saves time and money and aids international business and the growth of the law. It also provides enforcement mechanisms and preserves business relationships.

2.4 Conclusion

The above discussion has identified three dispute resolution mechanisms in law and analysed the arguments for and against these different mechanisms. It has also demonstrated the theoretical reasons for choosing arbitration as an effective method for resolving international commercial disputes. The discussion has identified the main reasons in support of arbitration as an effective dispute resolution technique: that it provides potential disputants with relatively quick proceedings, affordability, the possibility of expert adjudication, flexibility and certainty, confidentiality, aiding of international business, accommodation of third-party interests and ease of enforcement. These reasons provide the necessary support for the development of the analysis in the following chapters.

Chapter 3: Historical Context of Dispute Resolution in the UAE and Dubai

3.1 Introduction

Following Chapter 2's review of the theoretical factors in support of arbitration, this chapter now focuses on the specific legal regime regulating arbitration in the UAE. Historically, dispute resolution in the Gulf Arab States has been problematic.¹ Focusing on the UAE, there are a number of issues in relation to dispute settlement that do not aid productive business activities. However, in an attempt to manage these issues and to change the perceptions of the UAE regarding dispute resolution, much effort has been made by the UAE Government to reform and modernise its laws and practices regarding dispute resolution. This chapter argues that despite encouraging developments made in the legal frameworks of dispute resolution in the UAE, further changes are yet required to achieve effective and efficient conduct of international commercial arbitration.

This chapter is divided into three main parts. The first part (Section 3.2) discusses problematic issues related to the previous legal frameworks governing dispute resolution in

¹ Business leaders and legal practitioners, especially foreigners have a presumption that the legal systems of many Middle Eastern countries are substantively and procedurally ineffective and even do not support business interest. For example, it has been said that the substantive content of the law is generally seen as outdated and uncertain. Another issue besides the substantive law is the role of the courts as the later are insufficiently aware of, or responsive to, the needs of commerce and investment. See Nathan J. Brown, *The Rule of Law in the Arab World*, (Cambridge University Press, 2006). This view is referred to John Bentley's report. See John Bentley, Egyptian Legal and Judicial Sector Assessment: Report and Recommendation, submitted to USAID/Egypt in association with Kamel, Yehia, Abul Ela and Sakr, Vol. 4, February 1994. However, in the case of the UAE there is a perception that arbitration in UAE is uncertain, unpredictable and is not friendly venue for arbitration. This is because the complicated enforcement schemes implemented in the UAE. See Matthew Marrone and George Anthony Smith, 'Recent Developments in Arbitration Law in the UAE', *Weinberg Wheeler Hudgins Gunn & Dial* 15 September 2010, <<http://www.wwhgd.com/newsroom-news-71.html>> at 12 May 2014.

the UAE, particularly in the Emirate of Dubai. The second part (Section 3.3) considers the initiatives and the proactive role that has been taken by the UAE Government in developing the legal frameworks of dispute resolution mechanisms, particularly international commercial arbitration in Dubai. To achieve a better understanding of the legal frameworks of dispute resolution in the UAE, it is appropriate to look at the previous legal frameworks of dispute resolution and compare them with the recent rules governing dispute resolution. The third part (Section 3.4) provides a brief commentary on the current legal frameworks of selected states within the Gulf Arab Region other than the UAE, namely Qatar, the Kingdom of Bahrain and the Kingdom of Saudi Arabia. These states have recently developed their dispute resolution frameworks, so it is appropriate to compare the roles of these states in developing international arbitration in the Gulf region with the regulations in the UAE.

Most disputes in the Middle East are settled by informal dispute resolution processes.²Where a binding method of dispute resolution is required, arbitration is preferred over judicial methods. This is due to a number of reasons: for example, in arbitration, parties have considerable freedom and flexibility concerning choice of arbitrators, the location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.³

²Richard Silver, 'Arbitration to resolve twofold increase in dispute in Dubai' *Rhead Group online* (August 2010), < <http://rheadgroup.com/arbitration-to-resolve-twofold-increase-in-disputes-in-Dubai> > at 12 June 2014.

³ Kevin T. Jacobs and Matthew G. Paulaon, 'The Convergence of Renewed Nationalization, Rising Commodities, and 'Americanization' in International Arbitration and The Need for more Rigorous Legal and Procedural Defenses' (2008) 43 *Tex. Int'l L. J.* 363; and also see at origin Mark A. Buchanan, 'Public Policy and International Commercial Arbitration,' (1988) 26 *Am. Bus. L.J.* 511, p. 512.

The issues regarding dispute resolution in the UAE can be discussed more easily if divided into four categories. These are questions related to the involvement of Shari'a law in the process of arbitration; issues related to the existing legal frameworks, particularly the UAE Civil Procedure Code(*Federal Law No 11 of 1992*); issues related to rules in various existing institutions engaged in arbitration (i.e. *DIFC Arbitration Law No 8 of 2004* and *DIAC arbitration rules of 1994*);⁴ procedural issues related to the role of the local court in supporting the dispute resolution process; and the unpredictability of enforcement legal rights.⁵ With all the problems claimed in relation to these issues, many foreign investors have been unenthusiastic about situating their dispute resolution in the UAE in particular or in the Gulf Arab Region in general (as the Gulf Arab States all share similar economic, cultural, religious and political characteristics).⁶

The initiatives taken by the UAE Government to reform and modernise their laws and practices regarding dispute resolution can be divided into two categories: those at the Federal level and those at the Emirates level. At the Federal level, the UAE Government has made two significant moves in its accession to the New York Convention on the

⁴ The rules of the existing arbitral institutions (i.e. Dubai International Financial Centre arbitration rules of 2004(DIFC Arbitration Law No 8 of 2004) and Dubai International Arbitration Centre arbitration rules of 1994 were outdated and not working efficiently. Notably, the establishment of the Dubai International Arbitration Centre (DIAC) was in 1994. It was before as the 'Centre for Commercial Conciliation and Arbitration'. See Martin Hunter, *Dubai International Arbitration Centre (DIAC)*, (World Arbitration Reporter, 2nd ed,2010); The Dubai International Financial Centre(DIFC)was found in 2004 by the Government of Emirate of Dubai with the intention to promote Dubai as a recognized hub for institutional finance and commerce, comprises an autonomous judicial system. Available at the website of both the DIAC and the DIFC <http://www.diac.ae>>;<<http://www.difc.ae>>.

⁵There is uncertainty regarding the role of Shari'a law. The Sharia'a role must be clear because it can affect all aspects of arbitrations, including the applicable law, the validity of the arbitration agreement, procedural rules, the arbitrability of the dispute, and the choice and capacity of arbitrators. This uncertainty can often be clear by foreign parties' lack of familiarity with Shari'a. See Steven Finizio and Christopher Howitt, 'When International Arbitration Meets Sharia', *Commercial Dispute Resolution* March/ April 2013. 49.

⁶ Minas Khatchadourian, 'Arbitration and Mediation between Europe and the Gulf' (2008) *TheSharm El-Sheikh International Arbitration Centre (SHIAC)*.

Recognition and Enforcement of Foreign Arbitral Awards in 2006,⁷ and its proposal of a new Federal arbitration law based on the United Nations Commission on International Trade Law (UNCITRAL Model Law).⁸ At the Emirates level, however, the Emirate of Dubai has also made a number of significant changes. These include the amendment of the DIAC arbitration in 2007, the modification of the DIFC arbitration rules in 2008 and the joint venture between the DIFC and the LCIA to create the DIFC–LCIA Arbitration Centre.⁹ All these developments are substantial steps designed to promote Dubai's suitability as an international hub for dispute resolution.

In order to determine whether the existing legal frameworks of arbitration in the UAE are in line with the international standards and best practices of dispute resolution processes,¹⁰ it is necessary to note the most common model law used by states in forming their national arbitration laws and international institutions. The UNCITRAL Model Law and the ICC arbitration rules are considered the most extensive model laws of international commercial arbitration. The UNCITRAL Model Law was designed to assist states in reforming and modernising their arbitration laws, and has also been accepted by states from all regions and the different legal or economic systems of the world. Further, the arbitration rules of most well-known arbitral institutions are based on the UNCITRAL Model Law; however,

⁷ Ian Clarke and Charles Lilley, *The European, Middle Eastern and African Arbitration Review* 2013, [2013] *Global Arbitration Review*.

⁸ It should be noted that the new draft of the federal arbitration law in the UAE will replace the existing provisions of the UAE Civil Procedure Code No 11 of 1992. See Quinn Smith and Omar Ibrahim, 'Arbitrating at the Crossroads of East and West: An Overview of Prominent Arab National Arbitration Laws' (2008) 24(3) *Int'l Lit. Quarterly* 20.

⁹ James Kwan, 'The New DIAC Arbitration Rules: Adopting International Best Practice In the Middle East' (2007) 22, 12 *Mealey's International Arbitration Report*; See also Mark Beeley, 'Arbitration in the Dubai International Financial Centre: A Promising Law, But Will It Travel Well?' (2009) *International Arbitration Law Review*; and See Arbitration Law, DIFC Law No 1 of 2008.

¹⁰ Arbitration law is in line with the international standards and best practices if the law incorporates all of the features that legal practitioners would expect to find in a progressive international arbitration law. See Claudia T. Salomon, J.P. Duffy and Tom Canning, 'The New Dubai International Arbitration Law' (2008) Vol.240 *New York Law Journal* No 97.

such rules may contain some differences.¹¹ The Model Law provides a comprehensive set of procedural rules covering all aspects from the arbitration agreement to the recognition and enforcement of the arbitral award. As the ICC arbitration rules have adopted recent trends and best practices in conducting international commercial arbitration, it is appropriate to use them as a standard for assessing the existing legal frameworks of arbitration in the UAE.

The law governing arbitration in the UAE is found in a number of provisions of the UAE Civil Procedure Code of 1992. This can be described as an inadequate state of affairs, as the UAE does not have a separate arbitration law.¹² Further, the arbitration provisions within the UAE Civil Procedure Code of 1992 are not based on the UNCITRAL Model Law. Accordingly, the legal regime dealing with arbitration is not at the level of the international standards. The following section analyses the drawbacks concerning the existing UAE Civil Procedure Code of 1992. It also discusses issues related to the previous legal frameworks of the existing arbitral institutions in Dubai.

¹¹ A good example of well-known arbitral institution has adopted the UNCITRAL Model Law is the International Chamber of Commerce: International Court of Arbitration in Paris (ICC). The arbitration rules of the ICC are considered as the most common used and trusted among international arbitration institutions. See Jean- Dominique Touraille, Eric Borysewicz and Karim Boulmelh, 'France' in Baker & McKenzie (eds), *The Baker and McKenzie International Arbitration Yearbook 2014-2015* (2015) 117, 124.

¹² Obviously, until now, the UAE is not a Model Law country, because it does not have a particular arbitration law. However, it should be noted that recently the UAE announced a new proposed federal arbitration law. This will be a significant development for the business of dispute resolution in the UAE.

3.2 Analysis of Previous Legal Frameworks Governing Dispute Resolution in the UAE and Dubai

The increasing number of disputes and cases in Dubai's courts resulting from the financial and real estate crisis produced a massive upsurge in arbitration.¹³ Effective and efficient legal frameworks of dispute resolution were required to manage and solve these disputes productively. The existing legal frameworks, particularly the UAE Civil Procedure Code of 1992 and the rules of the existing arbitral institutions (i.e. the DIFC arbitration rules of 2004, DIFC Arbitration Law No 8 of 2004 and DIAC arbitration rules of 1994), were outdated and not working efficiently to resolve international disputes. To substantiate this claim, it is necessary to identify the drawbacks of these rules and explain the need for change. This is because effective change depends on accurately identifying the errors in the present system. However, the rules of the existing arbitral institutions were amended after the real estate crisis, and therefore it is also necessary to discuss these previous rules and compare them with the amended rules. This is a substantial undertaking, as it analyses and discusses the previous and current laws applicable to arbitration in the UAE, including institutional arbitration rules in Dubai.

In this section the obstacles to the implementation of productive and effective dispute resolution in the UAE, particularly the Emirate of Dubai, are identified and analysed. First,

¹³ Dubai Real States Crisis occurred in November 2009. The reason behind this crisis is that when Dubai announced that it would request creditors of Dubai World to agree to postpone debt repayments for six months. 'Some commentators are of the view that banks that have lent money to Dubai World could suffer significant losses if the company were to default on all or part of its \$59 billion debt. Duabi's total debt stands at \$80 billion. If creditors were to reject proposals to postpone debt repayments for six months, the Dubai government could be forced to hold a fire sale of its international real estate assets'. Frank Shostak, 'What's Behind the Dubai's Financial Crisis?' (2009) < <http://blog.mises.org/11119/whats-behind-the-dubais-financial-crisis/> > at 25 June 2014; see also Omar Salah, 'Dubai Debt Crisis: A Legal Analysis of the Nakheel Sukuk' (2010) 4 *Berkeley Journal of International Law*, pp.19-32.

this section discusses the involvement of Shari'a law in the process of arbitration. Second, and for reasons of space, it explains and analyses only some selected provisions relating to arbitration in the UAE focusing on the *UAE Civil Procedure Code 1992*, No 11. Third, it illustrates how the legal frameworks for dispute resolution in the Rules of Commercial Conciliation and Arbitration (*Law No 2 of 1994*; the present DIAC arbitration rules) and the DIFC arbitration rules of 2004 (*DIFC Arbitration Law No 8 of 2004*; the present DIFC arbitration rules) are outdated. The final part (Section 3.4) examines the role of the local court in supporting the dispute resolution process, and the unpredictability of enforcement of legal rights as a major problematic procedural issue in arbitration in the UAE and Dubai.

3.2.1 Arbitration Under Shari'a in Dubai

Reliance on dispute resolution methods other than litigation (i.e. arbitration) is not a new phenomenon in the Gulf Arab Region. Such dispute resolution has been practiced in the region since the pre-Islamic period. Since the founding of the Islamic schools and Islamic philosophy, the religion plays a major role in law and society.¹⁴ As stated by Gemmell, 'Islamic law pervades the commercial world, as well as a Muslim's life. Islam is a complete way of life: religion, an ethic and a legal system all in one.'¹⁵ Some Gulf Arab States, such as the UAE and Qatar, apply Shari'a law as the basis for the legal systems in their countries. However, Saudi Arabia enacts the Shari'a law as its constitutional law.¹⁶ Consequently, it is not surprising that the Shari'a law plays a significant role in the Gulf

¹⁴ Arthur J. Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 *Santa Clara J. Int'l L.* 169, 170.

¹⁵ Ibid. It should be noted that Islamic law is known as the Shari'a law as well.

¹⁶ Nicholas HD Foster, 'Islamic Commercial Law: An Overview (I)' (2006) *Indret* 4, p.387.

Arab Region's arbitration systems. In fact, a number of Gulf Arab States do not separate religion from their arbitration law in their adherence to Shari'a principles.¹⁷

As a preliminary issue, it is useful to emphasise that the jurisprudential issue in regard to Shari'a rules is that all legal systems reserve the right to not enforce agreements to awards if they are contrary to public policy. What constitutes public policy is generally decided by the courts. The difference in the case of Dubai and UAE is that such public policy is derived from the rules of Shari'a. However, this does not mean that Shari'a rules will always make arbitration awards unenforceable. The discussion below will demonstrate how the courts have accommodated Shari'a rules while upholding arbitral awards. For example, since UAE, has acceded to the New York Convention and made legislative changes there has been a demonstrable change in the attitude of the courts, especially Dubai courts. A comparison of the earlier decisions of the courts with those given after the accession to the New York Convention will be used to substantiate this claim. It is acknowledged that this is an area that requires more change but the trend is that the Shari'a rules do not pose an insurmountable hurdle.

Historically and conceptually, there are a few key differences between Shari'a and Western ideas of arbitration, including the nature of arbitration, the scope of arbitration, the choice of the law and the extent of judicial review and enforcement procedures. These differences

¹⁷ In these states, for example, they may prohibit contractual provisions requiring an award of interest. See Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *N.Y. Int'l L. Rev.* 1, p.41.

The level of influence of Shari'a law and Western legal system between Muslim or/and Middle Eastern Countries can be divided into two groups. The first group is that countries have adopted Western civil law such as Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco and Tunisia. On the same group, there are some countries who have adopted Western common law such as Iraq, Jordan, Sudan and the UAE. The second group is that countries have more substantially adopted Shari'a law and principles these include Saudi Arabia, Qatar, Oman and Yemen. See Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2010) Vol.1 *International Journal of Arab Arbitration* No 4.

are relevant considerations in understanding the issues that exist in the practice of the dispute resolution process. In relation to the nature of arbitration, the Western concept of arbitration recognises the finality of the arbitral decision.¹⁸ In contrast, in Islamic jurisprudence and the Shari'a view, there is extensive discussion as to whether arbitration is more than a simple conciliation.¹⁹

Another area of distinction between the Western concept of arbitration and *Shari'a* is the question of which matters can be arbitrated (i.e. the scope of arbitration). There is a common precept among the four *Sunni* Schools that arbitration is applicable in financial matters, which is consistent with the perspective adopted in international commercial arbitration. However, the scope of arbitration is more limited in some countries that apply Shari'a law.²⁰ For example, in Saudi Arabia, some matters are not permitted to be arbitrated, such as *hudoud*,²¹ *laan*²² between spouses and all matters relating to public policy orders.²³ Similarly, the *UAE Federal Law No 11 of 1992 (UAE Civil Procedure Code)* in Article 203(4) stipulates that 'arbitration shall not be permitted in matters in which settlement is not permitted. An agreement to arbitration shall only be valid if made by someone who has the capacity to act with regard to the right which is the subject of the

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Types of disputes subject to arbitration can be categorized into three types. The first type is 'Time Disputes' which concern delays in construction projects. This can result in the imposition of liquidated damages and other compensatory measures. The second category is 'Quality Disputes' which concern the expected level of workmanship on certain projects. The final category is related to 'Payment Disputes'. See Mahmoud Fadli, 'International Arbitration in the United Arab Emirates: A Look at Developments in Dubai and Abroad' < <http://mahmoudfadli.com/ICAUAE.html> > at 10 July 2014.

²¹ *Hudoud* can be defined as a type of crime in Shari'alaw which include murder, assault, adultery, drunkenness, theft and robbery. Kutty, above n 17.

²² Ibid. *Laan* can be defined as a Shari'a procedure whereby the married couple terminates their marital relationship upon one party accusing the other of adultery.

²³ Article 1 of the Rules for Implementation of the Saudi Arabian Arbitration Regulation stipulates that 'arbitration in matters wherein conciliation is not permitted, such as *hudoud*, *laan* between spouses and all matters relating to the public order shall not be accepted. See *the Rules for Implementation of the Saudi Arabian Arbitration Regulation 1985*, art.1.

dispute.²⁴ In the UAE, for instance, there is uncertainty under a number of Federal laws as to whether or not commercial agency contracts can be arbitrated. As a result, several UAE courts have given different decisions on whether such contracts can be subject to arbitration.²⁵

Moreover, public policy implications can have a significant impact on the practice of international commercial arbitration, particularly in the matter of enforcement. Both UNCITRAL and the New York Convention 1958 provide that recognition and enforcement of an arbitral award may be refused, *inter alia* if the court finds that the subject matter of the dispute is not permitted for settlement by arbitration according to the law of the state, or if the recognition or enforcement of the award is in contradiction to the public policy of the state.²⁶ National arbitration laws differ between countries; therefore, there will be differences between jurisdictions regarding which matters can be subject to arbitration. In the context of Muslim nations, for example, arbitration can be excluded in several contracts, especially those including interest or if matters are of a speculative nature.²⁷ As a result, the recognition and enforcement of an arbitral award of this type of contract can be refused, as the charging of interest is forbidden and opposed to the public policy of several Muslim states.

²⁴ *the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)* art.(203(4).

²⁵ Kutty, above n17.

²⁶ See *UNCITRAL Model Law on International Commercial Arbitration 2006* art.36; and also see *the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* art.V(2).

²⁷ There are several aspects regarding arbitration where Western and Muslim nations have different philosophical approaches, these include public policy, unfair trade practices, capacity of arbitrators, sanctity contract, liability of arbitrators and statute of limitation. For example, under Shari'a law arbitrators are obliged to have similar qualifications as a judge, and they must be an adult male Muslim and knowledgeable in Shari'a. See Kutty above n 17.

Additionally, under Shari'a rules, there is no choice with regard to different systems of law, as the Shari'a disqualifies the selection of other laws by parties to a dispute.²⁸

Pursuant to the UAE legislation, unless the arbitrator was authorised to reconcile the parties, the arbitral award must be in conformity with the provisions of the law. UAE law states that a primary source of law is the Shari'a.²⁹

However, the new practice of international commercial arbitration provides the parties with freedom to negotiate their own choice of law provisions.³⁰

A final issue can arise in the judicial review and enforcement procedures. There are two main objectives of the legal frameworks of international commercial arbitration: first, ensuring the enforceability of arbitration agreements and arbitral awards, and second, preserving the arbitration process from interference by the domestic courts and other national and international institutions. In fact, the UNCITRAL Model Law and the rules of the major arbitral institutions such as the LCIA, the ICC and the AAA provide that arbitral awards shall be binding and enforceable. These rules also offer a limitation on the review of the merits of arbitral awards. Thus, from the Western and international perspective, there is an acceptance of the principle that the arbitral awards may not be consistent with the law. However, in the context of Middle Eastern and Islamic countries, the merit of a dispute is reviewed in the national courts before the enforcement of the foreign arbitral award. This is because the national courts need to ensure that the arbitral award is consistent with public policy (i.e. Shari'a law).³¹ As stated by El-Ahdab, under Shari'a law, non-Muslims are free to enter contracts and business relationships, and any award arising from their business is

²⁸ Qur'an 4:60, 5:49 ('Judge between them by what God has revealed and follow not their vain desires.').

²⁹ Kutty aboven 17.

³⁰ See *UNCITRAL Model Law on International Commercial Arbitration 2006* art. 28; also see *the ICC Arbitration Rules 2012* art. 17.

³¹ It has been suggested by a number of commentators that 'the enforcement of an arbitral award depends upon the belief of the governor of the region in which enforcement is sought as to the fairness of the award'. See Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, (1999)51-605.

not subject to the prohibitions and authorisations of Shari'a law. However, once a Muslim becomes party to a contract, application of Shari'a law or principles is necessary. Therefore, international lawyers are urged to be careful when drafting foreign award enforcement provisions. If a Muslim and a non-Muslim enter into a contract based on principles other than Shari'a, then there is a high probability that a Muslim court will invoke the public policy provision of the New York Convention³² and refuse to enforce the foreign award.³³

To sum up, Shari'a law is friendly to arbitration, and indeed encourages the use of it. However, the involvement of Shari'a law in the process of arbitration, especially when the local courts review the merit of an arbitral award in accordance with public policy (i.e. Shari'a law), can create uncertainty and unpredictable arbitration outcomes.

3.2.2 Arbitration in Dubai and the *UAE Civil Procedure Code*

Another problematic issue is that the UAE does not have a proper arbitration law or specialist arbitration courts. In the UAE, arbitration is governed principally by a small number of provisions, namely the *UAE Federal Law 1992, No11 (UAE Civil Procedure Code)*.³⁴ It contains provisions for dealing with arbitration that specify that contracting parties may stipulate that any dispute between them shall be referred to arbitration. It also covers the appointment and disqualification of the arbitrator³⁵ and the capacity of the UAE

³²Ibid, pp.51-601.

³³Ibid, pp.51-601.

³⁴the *UAE Federal Law 1992, No11* will be considered (*the UAE Civil Procedure Code*). It remains in force as *lex arbitri* in the UAE. These provisions are not based on the UNCITRAL Model Law.

³⁵the *UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)* art 206,207.

courts to interfere in a variety of aspects of arbitration.³⁶ A key issue related to the *UAE Civil Procedure Code* that has been considered by commentators is that the specific provisions of arbitration are not sufficient to prevent any application of Shari'a principles by the Dubai Courts.³⁷

The *UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)* was amended in 2005.³⁸ The applicable code provisions regarding arbitration are Articles 203–218. Despite the fact that the modified code comprises some provisions administering arbitration, it is still far from sufficient in the context of modern international commercial arbitration. In the following analysis, a number of difficulties in selected provisions of the relevant code are discussed, including the arbitration agreement, the tribunal, the procedure and the award.

3.2.2.1 The Arbitration Agreement

First, Article 203(2) stipulates that an arbitration agreement must be in writing in order to be enforceable.³⁹ That is, the arbitration agreement or clause must be agreed upon in writing by both parties. For example, a standard clause in the general conditions of a contract or at the back of an invoice or delivery note will not be accepted by the court as an arbitration clause.

Further, the code in Article 203(5) specifies that even if there is an arbitration agreement between the parties, assuming one of the parties files a suit in the UAE courts and the other

³⁶ *the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)* art 207, 209, 214, 215.

³⁷ S R Luttrell, 'Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC' (2008) 9 *Bus. Int'l* 254.

³⁸ *Ibid*, pp. 272-273.

³⁹ *the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)* art 203(2).

party fails to object to it at the first hearing, the suit may be considered, and the arbitration agreement between the parties shall be deemed terminated. This means that any challenge to the court's jurisdiction must be brought at the first hearing or session. Otherwise, the court will not refer the dispute to arbitration.⁴⁰

In relation to the formation of the arbitration agreement, UAE law does not recognise the authority of counsel or lawyers to sign an arbitration agreement on behalf of their clients. This means that, in the case of natural parties, they will be obliged to sign their own agreement themselves. However, if they are corporate bodies, the agreement must be signed by hand by their officers. For instance, 'in May 1994, there was a case where the Dubai Court of Cassation invalidated an arbitration agreement for the reason that one of the persons signing was acting under a power of attorney that did not cover the submission'.⁴¹ Generally speaking, parties and their representatives should consider these issues of a technical nature to ensure that they will have a valid arbitration agreement.

3.2.2.2 The Tribunal

The arbitration chapter of *the UAE Civil Procedure Code* also comprises mandatory provisions regarding the appointment of arbitrators or the tribunal. In this regard, the code provides parties with complete autonomy to appoint their arbitrators and freedom to choose the appointment procedure. However, in the case that one party fails to appoint his or her arbitrator, the other party will have the right to request the court either to nominate an arbitrator for him or her, or oblige him or her to engage in arbitration. Significantly, the

⁴⁰Michael Black QC, Dubai: a regional arbitration centre? An introduction to the legal system in Dubai and the UAE, arbitration law and the need for reform, (speech delivered at the American Bar Association Forum on the Construction Industry, Texas, 3 February 2012.

⁴¹ Dubai Court of Cassation of 25 June 1994. See Luttrell, above n 37, p. 266.

Court's appointment is final, and it is not subject to appeal.⁴² In other words, the parties must nominate the number of arbitrators and identify them. Otherwise, the UAE courts will be tasked to make the appointment instead. This shows the degree of the local court's power as well as the possibility of the local court's intervention.

Another provision regarding the appointment of arbitrators is Article 206(1), which places a limitation on who may act as an arbitrator. An arbitrator may not be a minor, bankrupt, legally incapacitated or deprived of his or her civil rights due to a criminal offence unless she or he has been rehabilitated. Further, Article 206(2) specifies that the number of arbitrators must be odd.⁴³ The arbitrators are required to be present at hearing, sign the hearing records and hear the parties' arguments. Subsequently, they will be required to make a decision that must be reached by a majority of the arbitrators. The difficulty of Article 206 concerning the appointment of arbitrators is that there is no limit set on the number of arbitrators, and that the qualification requirements of the arbitrators are ambiguous.

It should be noted that the code does not overlook the right for parties to challenge an arbitrator. Article 207(4) states that:

an arbitrator may not be disqualified except for reasons occurring or appearing after his appointment. A request for disqualification must be based on the same grounds on which a judge may be dismissed or deemed unfit for passing judgement. The request for disqualification shall be filed with the court which has jurisdiction to consider the dispute within five days from notifying the parties of the appointment of the arbitrator or from the date on which the reason for disqualification arose or from the time it became known if subsequent to the notification of the appointment of the arbitrator. In all events, the request for

⁴² *the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code) art 204(2).*

⁴³ *the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code) art 206(2).*

disqualification shall not be granted if the court has already passed a judgement or if the hearing of pleadings has been concluded.⁴⁴

The parties will be entitled to challenge and dismiss an arbitrator on the same grounds on which a public judge can be challenged and dismissed in the UAE.⁴⁵ However, there is a restriction on the parties' ability to challenge an arbitrator. The code limits the parties' right to challenge for reasons occurring or appearing after the arbitrator's appointment. It also requires that both parties must agree to the dismissal of a particular arbitrator, as an arbitrator cannot be dismissed by just one party unless he or she deliberately neglects to act in accordance with the arbitration agreement.

Moreover, challenging an arbitrator will suspend the arbitration proceedings until a substitute arbitrator is appointed. This could disadvantage parties with respect to the time and money required to repeat all or part of the proceedings, and could also result in a delay in the resolution of the dispute. In contrast, the modern practice of international arbitration suggests a provision that allows the parties and the tribunal to continue their arbitration proceedings with a majority of the arbitrators, which saves the parties and the tribunal having to repeat the proceedings anew, and thus probably speeds up the resolution of the dispute.

3.2.2.3 The Procedure and the Award (Enforcement of Arbitral Awards in UAE)

The code provides procedures for enforcing domestic arbitral awards with finality. In order to enforce domestic arbitral awards, the successful party must first ratify the arbitral award

⁴⁴the UAE Federal Law 1992, No11 (*the UAE Civil Procedure Code*) art 207(4).

⁴⁵ An arbitrator can be challenge and dismissed under the grounds of independence or impartiality, or in the case that the arbitrator has deliberately neglected to act in accordance with the arbitration agreement. See *the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)* art 207 (3), (4).

through the UAE court.⁴⁶ There are a number of requirements regarding a valid arbitral award, which are listed in Article 212. A valid arbitral award must:

- (i) be signed by the tribunal (if there is a panel the majority of members of the tribunal must sign the award);
- (ii) state the facts of the dispute, the legal reasons for the decision and the date on which it was reached; and
- (iii) be accompanied by the arbitration agreement.

The code has a number of procedural requirements that can affect the enforcement of arbitral awards, especially in the case where these requirements are not complied with. An arbitral award may be challenged by way of either an application for annulment or submissions made during the ratification of the award. The grounds for challenge or annulment are found in Article 216 of the code and may include the following circumstances:

- (i) The arbitration agreement and the tribunal's jurisdiction are defective: for example, if the award was made without an arbitration agreement, or on the basis of an invalid arbitration agreement, or the arbitration agreement was concluded by parties who did not have the legal capacity to agree to arbitration. In regard to the tribunal, the award can be challenged in circumstances where the tribunal goes beyond its jurisdiction as specified in the arbitration

⁴⁶ Article 215 of the UAE Federal Law 1992, No11 (*the UAE Civil Procedure Code*) states that the arbitrators' award may not be enforced unless the same has been approved by the court with which the award was filed. In other words, in order to validate the arbitral award and make it enforceable, it is required to be filed and approved by the local court. This is a challenging provision as it gives the local courts the capacity to reopen arbitral awards and to deliver judgment on the dispute anew. Generally, under this code the local court has more power than the arbitrators. 'For instance, courts have the power to dismiss an arbitrator, here preliminary issues, grant interim measures, make evidentiary decision on commission, extend the time for arbitration and to approve, correct, enforce or even nullify awards'. See Marrone and Smith, above n 1; See also the UAE Federal Law 1992, No11 (*the UAE Civil Procedure Code*) art 207, 208, 209, 214, 215, 216, 217.

agreement, the arbitrators were not appointed according to law, or where one or some of the arbitrators rendered the award in the absence of the others and without their authorisation, or by arbitrators who did not meet the terms and legal requirements to act as an arbitrator.

- (ii) There are procedural defects: for example, where the subject matter of the dispute was not indicated to the tribunal either in the arbitration agreement or through the parties' pleadings, and where the award suffers from procedural irregularities.
- (iii) The award is contrary to public policy.⁴⁷ The meaning of public policy can be found in Article 3 of the UAE Civil Code, which requires compliance with the fundamental principles of Islamic Shari'a law.⁴⁸

Notably, a number of arbitral awards have been challenged in the UAE courts on grounds of procedural uncertainty. For example, an arbitral award was annulled on the grounds that the award was not issued within the required timeframe (i.e. six months) from the first hearing, even though it is a familiar practice for parties and tribunals to extend this time by tacit agreement.⁴⁹ In another case, the tribunal failed to require the witnesses to swear an oath, as prescribed by the UAE courts.⁵⁰

⁴⁷*International Bechtel V Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Petition No 503/2003, Judgment dated 5 May 2005; Dubai Court of Cassation, Petition No 146/2008, Judgment dated 9 November 2008.

⁴⁸*the UAE Federal Law 1992, No11 (the UAE Civil Procedure Code)*, art.3. According to Luttrell, under 216 (1)(c), there are vague grounds which can annul an award, specifically if 'something invalid in the ruling or in the procedures affecting the ruling' occurred during the arbitration. See Luttrell, above n 37.

⁴⁹ Andrew MacCuish and Sai Dandeker, 'United Arab Emirates: Enforcement of Domestic Arbitral Awards in the UAE Courts', *Mondaq*, 17 June 2015 <<http://www.mondaq.com/x/405466/Civil+Law/Enforcement+Of+Domestic+Arbitral+Awards+In+The+UA+E+Courts>> at 20 July 2015.

⁵⁰*International Bechtel V Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Petition No 503/2003, Judgment dated 5 May 2005.

The issue of the enforcement of foreign arbitral awards is also evident in the unsupportive role of the UAE courts and Dubai courts prior to accession to the New York Convention. The arbitration section of the *UAE Civil Procedure Code* provides that the court may invalidate the arbitration award on various grounds relating to the validity of the arbitration clause, the appointment of the tribunal or the arbitration procedure.⁵¹ The unsupportive role of the UAE courts in general can be observed in its adoption of a formalistic approach concerning a number of legal concepts, such as the signature of the award, the capacity and authority to enter into an arbitration agreement or witnesses' oath taking.⁵² Further, the code has few restrictions on grounds for challenging arbitral awards, whether domestic or foreign. In other words, the code gives any party the opportunity to invalidate the arbitral award for various reasons.⁵³

⁵¹ In the UAE, there are three possible areas of court intervention: enforcing the arbitration agreement, establishing the arbitral tribunal and challenges to jurisdiction. For more detailed information see Aymen Masadeh, 'The court's supportive role in Arbitration under the law of United Arab Emirates' (2013) Vol.1 *International Journal of Humanities and Management Sciences (IJHMS)* Issue 1.

⁵² Previously, the grounds of refusing arbitration awards in the UAE were much broader than the permitted grounds in the New York Convention. A number of arbitration cases or arbitral awards were rejected from enforcement with grounds of formalistic issues. First example is an arbitral award was not enforced because it was not signed in all pages. In fact, the documents were signed at the end page and initialed on every page. Another example of the difficulty to enforce an arbitral award in the UAE before the accession of the New York Convention was where the court decided that, although the parties had agreed what oaths the witnesses should swear before the hearing, because the oaths administered were not exactly the same oaths as those used in the UAE courts, the award was invalid. See Karim J Nassif, Gordon Blanke, and Soraya Corm-Bakhos, 'Arbitration under UAE law: towards a modern legal framework?' *Habib Al Mulla & Company* (the UAE), 09 September 2010 <<http://www.inhouselawyer.co.uk/index.php/united-arab-emirates/8140-arbitration-under-uae-law-towards-a-modern-legal-framework>> at 13 July 2014.

⁵³ There are well-known examples of the difficulty to enforce an arbitral award in the UAE, before the accession of the New York Convention. First example is that the Dubai Court of First Instance refused recognition and enforcement of an award issued by the Singapore International Arbitration Centre on the basis that the award concerned was not ratified in the country of origin and could therefore not be executed under Articles 235 and 236 of the *UAE Civil Procedures Code* even though clearly stating that the ratification process provided for under the *UAE Civil Procedures Code* applied only to UAE domestic – with the exclusion of foreign – awards, the Court only made fleeting reference to the existence and the UAE's membership of the New York Convention. See Gordon Blanke and Soraya Corm-Bakhos, 'Enforcement of Foreign Awards in the UAE: A U-Turn Ahead?' *Habib Al Mulla & Company* (the UAE), 08 November 2011 <<http://www.inhouselawyer.co.uk/index.php/united-arab-emirates/9657-enforcement-of-foreign-awards-in-the-uae>> at 15 July 2014. It should be noted that there have been a number of cases where the UAE Courts have applied the provisions of the domestic law resulting in the setting aside of foreign awards these including first the case of *Dubai Court of Cassation*, Case No 258/1999, Judgment dated 27 November 1999 and second the case of *Dubai Court of Cassation*, Case No 17/2001, Judgment dated 10 March 2001.

The provisions of the UAE code regarding international arbitration and enforcing foreign judgments are complex. Foreign judgments and arbitral awards are enforced in the UAE only in cases where the foreign arbitral award was rendered in a country that has a reciprocal agreement with the UAE to recognise foreign judgments and/or arbitral awards.⁵⁴ This indicates the limited possibility of enforcing foreign judgments and/or arbitral awards in the UAE, as the number of countries with which the UAE has entered into such reciprocal agreements is limited.⁵⁵

⁵⁴ Luttrell explains the contradiction between Article 20 and 235(2)a of the *UAE Civil Procedure Code*. He stated that article 20 of the code states that the UAE courts will be competent and have jurisdiction to hear any actions filed against UAE parties including individuals and entities residence in the UAE or overseas. However, under article 235(2)a, the court will only enforce in the situation if there is no competence. As a result, the UAE Courts have the capacity to enforce only foreign arbitral awards that concern matters the courts never had jurisdiction. See Luttrell, above n 37, pp. 272-273.

⁵⁵ The UAE has entered into a number of multilateral and bilateral conventions or agreements that have impact on the enforcement of foreign judgments or/and arbitral awards. In context of multilateral conventions, the UAE has entered into several multilateral conventions, most importantly, the Gulf Cooperation Council Convention on the Enforcement of Judgments and Judicial Notices and Delegations ('GCC Convention') (1987). In this regards, the UAE has entered into this convention in 1996. There are six countries signed the ('the GCC Convention') namely, UAE, Bahrain, Qatar, Kuwait, the Kingdom of Saudi Arabia and the Sultanate of Oman. The main aim of this convention is that any judgments issued by any country of the mention above have the effect as it made and delivered by the local court of the same county. Further multilateral convention signed by the UAE related to the enforcement of judgments and arbitral awards is the Riyadh Convention on Judicial Cooperation between States of the Arab League (1983) ('the Riyadh Convention'). It covers more than 20 States. The following countries are the signatories of the Riyadh Convention (UAE, Bahrain, Qatar, Kuwait, the Kingdom of Saudi Arabia, the Sultanate of Oman, Yemen, Jordan, Tunisia, Algeria, Sudan, Somalia, Iraq, Syria, Egypt, Lebanon, Palestine, Libya, the Kingdom of Morocco, Mauritania, Djibouti). Article 37 of the Riyadh Convention, states that arbitral awards and judgments from Originating States will be recognized and enforced in Recipient States subject to certain exceptions. See Essam Al Tamimi and Emma Van Son, *Practitioner's guide to arbitration in the Middle East and North Africa: United Arab Emirates*, (JurisNet, LLC, Ch7, 2009) 488; see also Jalal El-Ahdab, *Arbitration with the Arab Countries*, (Kluwer Law International, 3rd Ed, 2011).

The Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States (ICSID) (1965) is a major convention in the field of international arbitration. The Convention established the ICSID as an institution that provide and facilities conciliation and resolution for international investment disputes between signatories' parties. Under the auspices of the World Bank, the (ICSID) Centre plays a decisive role in the development of investment law, as its purpose is to settle disputes arising from investments and involving a private person, the investor, and public person, the State. It has two mechanisms for settlement of dispute: the first for States that are a party to the ICSID Convention and the second for cases in which one of the parties to arbitration is not a party the Convention. The Convention has been signed by more than 140 member States. The UAE signed the Washington Convention on 23 December 1981 and it entered into force on 22 January 1982. See Pierre Duprey, 'Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be distinguished in this Regard from Arbitration Based on Investment Treaties?' in Emmanuel Gaillard (eds), *Towards a Uniform International Arbitration Law* (2005), pp. 251-291.

On the other hand, it is a fact that the UAE is a party to more than 35 bilateral investment treaties with developed and developing countries alike. The bilateral treaties ratified by the UAE related to arbitration are various, including the Treaty on Judicial Cooperation in Criminal Matters, Extradition of Offenders,

A major issue regarding the enforcement of arbitral awards in the UAE is that arbitration proceedings are subject to the intervention and supervision of the local court. This weakens the arbitrators' authority. The courts have extensive capacity to dismiss an arbitrator, hear preliminary issues, grant interim measures, make evidentiary decisions on commission, extend the time frame for the arbitration and to approve, correct, enforce or even nullify awards. In contrast, the code does not provide arbitrators with adequate power to even impose fines or to force any party to provide any information or documents that are required to produce the arbitration award.

In conclusion, the main criticisms regarding the provisions of the *UAE Civil Procedure Code* are that they lack certain necessary aspects of modern arbitral proceedings, and that they require the irregularity and lengthy process of enforcing arbitral awards through the UAE or Dubai Courts. A new Federal arbitration law in the UAE based on the UNCITRAL Model Law is clearly needed to address these issues, and it should come in effect as soon as possible to remedy the great uncertainty associated with the current regime. The following section considers arbitration law under the DIAC. It discusses the major issues present in the DIAC arbitration rules of 1994 and the objective of the 2007 amendments to those rules.

Cooperation in Civil, Commercial and Personal Matters with Morocco (2006); and Sudan (2005). Also, the UAE has an Agreement on Legal and Judicial Cooperation with Syria (2002), Egypt (2000) and Jordan (1999). More to the point, the UAE entered into a bilateral convention with France titled the Treaty on judicial Cooperation, Recognition and Enforcement of Judgment in Civil and Commercial Matters (1992). Recently, the UAE is negotiating Free Trade Agreements with the European Union, Singapore, Australia and United States which take account of provisions governing the settlement of disputes and the enforcement of arbitral awards. See David N. Cinotti, 'Bilateral Investment Treaties: Protect UAE Investors Engaged in Foreign Direct Investment', *Emirates Law Journal* (2012) P.11.

3.2.3 Arbitration at the Centre for Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry (DCCI): The Dubai International Arbitration Centre (DIAC) at Present

The DIAC was first created in 1994 as the Centre for Commercial Conciliation and Arbitration. It is located within the Dubai Chamber of Commerce and Industry (DCCI). At that time, the Centre for Commercial Conciliation and Arbitration applied law No (2) of 1994 (Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry).⁵⁶ The rules of the Centre for Commercial Conciliation and Arbitration were not appropriate to the demands of modern international arbitration and best practice, and did not address certain key matters present in the rules of world-class arbitral institutions.⁵⁷ In other words, the rules were principally aimed at domestic arbitration and were not designed to deal with commercial arbitration involving a foreign business. For this reason, there was a need to adopt new rules that could line up with the modern practices of international arbitration.

In May 2007, by Decree No 11, the DIAC amended its arbitration rules to pursue the modern and international trends in practice of other arbitration centres around the globe. The 2007 DIAC arbitration rules replaced the previous law No (2) of 1994 (Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry). The aim of adopting the new arbitration rules of the DIAC was to adapt the institution to cope with international as well as domestic arbitration.

⁵⁶The *Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry* 1994, No (2) of was applicable to all arbitration cases since 1994 until the 7th of May 2007. Dubai International arbitration centre <<http://www.diac.ae/idiar/rules/>>. [here,after ‘DCCI Rules’].

⁵⁷Essam Al Tamimi and Emma Van Son, ‘The DIAC Rules and the New U.A.E. Arbitration Law’, (2008) 25 *Journal of International Arbitration (Kluwer Law International)* 2, 211-217.

The following discussion analyses notable issues relating to the previous law No (2) of 1994 (Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry). Previously, Article 2 of the DCCI rules of 1994 provided that:

the provision of these rules shall apply to commercial disputes that are filed with the Chamber for conciliation and arbitration pursuant to a previous agreement between the parties to the dispute or an application from one of them and the approval thereof by the other.⁵⁸

The language of this provision seems to indicate that the DCCI rules were limited in their application to disputes of a commercial nature.

Another major issue regarding the rules of the DCCI arises from Article 43 in relation to the language of the arbitration. The provision stated:

the Arabic language shall be the language of the arbitration unless the parties agree otherwise, or the tribunal decides otherwise taking into account the surrounding circumstances and in particular the language of the contract and the correspondence between the parties.⁵⁹

The modern practice of arbitration suggests that the initial language shall be the language of the arbitration agreement unless otherwise agreed by the parties. In contrast, the DCCI provision nominated Arabic as the initial language of the arbitration. Assuming the arbitration was held in a language other than Arabic, it would have been essential to attach a certified Arabic translation to the award. Among other things, this would have increased the costs of arbitration procedures, as both parties would have been required to provide certified translations.

Comparing the DIAC rules of 2007 with the previous DCCI rules of 1994, the new rules require the tribunal to notify the parties of a preliminary meeting with the intention to fix a

⁵⁸*The Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry* 1994 No (2), art.2, available at <www.diac.ae/idiar/rules/1994/>.

⁵⁹*Ibid*, art.43.

timetable for the submission of documents, statements and pleadings. This opportunity was unavailable under the DCCI rules.⁶⁰ Moreover, interim measures protection is very significant in international commercial arbitrations because it can be used to protect the rights or interests of a party pending the arbitration award. Article 42 of the old DCCI rules afforded only the courts of the state the power to grant such interim measures. Thus, under the DCCI rules, the arbitral tribunal did not have the right to grant interim relief to parties. In contrast, the new DIAC rules of 2007 empower the tribunal to order interim measures over the subject matter of the dispute when so requested by one of the parties.⁶¹ As a result, the authority of arbitrators is extended and the involvement of the local court in the arbitration proceedings is lessened.

The confidentiality of all proceedings, awards, evidence and documents produced or disclosed in the arbitration is a considerable development in the new DIAC arbitration rules of 2007.⁶² In particular, Article 27 provides the tribunal with the capacity to order the production of documents, which means that the tribunal can request the parties to disclose a particular document that may be used against their interests.⁶³ In comparison, the 1994 rules of the DCCI did not address the issue of a specific disclosure for the production of

⁶⁰ *The Dubai International Arbitration Centre arbitration rules 2007*, art.22.

⁶¹ Article 31 states that the tribunal may issue any provisional order or take other interim or conservatory measures it deems necessary, including injunctions. See *The Dubai International Arbitration Centre arbitration rules 2007*, art.31.

⁶² Raid Abu-Manneh, 'Dubai: A Regional Centre?', Mayer Brown LLP, 2009 <http://www.mayerbrown.com/publications/article.asp?id=7383&nid=6> at 25 July 2014.

⁶³ Stephen Jagusch and James Kwan 'Middle East Overview: Section 2: Country Overview: The European & Middle Eastern Arbitration Review' (2008) *Global Arbitration Review*, <http://www.globalarbitrationreview.com/reviews/3/sections/6/chapters/63/middle-east-overview/> at 30 July 2014.

documents. Maintaining confidentiality in arbitration proceeding is a primary concern for parties and is likely to be an essential factor for the functioning of any arbitration regime.⁶⁴

Under the 1994 rules:

an arbitrator's appointment may have been revoked before the closing of the hearings by mutual consent of the parties, or upon a complaint of one of the parties to the dispute or one of the arbitrators, if the DIAC Committee had found that a legal or factual obstacle prevented him/her from carrying out his/her tasks, or if he/she did not conduct the arbitration in accordance with the rules or within the specified time.⁶⁵

The period allowed for the appointment a substitute arbitrator was 21 days from the date of the decision to terminate the arbitrator's appointment. This meant that, in circumstances where an arbitrator rejected her or his appointment, or died while conducting her or his duties in the proceeding, the arbitration process would be suspended until a substitute arbitrator could be appointed.⁶⁶ This provision restricted the tribunal from continuing their duties until they had substituted the defective arbitrator. It would also create a disadvantage for the parties with respect to the time and money involved in repeating all or part of the proceedings. In contrast, the new DIAC rules include a provision that allows for the expedited formation of the tribunal, which encourages parties to settle their dispute within the time frame prescribed in the arbitration agreement.⁶⁷

As stated above, the DCCI arbitration rules were not adequate in relation to recent trends in international arbitration. Thus, it was necessary that the rules be changed and made

⁶⁴ The parties' concern can be clear if the disclosure of arbitral materials is, for example, reveals trade secrets. See Samuel Estreicher and Steven C. Bennett, 'The Confidentiality of Arbitration Proceedings' (2008) Vol. 240 *New York Law Journal* No 31.

⁶⁵ Kwan, above n 9.

⁶⁶ Ibid.

⁶⁷ Alec Emmerson and Sapna Jhangiani, 'DIAC announces new set of arbitration rules', (2007), *Clyde & Co* <<http://www.clydeco.com/knowledge/articles/diac-announces-new-set-of-arbitration-rules.cfm>> at 30 July 2014.

consistent with the modern practice of international arbitration. These changes have the effect of facilitating both domestic and international arbitration. The following section discusses the main issues relating to the previous arbitration law of the DIFC (i.e. *law No 8 of 2004 the DIFC arbitration law*) in order to understand the reasons the 2008 amendments were made (law No 1 of 2008 DIFC arbitration law).

3.2.4 Arbitration at the Dubai International Financial Centre (DIFC)

The DIFC is a financial free zone providing its registered entities with no tax on income and profit, 100 per cent foreign ownership and duty-free foreign exchange transactions. The DIFC was founded in 2004 by the Government of the Emirate of Dubai with the intention to promote Dubai as a recognised hub for institutional finance and commerce. Among other things, it comprises an autonomous judicial system. The main activities of the DIFC are based on financial services such as banking and brokerage, capital markets, wealth management, reinsurance and Islamic finance; however, it also provides its registered residents with ancillary services that include legal, accounting and consulting services.⁶⁸ Previously, the DIFC applied law No 8 of 2004 as its arbitration law. Comparing the DIFC arbitration centre with other arbitration centres in the Gulf region, it can be observed that the DIFC arbitration centre's a unique characteristic is its independent judicial system.⁶⁹

One potential issue regarding the *law No 8 of 2004 (the DIFC arbitration law)* was that it limited the capacity of arbitration to cases in which one of the parties, or the dispute itself,

⁶⁸Reza Mohtashami, 'Recent Arbitration –related Developments in the UAE' (2008) 25 *Arbitration International (Kluwer Law International)* 5, 631-640.

⁶⁹Salomon, Duffy and Canning, above n 10.

was related to the DIFC.⁷⁰ In other words, the DIFC's previous arbitration law, enacted in 2004, effectively limited the scope of arbitration to disputes arising out of or in connection with the DIFC. As a result, a reform of the law No 8 of 2004 was needed in order to extend the jurisdiction of the DIFC courts.⁷¹

To understand the issue of the DIFC courts' jurisdiction, it is appropriate to describe briefly the court system in Dubai. Dubai has two permanent Court systems: the Dubai Courts and the DIFC Courts. The official language used in the Dubai Courts is Arabic, while in the DIFC courts it is English, as the latter employ a combination of experienced local and foreign judges. Notably, both Courts are treated equally as Courts of law in Dubai. As a result, decisions made by the DIFC courts are enforceable within the DIFC (the free zone itself), in the Emirates generally and, in some circumstances, internationally. As mentioned previously, the DIFC courts are composed of two levels: the Court of First Instance and the Court of Appeal.⁷²

There are other temporary Courts and special tribunals in the UAE, established by either the Ruler of an Emirate or the Minister of Justice, that deal with specific matters.⁷³ The decisions made by these Courts or special tribunals are final and binding, and there is no

⁷⁰ Claudine Helou, 'The New Law of the Dubai International Financial Centre' (2009) Vol. 1 *International Journal of Arab Arbitration* No 1
<<http://www.intljaa.com/english/issue.asp?issueID=1&contentid=10&MenuID=1>>.

⁷¹ Ibid. See also S R Luttrell, 'The Arbitration Law of the Dubai International Finance Centre' (2008) 3 *Journal of International Commercial Law and Technology* 3, p170.

⁷² See Chapter 1.

⁷³ There are other special tribunals and committees in Dubai, these include the Special Judicial Committees which has competence to hear claims brought against Amlak Finance PJSC and Tamweel PJSC (*vide Decree No 61 of 2009*). An additional special committee in Dubai is the *Zabeel Special Committee* which has jurisdiction over matters related to *Zabeel Investments LLC* and its subsidiaries and associates (*vide Order of Ruler of Dubai dated 9 February 2011*). Finally, there are special types of Rent Committees which has responsibility to deal with tenancy disputes in three Emirates namely Abu-Dhabi, Dubai and Sharjah. See Habib Al Mulla, Karim Nassif and Gordon Blanke, *Dispute Resolution in 47 Jurisdiction Worldwide: United Arab Emirate, Getting the Deal Through – Dispute Resolution* (2011)
<http://www.habibalmulla.com/Mediaresource/dcc0a244-a9e0-4c56-9a3d-1b2e038cc335.pdf> at 30 June 2014.

right to appeal any decision of a tribunal or court. An example of a special tribunal in Dubai is the Dubai World Tribunal, which was established by Decree No 57 of 2009 and subsequently amended by Decree No11 of 2010. The Dubai World Tribunal has jurisdiction over matters related to Dubai World and its subsidiaries. Significantly, the tribunal has an exclusive jurisdiction that prohibits the Courts of Dubai and the DIFC Courts from hearing or deciding any disputes considered within its jurisdiction.⁷⁴

However, the DIFC Court has jurisdiction over civil and commercial disputes.⁷⁵ The issue of the scope of DIFC courts' jurisdiction has arisen in three recent cases in the DIFC courts.⁷⁶ Due to the limited competences of the DIFC courts, foreign investors in Dubai had difficulties as they did not have access to any alternative options allowing them to avoid using the Dubai Courts or other Arabic language judiciaries in the UAE in the event of a

⁷⁴ Dubai World Tribunal, The Special Tribunal to Decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries. The Tribunal handles various matters pertaining to the settlement of the financial position of Dubai World and its subsidiaries. See, <<http://dubaiworldtribunal.ae/>>.

⁷⁵ It should be noted that the jurisdiction of the DIFC Courts is set out in Article 5 of the *DIFC Law No 12 of 2004* which provides that the DIFC Court of First Instance shall have the exclusive jurisdiction over:

civil or commercial cases and disputes involving the Centre or any of the Centre's bodies or any of the Centre's establishments;

civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part in the Centre or an incident that has occurred in the Centre;

objections filed against decisions made by the Centre's bodies, which are subject to objection in accordance with the Centre's laws and regulations;

any applications over which the Courts have jurisdiction in accordance with the Centre's laws and regulations;

Article 5 also provides that the parties may elect to contract out of *DIFC Law No 12* and agree to submit disputes arising under the contract to the Courts of another jurisdiction. On 7 December 2009, the DIFC Courts and the Dubai Courts signed a Protocol clarifying the extent of each court's jurisdiction. According to the Protocol, the Dubai Courts and DIFC Courts agree that the DIFC Courts should have exclusive jurisdiction over civil or commercial cases in disputes involving the DIFC or any company licensed to operate from the DIFC. The DIFC Courts also have jurisdiction over any civil or commercial case or dispute arising from, or related to, a contract or financial transaction that has been performed in whole or in part within the DIFC.

⁷⁶For example, the case of *Hardt & Another v Damac (DIFC) Company Ltd et al* (2010); the case of *Taaleem PJSC v National Bonds Corporation PJSC & Deyaar Development PJSC* (2010), and the case of *Corinth Pipeworks SA v Barclays Bank PLC* (2010). For more detailed information about these cases see Richard Bell, 'Jurisdiction of the DIFC Courts - Recent Developments', *Clyde & Co* 22 March 2011 <<http://www.clydeco.com/insight/articles/jurisdiction-of-the-difc-courts-recent-developments>> at 30 July 2014.

need to take legal action. Essentially, for disputing parties, the DIFC arbitration law of 2004 was the only safe way to conduct arbitration in Dubai, as the Federal code has other drawbacks.⁷⁷ Many foreign businesses recognised the advantages of having their disputes heard in Dubai, as it administered the actual conduct of arbitral proceedings and the recognition and enforcement of foreign arbitral awards within the DIFC. Moreover, it used English language and was based on a familiar legal structure. However, the uncertainty in a number of remaining aspects of the DIFC Court's jurisdiction was a controversial issue facing the legal community in Dubai.

The limited scope of the DIFC Court's jurisdiction was not the only problem with the previous arbitration law of the DIFC of 2004. Luttrell highlighted a number of issues regarding the arbitration law of the DIFC of 2004, including the definition of the 'seat'. He also indicated that the law does not cover the privacy and confidentiality of arbitral proceedings, does not express the right to order or apportion costs and, finally, does not deal satisfactorily with the status of DIFC-rendered arbitral awards in the wider UAE.⁷⁸

On one hand, the arbitration law of the DIFC of 2004 was remarkable for several reasons. Specifically, it gave its users a high level of party autonomy, it contained some mandatory provisions and, finally, it granted the arbitral tribunal the capacity to order interim measures. On the other hand, the law also presented several issues limiting the application of its definite dispute resolution process. The role of the local courts in the arbitral

⁷⁷ Luttrell, above n 71, p170.

⁷⁸ Ibid, p176.

proceedings is significant in all jurisdictions.⁷⁹ Therefore, it is relevant in the following section to discuss the UAE courts' role in international commercial arbitration.

3.2.5 The Role of the Local Courts and the Unpredictability of Enforcement

In many legal systems, arbitration processes are independent of the national courts. Arbitration is classified as one form of alternative dispute resolution, and scholars have generally considered that an effective dispute settlement mechanism is one that reduces the involvement of the local court.⁸⁰ The modern practice of arbitration as a dispute resolution method provides the arbitral tribunal with the right to decide on its own jurisdiction, and it provides the parties with the freedom to designate the laws governing their dispute. However, in a number of legal systems, particularly that of the UAE, the local court can intervene in arbitration at the outset, during or in the closing stages of the proceeding.⁸¹ Many advantages of arbitration thus stand negated by such possibilities of intervention by the courts. The following subsections explain how the role of the UAE courts has been historically problematic in dealing with arbitral proceedings at all stages.

3.2.5.1 Pre-Arbitral Hearings

⁷⁹ M. T. Abdullah, *Role of UAE courts in international commercial arbitration* (PhD thesis, University of Bedfordshire, 2013).

⁸⁰ Lola Akin Ojelabi, 'Improving Access to Justice through Alternative Dispute Resolution: the Role of Community Legal Centres in Victoria, Australia' (Research Report, Faculty of Law and Management, La Trobe University, September 2010). For example, the Hon. Marilyn Warren AC states that 'Notable, the Model Law is an internationally recognised arbitration regime endorsed in over 60 nation-states that gives parties the freedom to choose how they want their disputes resolved with minimal court intervention'. See The Hon. Marilyn Warren AC, 'Australia as a 'safe and neutral' arbitration seat' (Speech delivered at the Australian Centre for International Commercial Arbitration (ACICA), Australia, 6 – 7 June 2012).

⁸¹ Masadeh, above n49, p.129.

A case can be taken by one of the parties to the local court, notwithstanding the existence of an arbitration agreement or submission. In this situation, the defendant party has two options: to opt for litigation, or alternatively, to refuse the court's jurisdiction. The governing arbitration rules will play a major role in deciding whether the court can be involved. Comparing the UNCITRAL Model Law with the current law of the UAE (*Federal Law No 11 of 1992; UAE Civil Procedure Code*) regarding court jurisdiction over existing arbitration agreements, the Model Law provides that a party has no right to refuse court jurisdiction after the submission of his first statement on the matter. In contrast, the situation in the UAE Federal law is ambiguous, as Article 203(5) provides that any objection to court jurisdiction by a party must be registered before the first hearing or first session. This means that a party may still be able to refuse court jurisdiction even after submitting first statement on the matter, where the first hearing or first session has not yet taken place.

The involvement of the local court at the beginning of arbitration proceedings can also occur in the absence of the appointment of an arbitrator for the respondent or sole chairperson arbitrator, or in disqualifying or challenging the impartiality of an arbitrator. In all cases, the local court has the capacity to intervene in the arbitration proceedings upon a request of the parties. It should be noted that the decision made by the court regarding the selection of arbitrators is not subject to appeal. Therefore, in order to avoid the intervention of the local court, it is recommended that the parties select their own arbitrators and agree on procedures that facilitate the selection of a substitute arbitrator, especially in the case where a nominated arbitrator cannot act as a result of withdrawal or dismissal. The disqualification of an arbitrator is provided by the UAE Federal Law in Article 207(4);

however, decisions made by the Dubai Courts regarding the disqualification of an arbitrator are rare. This is because both parties must agree to the dismissal of a particular arbitrator. An arbitrator cannot be dismissed by only one party unless he or she deliberately neglects to act in accordance with the arbitration agreement.

3.2.5.2 During the Arbitral Hearing

In many legal systems, the modern practice of arbitration grants the arbitral tribunal the power to decide on its jurisdiction. This is known as the *competence-competence* principle. In the UAE, however, the current Federal law does not provide the arbitrators the power to issue interim measures. An example of the involvement of the court is when the arbitral tribunal needs to order a third party to provide documents that are necessary for the arbitration decision. In this situation, the court is the only authority that has the power to grant or order interim measures.⁸² The other issue is that Article 209(2) of the UAE Federal Law does not cover all interim measures, which means that the majority of interim measures need to be decided by the court. The difficulty here can be that the UAE court has a very broad jurisdiction over disputes, which may include claims arising out of contracts executed or to be performed in the UAE and claims over foreigners resident in the UAE. This makes it very difficult to prove that the UAE court does not have jurisdiction over a dispute.

3.2.5.3 Post-Arbitral Hearings

⁸²Ibid, p.129. Interim measures can include measures relating to the attendance of witnesses; the preservation of evidence; the documentary disclosure ect.

The final stage of the arbitration proceedings is the recognition and enforcement of arbitral awards. At this point, the court plays a significant role, as it has to ratify an arbitral award for the purpose of enforcement. On one hand, the winning party may request the local court to recognise and enforce the award, or on the other hand, the losing party may ask the local court for an order challenging the award. The UAE courts have the power to require that the foreign award satisfies the rules and procedures of the UAE. A number of arbitral awards have been challenged before the court and nullified on the grounds of public policy and validity of the agreement. As there is no system of binding precedents in the UAE, it is possible that the court may reach a different conclusion in any subsequent dispute regarding the enforcement of a foreign arbitral award. This makes enforcing arbitral awards a lengthy and unpredictable process.⁸³

Generally, an effective dispute resolution mechanism requires a limitation on the courts' role, especially where the case is handled by arbitrators, in order to uphold the purpose of arbitration of providing an alternative to the court. Prior to the UAE accession to the New York Convention, the role of the Dubai courts did not amount to one of support for international arbitration. However, after accession to this convention, the situation has shifted to become a more supportive one.⁸⁴ This shift will be explained more explicitly in the following section (Section 3.3) by discussing the UAE's adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

⁸³ In the UAE, in order to enforce a domestic arbitral award, it must be submitted to recognition process before the competence court. In this regard, enforcement of arbitral award is subject to ordinary and extraordinary channels of appeal and then the Court of Cassation. This can make recognition process lengthy and take more than 18 months. See Nassif and Blanke and Corm-Bakhos, above n 52.

⁸⁴ Ibid. In Dubai, for example, the national courts have recognized a variety of legal principles related to international arbitration such as the principle of *pacta sunt servanda*, *competens-competens* and separability. Moreover, the local courts presently have limited grounds to review the subject matter of such dispute.

On the whole, there is no doubt that the UAE, particularly the Emirate of Dubai, had an outdated legal framework for dealing with dispute resolution until recently. The legal community and comparative law experts emphasised the need for accurate drafting of decrees regarding dispute resolution in order to aid international business activities in the UAE. This is because the previous legal frameworks of dispute resolution—that is, the *Federal Law No 11 of 1992*, *Law No 2 of 1994 (Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry)* and *DIFC Law No 8 of 2004*—were deficient in a number of respects, and were not in line with international standards of best practice. The situation has, however, changed since the UAE’s accession to the New York Convention. This is analysed in the following section.

3.3 Suggested Solutions: The Current Rules Governing Dispute Resolution in the UAE

As argued previously, the legal framework for dispute resolution in the UAE has been considered out of line with international best practice. Practitioners and commentators have considered this framework as containing potential drawbacks for parties and tribunals, as well as involving the risks of court intervention in the arbitral process. For these major reasons, the UAE Government was put under pressure to improve and change its dispute resolution systems. An additional reason that influenced the UAE Government to develop and modernise its dispute resolution legislation is that of the financial and real estate crisis,⁸⁵ which has resulted in an increased number of disputes and cases in Dubai’s courts.

⁸⁵Shostak, above n 13; see also Salah, above n 13.

Moreover, the ECC recognised that international investors increasingly favour arbitration over litigation as a preferred dispute resolution mechanism. Therefore, the UAE Government, particularly that of the Emirate of Dubai, identified arbitration as a key priority area for legislative development. Accordingly, the Emirate of Dubai developed its arbitration legislation to overcome the problems with the previous laws and to compete effectively with new arbitral institutions in the region and more widely around the globe.

The UAE Government, particularly that of the Emirate of Dubai, also realised the need to change the ways in which laws and regulations were viewed and enforced.⁸⁶ This would contribute to changing unfavourable perceptions of the UAE regarding dispute resolution, overcome the issues of the legal frameworks of the settlement system, enhance efficiency and facilitate transactions. Consistently with these aims, in 2005, the Government of the Emirate of Dubai launched the Dubai Strategic Plan of 2005 under the theme 'Dubai: Where the Future Begins'. The plan aims to develop the identity and reputation of Dubai with the intention to making it an economic hub and an excellent destination for investment. Most importantly, the plan provides a strategic agenda for development in many aspects, including the economic, social, infrastructure, land and environment, security, justice and safety and public sector excellence.

Regarding economic development, Dubai plans to improve its economic laws and regulations to rise to the level of international best practice and standards. The Dubai Strategic Plan also has aims regarding security, justice and safety. Dubai seeks to ensure access to justice and eliminate all economic, geographical, legal and procedural barriers that restrict access to justice. To achieve this plan in practice, Dubai has a responsibility to

⁸⁶Bentley, above n 1.

improve its legislation and laws, increase awareness of rights and duties and facilitate dispute resolution mechanisms.

Subsequent to the launch of the Dubai Strategic Plan, the UAE and the Emirate of Dubai have introduced significant legislative changes. First, in 2006, the UAE became the 138th state to adopt the New York Convention. In 2007, the DIAC amended its laws to bring them into line with the international standards and best practices of dispute resolution processes. In 2008, three additional significant developments occurred: first, the UAE Federal Government drafted a new arbitration law, which has been published for comment and is expected to be enacted in the near future; the DIFC enacted a comprehensive and jurisdictionally new arbitration law, and the DIFC and the LCIA joined to create the DIFC–LCIA Arbitration Centre. All these developments have greatly promoted Dubai’s position as an international hub for dispute resolution. It is important to discuss these initiatives that have been taken by the UAE Government in aid of the development of international arbitration to identify the work that still has to be done in order to make the arbitration more effective and friendly in the UAE, particularly in Dubai. This discussion is undertaken in the following subsections.

It is argued that, even though the legal framework of dispute resolution in the UAE has been developed, still more changes are required to achieve effective and efficient conduct of international commercial arbitration. This section mainly discusses the initiatives and the proactive role that has been taken by the UAE at the Federal level and the Emirates level in developing the legal frameworks of dispute resolution mechanisms, particularly in international commercial arbitration. The Federal-level initiatives discussed are the

accession to the New York Convention and the proposed Federal arbitration law. At the Emirate level, the developments in the DIFC and DIAC arbitration laws are analysed. Also discussed is the joint venture between the Dubai International Financial Centre and the London Court of International Arbitration to create the DIFC–LCIA Arbitration Centre and its advantages. The overall aim of the discussion is to explain these changes and assess the extent to which they have facilitated international arbitration.

3.3.1 Legislative Developments in the Current Dispute Resolution Systems

As mentioned above, a number of legislative developments have taken place in the UAE both at the Federal level and the Emirate level (i.e. the Emirate of Dubai). At the Federal level, there are two key developments in the UAE, which undoubtedly endorse international commercial settlement: the adoption of the New York Convention and the proposed Federal arbitration law.

3.3.1.1 Federal Level

This section considers the UAE’s adoption of the New York Convention and discusses the enforcement of foreign arbitral awards, particularly DIFC arbitral awards.

3.3.1.1.1 Adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

On November 19, 2006, the UAE Federal Government acceded to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

Several reasons contributed to the UAE's accession to the New York Convention, but scholars have considered that a well-known case in the UAE's Court of Cassation, *Dubai Aviation Corporation v Bechtel* (2004), was the major cause.⁸⁷ In this case, the Court of Cassation annulled an arbitral award made two years earlier in Dubai on the basis that the witnesses in the arbitration had not been sworn. On one hand, this decision had a serious negative impact on arbitration presumption in Dubai, but on the other hand, it put significant pressure on the UAE to ratify the New York Convention. Notably, when the UAE ratified the New York Convention, it did not enter any reservations, meaning that the UAE did not wish to limit its obligations under the Convention.⁸⁸ Generally, given the nature of the legal system in the UAE, where legal frameworks and laws vary among the Emirates and Shari'a law has a significant influence, the UAE's accession to the New York Convention is a welcome development. This is because it will enhance the predictability, fairness and certainty of arbitration process, especially the process of enforcing foreign arbitral awards.

Even since the UAE's accession to the New York Convention, however, doubts exist about the enforcement of foreign arbitral awards within the UAE. These concerns are based on the fact that the *UAE Federal Law 1992, No11 (UAE Federal Law)* specifies that an award rendered in a foreign country may be enforced in the UAE under the same conditions

⁸⁷Gemmell, above n 14, p.186

⁸⁸The Convention permits states to subscribe to the Convention with two reservations: 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'. In this sense, the first reservation grants states to recognise each other's foreign judgments, however; the second reservation does not allowed domestic matters to be subject to the Convention. See Gemmell, above n 14, p.186; See also Al Tamimi and Van Son, above n 57, pp.211-217.

applicable under the laws of the foreign country.⁸⁹ Moreover, the *UAE Federal Law 1992, No11 (UAE Federal Law)* includes provisions that permit the local courts to refuse to enforce a foreign judgment on the condition that it violates public policy. Accordingly, the foreign arbitral award must satisfy the laws and procedures of the UAE in order to be enforced. Otherwise, it will be refused by the local courts on the grounds that it creates a violation of local laws. This illustrates the potential for enforcement procedures under UAE *Federal Law No 11 of 1992* to be unpredictable and time-consuming, which goes against the purpose of arbitration (i.e. effective and efficient dispute resolution mechanism).

3.3.1.1.2 Enforcement of Foreign Arbitral Awards: The DIFC Arbitral Awards After the UAE's Accession to the New York Convention

Recent cases have provided evidence that the enforcement of foreign awards after the UAE's accession to the New York Convention can be accomplished a straightforward manner. Foreign arbitral awards in Dubai can be found within the DIFC. Pursuant to Articles 42(1) and (2) of the DIFC Law No10 of 2004:

- (1) Judgments, orders and awards issued or ratified by the DIFC Court may be enforced within the DIFC in the manner prescribed in the Rules of Court.
- (2) Judgments, orders and awards issued or ratified by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law.

The Article distinguishes between the enforcement of DIFC awards within the DIFC and the enforcement of DIFC awards outside the DIFC. In view of this difference, it is necessary to discuss the enforcement of DIFC awards in both circumstances.

⁸⁹ *the UAE Federal Law 1992, No11 (UAE Federal Law)*, art.235.

3.3.1.1.3 Enforcement of DIFC Awards Within the DIFC

Within the DIFC, enforcement of DIFC arbitral awards is governed by Articles 42(1) and (2) of the DIFC Law No 10 of 2004, as cited above. These awards are also mentioned in Chapter 7 of the DIFC Arbitration Law No 1 of 2008, particularly Articles 41, 42, 43 and 44. Article 41 of the DIFC Arbitration Law No1 of 2008 states that ‘Recourse to a Court against an arbitral award made in the Seat of the DIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.’⁹⁰

From the moment the DIFC award is approved by the DIFC Court in accordance with Article 42(1) DIFC Law No 10 of 2004, DIFC awards are enforceable within the DIFC. The winning party seeking enforcement must provide the DIFC Court with the original award and arbitration agreement, and once the award has been ratified, it is automatically enforceable within the DIFC.⁹¹

Moreover, under Article 44 of the DIFC Arbitration Law No1 of 2008, the grounds for refusing recognition or enforcement of a DIFC arbitral award are limited.⁹² Therefore, successful applications to set aside a DIFC arbitral award within the DIFC are infrequent. This confirms the finality of DIFC arbitral awards within the DIFC and reflects the positive effect of the UAE’s adoption of the New York Convention.

⁹⁰ *the DIFC Arbitration Law* No 1 of 2008, art.41.

⁹¹ *The DIFC Court Law No 10 (2004)*, art.42(1).

⁹² An arbitral award may be set aside only if the applicant can prove that a party was under some incapacity; the arbitration agreement was invalid; the party making the application was not given proper notice of the arbitration; the award deals with a dispute not contemplated by or not falling within the arbitrators’ terms of reference; the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties; the subject matter of the dispute is not capable of settlement by arbitration under DIFC law; or the award conflicts with public policy in the UAE. See *the DIFC Arbitration Law* No 1 of 2008, art. 44. It should be noted that the grounds for refusing recognition or enforcement of a DIFC arbitral award are consistent with those under the rules of the UNCITRAL Model Law as amended in 2006 and the New York Convention.

3.3.1.1.4 Enforcement of DIFC Awards Outside the DIFC, but Within Dubai

As mentioned, Dubai has two independent jurisdictions, namely the Emirate law jurisdiction and the DIFC law jurisdiction. As stated by Almutawa and Maniruzzaman, 'DIFC is a free zone where the civil and commercial laws of Dubai are not applicable, and as such the DIFC is considered an "offshore" jurisdiction, or enclave regime, from the point of view of Dubai civil and commercial law'.⁹³ Provision for the enforcement of a DIFC arbitral award outside the DIFC but within Dubai is found in Article 7(2) of the Judicial Authority Law.⁹⁴ The procedure for enforcing the DIFC arbitral awards in Dubai has been clarified under the protocol connecting the DIFC Courts and Dubai Courts (Protocol of Enforcement between DIFC Courts and Dubai Courts).⁹⁵ This protocol was issued in 2009⁹⁶ and is considered another instrument facilitating the enforcement of foreign arbitral awards within Dubai.

In order to enforce DIFC arbitral awards outside the DIFC but within Dubai, the winning party should meet the procedural requirements of the protocol. In practice, this means that

⁹³ Ahmed M. Almutawa and A.F.M. Maniruzzaman, 'The UAE's Pilgrimage to International Arbitration Stardom' (2014) 15 *The Journal of World Investment & Trade*, p.211.

⁹⁴ Article 7 (2) Law No 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre as amended on 31/ 10/2011, states that 'Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the Courts and these entities. Such execution shall be subject to the following conditions:

- (a) The judgment, decision, order or ratified Arbitral Award to be executed is final and executory;
- (b) The judgment, decision, order or ratified Arbitral Award is translated into the official language of the entity through which execution is carried out;
- (c) The Courts affix the executory formula on the judgment, decision, order or ratified Arbitral Award'.

⁹⁵ DIFC Courts Protocols and Memorandums, Enforcement Procedures: Summary of The Protocol of Enforcement between Dubai Courts and DIFC Courts 2009 <<http://difccourts.ae/summary-of-the-protocol-of-enforcement-between-dubai-courts-and-difc-courts/>> at 12 June 2014.

⁹⁶ Memorandum of Understanding between Dubai Courts and DIFC Courts was entered into effect as from 16 June 2009.

the award must take the form of a DIFC Court judgment, and it should be presented with an Arabic legal translation to the execution department at the Dubai Courts.⁹⁷ The award must be sent under a covering letter from the DIFC Court Registrar to the Chief Justice of the Dubai Court of the First Instance requesting enforcement.⁹⁸ In practice, the protocol between the Dubai and DIFC courts regarding enforcement has been implemented frequently, which means that an ‘offshore’ award can be ratified by the DIFC Court and enforced by the Dubai Court ‘onshore’. A good example is found in the Property Concepts case.⁹⁹ This protocol advantages the users of the DIFC to enforce their DIFC arbitral awards outside the DIFC, but within Dubai, without getting involved in any ratification process.¹⁰⁰

3.3.1.1.5 Enforcement of DIFC Awards in Other Emirates and Abroad

DIFC awards can be recognised and enforced in the rest of the UAE’s Emirates outside Dubai. There are two ways in which this can occur. The first is that the DIFC award will be considered as a foreign judgment issued by a DIFC Court order, or in accordance with *Federal Law No 11 of 1973 Regulating Judicial Relation between Member Emirates in the Federation*.¹⁰¹ The second way is under Article 221 of the *UAE Civil Procedure Code*. Under this Article, the DIFC arbitral award must be ratified by a Dubai Court, upon which it will be transformed into a Dubai Court judgment under Dubai Law No 16 of 2011.¹⁰²

⁹⁷DIFC Courts Protocols and Memorandums, above n90.

⁹⁸Ibid.

⁹⁹ As stated by Almutawa and Maniruzzaman, ‘At the time of the Property Concepts case, 40 DIFC awards or orders had already been enforced ‘onshore’ by Dubai Courts, making the property Concepts case the first DIFC arbitral award enforced ‘onshore’’. See Almutawa and Maniruzzaman, above n 93, p.213.

¹⁰⁰ Before the protocol between the DIFC Courts and Dubai Courts, the enforcement procedures were lengthy as *the UAE Federal Law 1992, No11 (UAE Federal Law)* required ratification procedure before enforcement.

¹⁰¹ Almutawa and Maniruzzaman, above n 93, p.213.

¹⁰² *The Dubai Law* No 16 of 2011 replaced the *Dubai Law* No 12 of 2004.

After that, it will be enforceable in the other Emirates under Article 221 of the UAE *Civil Procedure Code (No11) 1992*.¹⁰³ On account of the number of memoranda of understanding entered by the DIFC courts and Courts of other Emirates within the UAE,¹⁰⁴ the enforcement of DIFC arbitral awards will be straightforward, and possibilities of challenge by the courts of other Emirates will be rare.

In regard to the enforcement of DIFC arbitral awards abroad, the analysis needs to be divided into two categories: the enforcement of DIFC arbitral awards in states that are members of the Gulf Cooperation Council for Arab States of the Gulf (GCC),¹⁰⁵ and the enforcement of DIFC arbitral awards in Middle Eastern and North African countries and the rest of the world. In all categories, a DIFC arbitral award will be enforceable abroad either under the New York Convention or other relevant treaties.¹⁰⁶

First, in GCC member states, the DIFC arbitral award must be transformed into a Dubai Court judgment, upon which it can be enforced in the GCC subject to the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996(hereafter, the

¹⁰³ The process used to enforce a DIFC arbitral awards in the other UAE's Emirates under Article 221 of the *UAE Civil Procedure Code* is called the referral process. See Almutawa and Maniruzzaman, above n 93, p.213.

¹⁰⁴ For example, Memorandum of Understanding between Ras Al Khaimah Courts and DIFC Courts, signed on 26 December 2010. More protocols and memorandums are available at <<http://difccourts.ae/publications/protocols-and-mous/>> at 12 July 2014.

¹⁰⁵ There States are the United Arab Emirates, the Kingdom of Bahrain, the kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait.

¹⁰⁶ The UAE is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards, therefore, a DIFC award will, theoretically, be enforceable in any signatory state. Moreover, the UAE has also entered into several treaties which relate to the enforcement of arbitral awards. These include the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications; the Riyadh Arab Agreement for Judicial Cooperation (Riyadh Convention); and a number of bilateral treaties with other states, namely Morocco; Syria; Egypt; Jordan; Tunisia; India; France; Somalia; and Sudan. See Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer Law International, 2003); also see Cinotti, above n 55; see Al Tamimi and Van Son, above n 57.

GCC Convention).¹⁰⁷ As stated by Hall, Sharih and Clifford, the GCC Convention is ‘a treaty based instrument which should support pan-GCC enforcement and which provides that all member states shall ensure that their domestic courts enforce the final judgments of the courts of other member states’.¹⁰⁸

The second category is the enforcement of DIFC arbitral awards in Middle Eastern and North African countries and the rest of the world. For Middle Eastern and North African countries, a DIFC arbitral award can be recognised and enforced subject to the Riyadh Arab Agreement for Judicial Cooperation 1983 (hereafter, the Riyadh Convention) as well as bilateral treaties specifically dealing with arbitration.¹⁰⁹ It can also be recognised and enforced in other countries under the New York Convention.¹¹⁰ According to Evans,

there is express provision in Dubai law for the enforcement of DIFC Awards, both within the DIFC and throughout Dubai, and in UAE Federal Law for enforcement in other Emirates forming part of the UAE. There are corresponding provisions regarding the enforcement within the DIFC of awards from Dubai outside the DIFC, or from other Emirates, or from other States.¹¹¹

Arbitral awards and judgments of the DIFC are equivalent to those of the UAE. This is because the DIFC is a recognised legal jurisdiction within the UAE. Providing that the

¹⁰⁷The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications, available at Dubai International Arbitration Centre (DIAC) <<http://www.diac.ae/idias/rules/GCC/>> at 10 August 2014.

¹⁰⁸See Christopher Hall, Imran Sharih and Philip Clifford, ‘New Dispute Resolution Option in the DIFC Courts’, *Latham Watkins Client Alert* (18 October 2012) <<http://www.lexology.com/library/detail.aspx?g=5fe9ee03-d1cd-4f87-9036-294f4de363e8>> at 10 May 2014. This quotation is found originally in Almutawa and Maniruzzaman, above n 93, p.214. Regarding the enforcement of a DIFC arbitral award within the GCC, Almutawa and Maniruzzaman raised a discussion in the case that a DIFC arbitral award face challenge on the grounds of public policy. In Respond, they provided an example of Kuwait, where a DIFC arbitral award has already been recognised. This can be seen in the case of *Global Strategies Group (Middle East) v Aqeeq Aviation Holding Company LLC* (the DIFC Arbitration 002/2010).

¹⁰⁹The Riyadh Convention is a reciprocal treaty that allows enforcement of judgments and arbitral awards between the signatories.

¹¹⁰Abu-Manneh, above n 62.

¹¹⁰Anthony Evans, ‘The Future for Arbitration in Dubai’ (2008) *Chief Justice of the DIFC Courts*, <http://difccourts.complinet.com/net_file_store/new_rulebooks/d/i/difcc_ja_arbitration.pdf> at 25 August 2014; Richard Bell and Laura Chicken, ‘Enforcement of Arbitral Awards in the UAE- Part II: Enforcing DIFC/LCIA Arbitral awards’ (2011) <<http://www.clydeco.com/knowledge/articles/enforemnt-ofarbitral-awards-in-the-uae>> at 25 Aug 2014.

¹¹¹*Ibid.*

UAE is a signatory to the GCC, Riyadh, New York Conventions and other bilateral treaties specifically dealing with arbitration, and that the DIFC is a legal jurisdiction within the UAE, the DIFC courts' arbitral awards and judgments will, in theory, be enforceable in any signatory state.

In practice, since the UAE's accession to the New York Convention, there have been several occasions on which the UAE courts have ratified foreign arbitral awards under the New York Convention.¹¹² Two examples are Case No 35/2010, in the Fujairah Courts, and Case No 268/2010, *Maxtel International FZE v Airmec Dubai LLC*, in the Dubai Courts.¹¹³ For reasons of space and relevance, only the case of *Maxtel International FZE v Airmec Dubai LLC* is discussed below.

In the case of *Airmec Dubai LLC v Maxtel International LLC*, the Dubai Court of Cassation recognised and enforced two foreign arbitral awards and based its decision fully on the provisions of the New York Convention without referring to the provisions of the *UAE Federal Law 1992, No11 (UAE Federal Law)*, as the court found those provisions not relevant in the context of the enforcement of foreign arbitral awards.¹¹⁴ In this case, the parties entered into a purchase agreement, and they agreed to settle any disputes arising out of their agreement by DIFC–LCIA arbitration seated in London. The facts were that the respondent purchased and delivered steel sheeting from the claimant and a payment dispute arose between the parties. By their purchase agreement, the dispute had to be submitted to

¹¹² Michael Black QC, 'Dubai: a regional arbitration centre? An Introduction to the legal systems in Dubai and the UAE arbitration law and the need for reform' (2012) *American Bar Association*.

¹¹³ See Case No 35/2010, ruling of the Fujairah Federal Court of First Instance, dated 27 April 2010), case No 268/2010 – *Maxtel International FZE v. Airmec Dubai LLC*, ruling of the Dubai Court of First Instance, dated 12 January 2011 and the Dubai Court of Appeal in *Airmec Dubai LLC v. Maxtel International LLC*, ruling dated 22nd February 2012).

¹¹⁴ Mike McClure, 'Dubai-a hub for international arbitration?' *Kluwer Arbitration Blog* 23 January 2013 <<http://kluwerarbitrationblog.com/blog/2013/01/23/dubai-a-hub-for-international-arbitration/>> at 15 May 2014.

arbitration. As a result of the arbitration procedures, the tribunal ordered two awards in favour of the claimant. The first award was based on damages and the second related to arbitration and legal costs.

With the purpose of executing these foreign judgments in Dubai, the claimant submitted a legal action before the Dubai Court of First Instance requesting enforcement of the two arbitral awards issued against the respondent. The claimant also asked the court to validate the precautionary attachment as enforceable.

In challenging these two foreign arbitral awards, the respondent made a submission that the awards should be set aside on the following grounds:

- a- The signatory of the arbitration agreement did not possess required authority to agree to arbitrate on behalf of the Respondent nor the authority required to dispose of the right which is the subject of the dispute.
- b- Procedures of appointing the arbitrator were invalid.
- c- The two arbitral awards were issued without an arbitration deed as required by Article 216 of the UAE Civil Procedures Law (CPL) and Article 5 (c) of the New York Convention.
- d- The arbitration proceedings were invalid as the arbitral awards were rendered by application of the English law in contradiction with the parties' agreement to arbitrate under DIFC rules.
- e- The Arbitrator failed to administer the oath to the witnesses as required by Article 211 of CPL.¹¹⁵

The respondent's submission was unsuccessful: it was denied by the Dubai Court of First Instance on the grounds that it lacked jurisdiction. Consequently, the Dubai Court of First

¹¹⁵Hassan Arab and Marwa El Mahdy, 'Dubai Cassation Court Emphasises its Strict Compliance to the New York Convention' *Al Tamimi Law updated* February 2013 <<http://www.tamimi.com/en/magazine/law-update/section-5/february-4/dubai-cassation-court-emphasises-its-strict-compliance-to-the-new-york-convention.html>> at 15 July 2014.

Instance recognised the two arbitral awards and confirmed the precautionary attachment requested by the claimant. After the ruling of the Dubai Court of First Instance, the respondent appealed to the Court of Appeal, which supported the decision made by the Dubai Court of First Instance.

Subsequently, the respondent disputed the judgment of the Court of Appeal before the Court of Cassation, basing this appeal on several arguments.¹¹⁶ First, the respondent argued that the purchase agreement between the parties was invalid because it was signed by an unauthorised signatory and not by the manager of the company. With reference to the proceedings that took place in the Dubai Court of First Instance, a request was submitted by the respondent asking the claimant to produce an original copy of the existing agreement, but the claimant only provided the court with a faxed copy and argued that the agreement was completed through fax.

Even though the Court of First Instance gave the respondent permission to identify the unauthorised signatory (the employee) in order to determine whether the latter had the authority to sign the agreement on behalf of the manager, the respondent was unsuccessful in determining the identity of the employee, who denied having concluded the agreement. As the respondent merely denied the validity of the documents and did not support its claims with any evidence, the Court of Cassation decided to refuse this defence.

Second, after the Court of First Instance rejected the respondent's request to set aside the two arbitral awards due to lack of jurisdiction, the respondent issued a counterclaim for lack of jurisdiction before the Court of Cassation, explaining that the jurisdiction of the

¹¹⁶ Ibid.

tribunal that had issued the two arbitral awards and the court's supervision was limited to ensuring that the arbitral awards were issued in accordance with Federal Decree No 43 of 2006 (by which the UAE acceded to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards). The respondent also based his counterclaim on the grounds that the New York Convention permits actions for setting aside arbitral awards, considering that Article 206 of the *Federal Law No 11 of 1992* allowed disputants to request that arbitral awards be set aside while the proceedings for the ratification of the award are being heard in front of the court.

Acting in response to the counterclaim submitted by the respondent regarding the lack of jurisdiction, the Court of Cassation found that Articles 212, 213 and 215 of UAE *Federal Law No 11 of 1992* provided the national courts with jurisdiction to either ratify or set aside an arbitral award issued within the UAE. However, for arbitral awards issued in a foreign state, as in this case, the court was obliged to apply the rules of foreign arbitral awards. Therefore, the Court of Cassation dismissed this argument. The Court also based its decision on the grounds that the provisions of an international convention (i.e. the New York Convention) that has been ratified by the UAE are considered equivalent to national law within the UAE. Thus, in any disputes arising in relation to the enforcement of foreign arbitral awards and foreign judgments within the UAE, the UAE courts are bound to implement the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

In accordance with the provisions of the New York Convention of 1958, the UAE courts have limited jurisdiction regarding foreign arbitral awards. The UAE courts have the right

to ensure that there is no contravention of the required procedural and substantive forms for awards, as stated in Articles 4 and 5 of the New York Convention. In this case, however, the Court of Cassation verified that the two arbitral awards satisfied the requirements of Articles 4 and 5 of the New York Convention.

Third, the respondent had an argument based on invalidation of the arbitration clause and certain procedures. The respondent argued that there was a procedural issue in the appointment of the arbitrator, and that the arbitrator had not succeeded in administering the oath to the witnesses as indicated by Article 211 of the *UAE Federal Law 1992, No11 (UAE Federal Law)*. With respect to Article 5 of the New York Convention, the court decided to reject this argument.

Finally, the respondent argued that there had been a violation of the UAE's public policy and Shari'a principles, as the two arbitral awards contained usurious interests. This argument was not granted by the Court of Cassation because of a lawful limitation on the prohibition against agreeing to usurious interests in any type of civil or commercial transaction. In reference to Article 409 of the Penal Law and Article 714 of the Civil Transactions Law, the prohibition applies to transactions between individuals, but does not extend to transactions between individuals and corporate entities. This means that usurious interests among corporate entities are permitted. As the disputants of this case were corporate entities, the usurious interest granted in the two arbitral awards by the Court of First Instance was confirmed. Thus, all the respondent's arguments in the petition before the Court of Cassation were rejected.

From this analysis of a relevant case, it appears that the UAE's accession to the New York Convention has encouraged confidence in arbitration and allowed foreign judgments to act as final and binding within the UAE. Considering these two issues in the arbitration laws and practices in the UAE, it is appropriate to say that both cases contribute to reducing the risk associated with foreign investment as well advancing the effectiveness of the conduct of international arbitration within the UAE. The following discussion considers the significant features of the most recent draft of the UAE proposed Federal arbitration law.

3.3.1.1.6 The New Proposed UAE Federal Arbitration Law

Another development at the Federal level that may help to foster confidence in arbitration within the UAE and attract foreign investment is the proposed new UAE Federal arbitration law. In February 2008, the UAE's Ministry of Economy released the first draft of a Federal Law on arbitration and the enforcement of arbitral awards (the proposed law).¹¹⁷ The most recent refinement of the proposed law was released in February 2012. However, it has been a point of criticism regarding the development of arbitration law in the UAE that since the draft proposals of the new law were released in 2008, the UAE has still been unsuccessful in finalising and enacting the law. Thus, the UAE still lacks its own arbitration law. The proposed law is a crucial development, as it aims to fill gaps in the current law (i.e. *UAE Federal Law 1992, No11 (UAE Federal Law)*).¹¹⁸ It is intended to function as a comprehensive, modern arbitration law.¹¹⁹ According to Article 2 of the proposed law, two

¹¹⁷ A copy of the draft law is available at the UAE's Ministry of Economy website <www.economy.ae>. 25 September 2013.

¹¹⁸ It remains unclear when the proposed law will be finalised and put into practice, however, it is expected to be enacted in the near future. Almutawa and Maniruzzaman, above n 93, p.221.

¹¹⁹ For detailed analysis of the proposed UAE's law, See James Loftis and Mark Beeley, 'International Dispute Resolution: Preliminary Analysis of the Draft UAE Arbitration Law', *Vinson & Elkins* 7 February 2008

of its main objectives are to provide domestic and international arbitration within the state and efficient enforcement of arbitration awards within the state or territory.¹²⁰ Thus, the proposed new law will distinguish between domestic and international arbitration and codify the UAE's obligations under the New York Convention.

It has been suggested by the United Nations General Assembly that

all States give due consideration to the Model Law on International Commercial Arbitration of the UNCITRAL, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of International Commercial Arbitration practice.¹²¹

Accordingly, the proposed arbitration law in the UAE is mainly derived from the UNCITRAL Model Law, and it has taken into account the amendments and additions to the Model Law, including those of 2006. It also incorporates various alterations of the Model Law.¹²² It will be published in both Arabic and English.

By way of administration, the Ministry of Economy and the Ministry of Justice are tasked with supervising the implementation of the proposed law. More specifically, the Ministry of Economy will establish an arbitration office with the aim of observing any new developments in relation to international arbitration, with the intention to make recommendations to the Minister. The Minister also has the opportunity to request specialist assistance in domestic and international arbitration from governmental or non-governmental organisations as well as the private sector either locally or internationally.¹²³

<<https://www.yumpu.com/en/document/view/37149538/international-dispute-resolution-preliminary-analysis-of-the-draft>>at 15 January 2014.

¹²⁰*The proposed Federal arbitration law*, art.2.

¹²¹United Nation, 'UNCITRAL Model Law on International Commercial Arbitration with Amendments as adopted in 2006'. January 2008.

¹²² Some provisions are based on the Egyptian Arbitration Law No 27. See Almutawa and Maniruzzaman, above n 93, p.221.

¹²³*The proposed Federal arbitration law*, art.4.

With the intention of making sure that the new proposed law will be interpreted in consonance with the current international arbitral best practice, Article 3 of the new draft provides that any arbitral tribunal, court or other authority of or within the state may refer to, and take guidance from, the documents and publications of the UNCITRAL relating to the Model Law, including those of the Working Groups involved in its preparation.¹²⁴ This is a major step forward, as it will provide foreign investors and their legal representatives with familiarity, predictability and transparency in dealing with the law.

To clarify and modernise the arbitration procedure, the proposed law has taken into consideration certain new provisions that are not found in the Model Law. First, under the proposed law there is no restriction on the selection of arbitrators; any individual who is legally qualified will be eligible to act as an arbitrator.¹²⁵ It also gives disputants the opportunity to be represented by any individual of their choice, regardless of that individual's nationality or qualifications.¹²⁶ Moreover, it provides for the use of a number of arbitrators: for example, if there is more than one arbitrator, then their number must be odd, and if there is an even number, an additional arbitrator should be appointed as a chairman.¹²⁷ It also provides for challenges to the arbitrators in the event that there is justifiable doubt concerning their impartiality and independence.¹²⁸

¹²⁴*The proposed Federal arbitration law*, art.3.

¹²⁵*The proposed Federal arbitration law*, at Annex2, art.11.

¹²⁶*The proposed Federal arbitration law*, at Annex2, art.38.

¹²⁷ If the existing agreement between parties does not specify the number of arbitrator, then there will be a sole arbitrator as a general rule. See *The proposed Federal arbitration law*, at Annex2, art.10.

¹²⁸*The proposed Federal arbitration law*, at Annex2, art.12.

Importantly, the proposed law allows the confidentiality of the arbitration proceedings to be maintained, but also offers parties the choice of whether or not this should be the case.¹²⁹ It also provides additional procedures regarding discovery and evidence. Moreover, in the event that there are specific issues, experts can be appointed to report to the arbitrators on such issues.¹³⁰ Article 19 of the proposed law gives the arbitrators extensive capacity to order any party to provide documents to the arbitral tribunal or another party.¹³¹ The proposed law describes the types of awards and what facts can be incorporated in the arbitral award.¹³² Costs should be included in the award, and must be paid fully to the arbitral tribunal. Otherwise, the arbitrators can refuse to make the award.¹³³

Considering the enforcement of arbitral awards, the proposed law has also suggested a number of amendments that diverge from the Model Law to expedite and simplify the enforcement process. A significant example is that either original signed awards or certified copies are equally enforceable. In order to have a valid award, the award must be signed by a majority of the arbitrators, on the condition that there is an explanation for any omitted signature. In the case of certified copies, however, it is required that these be validated by a public notary, consular authority or judicial officer. To facilitate the enforcement of foreign arbitral awards and comply with New York Convention 1958, the proposed law has considered limited grounds for setting aside arbitral awards.¹³⁴

¹²⁹*The proposed Federal arbitration law*, at Annex2, art.39.

¹³⁰*The proposed Federal arbitration law*, at Annex2, art.26.

¹³¹*The proposed Federal arbitration law*, at Annex2, art.19.

¹³² For example, arbitrators can grant preliminary, interim, interlocutory, partial and final awards. See *The proposed Federal arbitration law*, at Annex2, art.31.

¹³³ The costs may include arbitrator's fees and expenses, costs of experts' advice, costs of the arbitration proceedings, administration fees or expenses of any arbitral institution. *The proposed Federal arbitration law*, at Annex2, art.31.

¹³⁴*The proposed Federal arbitration law*, at Annex2, art.35,36

In the main, there is no doubt that the implementation of the draft Federal Law on arbitration and the enforcement of arbitral awards will bring about significant reform to the arbitration environment in the UAE. It will remedy the UAE's lack of its own separate arbitration law. This will be a welcome change, as the preferred dispute resolution method in the UAE is arbitration, and the number of commercial arbitration cases is rapidly escalating.¹³⁵ In the following section, the key developments in arbitration law that have taken place in the Emirate of Dubai are discussed.

3.3.1.2 Emirate Level (the Emirate of Dubai)

At the Emirate level, a number of key developments have occurred in the Emirate of Dubai to facilitate international commercial settlement. In 2007, the DIAC amended its laws to bring them into line with international standards and best practices in dispute resolution. In 2008, two additional developments took place: the DIFC created a comprehensive and jurisdictionally new arbitration law. Second, the Dubai International Financial Centre and the London Court of International Arbitration joined to create the DIFC–LCIA Arbitration Centre. These substantial developments are steps in the right direction to achieving effectiveness and efficiency in the conduct of international arbitration.

3.3.1.2.1 The DIAS Arbitration Rules of 2007

¹³⁵ Patrick Bourke, 'Client briefing: Potential Change to the UAE's Federal Arbitration Law', *Norton Rose Fulbright* (Dubai) August 2010 < <http://www.nortonrosefulbright.com/knowledge/publications/30004/client-briefing-potential-change-to-the-uaes-federal-arbitration-law> > at 10 June 2014.

In May 2007, the new arbitration rules of the DIAC came into force.¹³⁶ To create a modern and developed legal framework in international arbitration, the DIAC's Board of Trustees amended its laws to bring them into line with international standards and best practices in dispute resolution. It is appropriate here to identify the key features of the new DIAC arbitration rules as a model of a proactive arbitral institution in Dubai.

Improvements can be observed in the new law regarding the parties' autonomy to choose certain key parameters of the arbitration, including the seat, the language of arbitration, the competences of the arbitral tribunal and the level of confidentiality.¹³⁷ The new DIAC arbitration rules of 2007 give parties freedom to agree upon the seat of arbitration. Another significant provision is the language of arbitration: the rules specify that, unless otherwise agreed, the language of the arbitration will be the same as that of the arbitration clause. Previously, Arabic was the primary or default language. Notably, the new rules also take into account arbitration clauses drafted in more than one language.

The new rules provide the arbitral tribunal with the capacity to appoint experts, having first consulted with the parties and granted protection orders or interim measures, including the grant of injunctive relief.¹³⁸ The time frame of arbitration is six months. This means that the tribunal must render its final award within six months from the date on which the sole arbitrator (or chairman of the tribunal) receives the file. If so determined by the tribunal, this period may be extended by a further six months; further extensions must be referred to the Executive Committee of the DIAC. The arbitral award is final and binding.

¹³⁶ Al Tamimi and Van Son, above n 57, pp. 211- 217.

¹³⁷ Ibid. These are the main features of the new amendments of the DIAC.

¹³⁸ Ibid.

Confidentiality is another major aspect of the arbitration process, for which the new DIAC rules make new provisions.¹³⁹ The rules provide that any materials or documents produced to the tribunal, along with any orders and awards made in the arbitration, must remain confidential to the parties unless they otherwise agree in writing, or unless a specific exception applies (e.g., especially where disclosure is required to enforce or challenge an award in legal proceedings before a court or other judicial authority). Generally, the new DIAC arbitration rules of 2007 represent useful aspects of modern arbitration.

3.3.1.2.2 The DIFC Arbitration Rules of 2008

The DIFC as Separate from the UAE Legal System

As stated previously, in 2004 the UAE's Constitution was amended to establish a financial free zone within the Emirate of Dubai.¹⁴⁰ These amendments to the Federal Decrees were necessary to build a new investment climate with a solid legal foundation in Dubai, and have indeed contributed to placing the Emirate of Dubai at the level of other major financial zones globally.

Subsequent to these amendments to the Constitution, the DIFC was established. As a financial free zone, the DIFC has exemption from all UAE federal, civil and commercial

¹³⁹ Ibid.

¹⁴⁰ Article 121 of the UAE Constitution tackles the division of powers between Federal and Emirati authorities, in condition of that the Federation has the opportunity to enact a Financial Free Zone Law. Consequently, a particular Emirate will be permitted to create a Financial Free Zone. See 'Federal Law No 8 of 2004' Regarding the Financial Free Zone, available at <<http://www.dfsa.ae/Documents/Federal%20Law%20No%208%20of%202004.pdf>> at 25 Aug 2014; See also 'Federal Decree No 35 of 2004' *Federal Decree No 35 of 2004* regarding the establishment of the DIFC as a Financial Free Zone in the Emirate of Dubai, available at <<http://www.dfsa.ae/Pages/LegalFramework/LegalFramework.aspx>> at 25 Aug 2014.

laws. This means that the DIFC has the authority to make its own laws and regulations.¹⁴¹ The DIFC opted for its civil and commercial matters to be modelled on English common law in preference to the civil law applicable in Dubai.

Additionally, as a separate body with its own law, the DIFC created its own courts, which have exclusive jurisdiction over civil and commercial disputes connected to the DIFC.¹⁴² The DIFC has employed experienced local and international judges as well as arbitrators. In this manner, the DIFC has created its own separate identity, by having its own judicial authority (i.e. courts), regulations and an international arbitration institution, promoting the view among foreign investors and common law legal representatives that the DIFC is a business-friendly environment.¹⁴³ The following discussion examines the main features of the DIFC Arbitration Laws. The DIFC enacted a new arbitration law in September 2008, replacing the previous law of 2004. It has made specific changes with regard to its jurisdiction and proceedings. In addition, this law has a number of provisions in common with the *UAE proposed Federal arbitration law*.

The New DIFC Arbitration Law of 2008 Compared to the Previous Law of 2004

As mentioned above, under the 2004 law, jurisdictional limitations were potentially problematic, chiefly because the 2004 law limited the access of the DIFC Courts to

¹⁴¹ *Dubai Law No 9 of 2004*, this law recognises the DIFC as an independent body that has its legal framework. Available at < <http://www.dfsa.ae/Pages/LegalFramework/LegalFramework.aspx> > at 25 Aug 2014.

¹⁴² See Article 5 of *the DIFC Law No 12 of 2004* which provides the jurisdiction of the DIFC Court. It should be noted that the DIFC has extended its jurisdiction which permits any parties; even those not incorporated within the DIFC, to use the DIFC Courts to resolve commercial disputes on condition that parties have an agreement to arbitrate at the DIFC. See Helou, above n 70.

¹⁴³ Reza Mohtashami and Sami Tannous, 'Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East' (2009) 25 *Arbitration International (Kluwer Law International)* 2, 173-185.

arbitration cases involving companies registered in the DIFC. This jurisdictional limitation caused difficulties in determining whether the arbitration law should apply to particular parties or specific disputes. However, the new law of 2008 permits parties to seat their arbitration within the DIFC regardless of whether they themselves have any connection with the DIFC. Therefore, businesses that are not registered with the DIFC now have the same access to its courts, provided that both parties to the dispute agree to this beforehand and that no final judgment has been issued by another court.

Hypothetically, a business dispute originating from Oman between, say, an American company and an Omani company could potentially be litigated in the DIFC courts even though neither side is based in the UAE. This is despite the fact such a dispute would have no connection to the DIFC. Such a scenario is possible provided that the two sides opt-into the jurisdiction of the DIFC courts.¹⁴⁴

The 2008 law has simplified arbitration proceedings.¹⁴⁵ For example, if the parties choose the DIFC as their seat of arbitration, they have freedom to conduct their arbitration hearings in any place they consider appropriate, and can choose to arbitrate under the rules of any arbitral institution. The process of recognition of arbitration awards has also been taken into consideration with the aim of making it more straightforward. For an arbitral award of the DIFC to be recognised, it must be first be certified by the DIFC Court. Once certified, it is enforceable with the DIFC.

In brief, both the new DIFC arbitration law of 2008 and the *UAE proposed Federal arbitration law* are based on the UNCITRAL Model Law. Both of these laws are applicable to civil and commercial arbitration, whether international or domestic. In addition, both adopt necessary provisions concerning disclosures by arbitrators, conflicts of interest, court

¹⁴⁴Damien P. Horigan, 'Consensual Jurisdiction of the DIFC Courts' Proceedings of 20th International Business Research Conference 4 - 5 April 2013, Dubai, UAE.

¹⁴⁵ See Marrone and Smith, above n 1.

enforcement of tribunal orders, the capacity of the arbitrator to decide on different types of awards, grounds for refusing recognition and enforcement, and confidentiality. Similar to the *UAE proposed Federal arbitration law*, the new DIFC arbitration law of 2008 simplifies the recognition and enforcement of arbitration awards.

The Joint Venture between the Dubai International Financial Centre and the London Court of International Arbitration to Create the DIFC–LCIA Arbitration Centre

Following the 2008 amendments to the DIFC arbitration law, the DIFC has continued its development efforts to become a leading forum for arbitration. A step in this direction is that the DIFC joined a leading arbitration institution, the LCIA, in 2008.¹⁴⁶ This joint venture (DIFC–LCIA) is located within the DIFC, and it will administer international commercial disputes in the course of arbitration and mediation. The DIFC–LCIA venture benefits from the reputation of the LCIA. The DIFC–LCIA provides its users with access to the LCIA’s expertise and databases of world-class legal and non-legal arbitrators.¹⁴⁷ Moreover, the DIFC–LCIA Centre applies a modified version of the LCIA rules and procedures, and its rules are considered ‘universally applicable and compatible with both civil and common law systems, offering the international business community,

¹⁴⁶ It is worth noting that with 116 years history of providing arbitration services, this is the first occasion that the LCIA has a joint venture abroad. See Craig Tevendale, ‘Desert disputes’ (2008), *Legal Business Arbitration Report*. In respect of the London Court of International Arbitration (LCIA), it can be considered as one of the historic institutions and a very important player in international commercial arbitration. The LCIA was founded in 1892 as an institution to provide arbitration services and it was given the name of London Court of International Arbitration (LCIA) in 1981. In 1986, the LCIA became a private not-for-profit company, limited by guarantee, and fully independent of the three founding bodies. It then set about consolidating its position in the international arena, under the guidance of Sir Michael Kerr, the first President of the LCIA Court, and Bertie Vigrass, the first Registrar of the independent LCIA. It should be noted that the LCIA’s first foreign venture was the DIFC–LCIA Arbitration Centre, which opened in Dubai in 2008. See The London Court of International Arbitration (LCIA), *History of the LCIA*, <http://www.lcia.org/LCIA/Our_History.aspx> at 22 October 2014.

¹⁴⁷ Dubai International Financial Centre, *Doing Business in the Dubai International Financial Centre*—Chapter:2 Introduction to the DIFC, *PricewaterhouseCoopers (PwC)* <http://www.difc.ae/sites/default/files/attached/3412/6769/9402/090114_DIFC_PWC_Book%20final%20updated.pdf> at 20 May 2014.

international lawyers and arbitrators a comprehensive and modern set of rules and procedures'.¹⁴⁸

3.4 The Current Status of International Arbitration in States Within the Gulf Arab Region Other than the UAE: Comparing Roles and Initiatives for the Development of International Arbitration

As mentioned above, the UAE Government has developed its dispute resolution legislation and has recognised the need for improvements and changes. It is appropriate to examine the current position of other states within the Gulf Arab Region regarding their dispute resolution systems, particularly for international arbitration. There are six Gulf Arab States: the UAE, Qatar, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, Oman and Kuwait. The following discussion is limited to the arbitration legislation of Qatar, the Kingdom of Bahrain and the Kingdom of Saudi Arabia.

3.4.1 Qatar

There are three legal arbitration jurisdictions in Qatar: the State of Qatar, the Qatar Financial Centre (QFC) and Qatar International Centre for Arbitration (QICA). Although Qatar has introduced a number of laws to encourage the use of arbitration as an alternative technique for settling disputes, it remains the case that Qatar has no special law on

¹⁴⁸The Dubai International Financial Centre, 'The Launch of the DIFC–LCIA Arbitration Centre' The Dubai International Financial Centre 17 February 2008< <http://www.difc.ae/news/launch-difc-lcia-arbitration-centre>> at 20 May 2014.

arbitration. Under the Emiri Decree No 29 of 2003, Qatar ratified the New York Convention.¹⁴⁹ It is also a member of the Riyadh, GCC and ICSID Conventions. Qatar has also entered into a number bilateral treaties specifically dealing with arbitration.¹⁵⁰

3.4.1.1 Arbitration Under the State Jurisdiction

Similarly to the UAE, Qatar does not have a separate arbitration code. Arbitration is governed principally by a few provisions, and it is regulated by the *Civil and Commercial Procedure Law No 13 of 1990* (hereafter, CCP Law).¹⁵¹ The CCP arbitration provisions are mainly based on old Egyptian laws, and are considered outdated compared to modern Arab arbitration legislation.¹⁵² The provisions of the CCP contain a number of potential problems;¹⁵³ for the reason of space, a selected few are presented here. The issues to be discussed relate to the arbitration agreement, the principles of competence-competence and autonomy, and the finality of the arbitral award.

¹⁴⁹ Emir refers to the ruler of Qatar ‘the head of State’.

¹⁵⁰ Bilateral Investment Agreements signed by Qatar available at http://unctad.org/Sections/dite_pccb/docs/bit_qatar.pds

¹⁵¹ *The Civil and Commercial Code Law No 13 of 1990*, art, 190-210.

¹⁵² According to Sharar Arabic countries and their current arbitration systems can be categorised as the following:

a) Countries such as Jordan, UAE, Bahrain and Oman are modernising their arbitration system in line with the UNCITRAL Model Law on Arbitration. In February 2008, the UAE’s Ministry of Economy released a draft Federal Law on arbitration and the enforcement of arbitral awards (the proposed Law). However, it remains unclear when the proposed law will be finalised and put into practice.

b) Countries such as Lebanon and Algeria are modernising their arbitration system in line with the new French Law approaches.

c) Countries such as Saudi Arabia and Yemen applying Islamic or Shari’a Law. In 2012 Saudi Arabia has enacted new arbitration law which replaced the old law of 1983. However, Saudi Arabia still does not have an arbitration institution and most of not all arbitrations are seated in the host of the Chamber of Commerce and Industry in Saudi Arabia. See Zain Al Abdin Sharar, ‘Does Qatar Need to Reform Its Arbitration Law and to Adopt the UNCITRAL Model Law for Arbitration? A Comparative Analysis’ (2011) Vol. 2 *the Legal & Judicial Journal-Ministry of Justice-State of Qatar*, p.299.

¹⁵³ *Ibid.* For a comprehensive analysis of *The Civil and Commercial Code Law No 13 of 1990*, art, 190-210.

The CCP is inadequate in the sense that it lacks provisions pertaining to the major aspects of arbitration. One such issue is the arbitration agreement and its scope. Pursuant to Article 190 of the CCP Law on arbitration, four conditions should be met to have a valid arbitration agreement, without which the arbitration agreement will be considered null and void. First, an arbitration agreement must be in writing; second, the agreement must express the subject matter of the dispute; third, all parties must have full legal capacity; and finally, the settlement must be amicable.

In view of Article 190, if any one of these conditions does not obtain, then the arbitration agreement will be null and void.¹⁵⁴ Further, Article 190 does not indicate clearly the types of disputes that cannot be arbitrated;¹⁵⁵ it merely states that the settlement must be amicable. In both respects, Article 190 reveals a narrow approach by the CCP regarding the scope and requirements of arbitration agreements. It also demonstrates uncertainty and ambiguity in failing to provide clear guidelines on the types of matters that can be arbitrated.

Moreover, neither the principle of competence-competence nor the principle of the autonomy of the arbitration agreement is incorporated in the CCP. This confirms the inadequacy of the provisions of the CCP compared to, for example, the UNCITRAL Model Law, which adopts both principles in Article 16(1).

The CCP provides for three forms of recourse against arbitral awards. Recourse can be made by application for appeal, reconsideration and setting aside. An issue arises in application for appeal in that the grounds for such an application, provided by Articles 202–

¹⁵⁴ Ibid.

¹⁵⁵ This can lead to an issue of setting aside of an award or refusing the recognition and enforcement on a public policy grounds.

209, are vague. However, it should be noted that the grounds provided for an application to set aside arbitral awards, in Article 207 of the CCP, are compatible with those found in Article V of the New York Convention.

Generally speaking, there is no doubt that the provisions of the Qatari CCP, specifically those related to arbitration, require substantial changes to meet recent trends in the conduct of international commercial arbitration. Critically, it has been said that the practice of arbitration in Qatar is comparable to the practice of commercial litigation.¹⁵⁶ Thus, it is necessary that Qatar suggest a solution to this issue by proposing a modern and comprehensive arbitration law based on the UNCITRAL Model Law.

3.4.1.2 Arbitration Under the Qatar Financial Centre (QFC)

Arbitration can also be conducted within the QFC under QFC Law No 7 of 2005 (i.e. the QFC Arbitration regulations). The QFC Arbitration regulations were in effect in November 2005.¹⁵⁷ The rules are based on the UNCITRAL Model Law with some alteration, and govern the arbitration of commercial disputes over contracts that have been concluded under QFC Law. The QFC is a separate jurisdiction with its own laws and Courts.¹⁵⁸ However, it remains to be seen whether the QFC can serve as a reliable and trusted arbitral institution on the international stage, as the QFC Arbitration Rules have not yet been tested.

¹⁵⁶ Abdel Hamead al Ahdab, *Arbitration in the Arab World* (1sted, 1998).

¹⁵⁷ The law available at

<http://www.complinet.com/net_file_store/new_rulebooks/q/f/QFCRA_4116_VER1.pdf>

¹⁵⁸ The QFC has its own independent Civil and Commercial Court. It is a common law jurisdiction and court proceedings are conducted in English. For more detailed information about the rules of the QFC, see Aida Maita, *Development of a Commercial Arbitration Hub in the Middle East: Case Study-The State of Qatar* (PhD Thesis, Golden Gate University, 2013)<<http://digitalcommons.law.ggu.edu/theses>> pp.105-108.

3.4.1.3 Arbitration Under the Qatar International Centre for Arbitration (QICA)

In addition to the CCP and the QFC, an Emiri Decision number (5/8) of 2006 established the Qatar International Centre for Arbitration (the QICA) within the Qatar Chamber of Commerce and Industry,¹⁵⁹ offering an alternative forum for commercial arbitration in Qatar. The aim of the establishment of the QICA and its rules was to provide an appropriate mechanism for resolving local and international disputes. The QICA is considered the most successful arbitration forum within Qatar, and has already presided over and resolved hundreds of arbitration disputes.¹⁶⁰ The rules applicable to QICA arbitrations are the provisions of the CCP, as well as the rules that came into effect on 1 May 2012. The latter are derived from the UNCITRAL Model Law (as amended in 2010). Importantly, using the QICA rules can benefit parties in a way that overcomes any deficiencies found in the CCP, especially in circumstances where the CCP is silent.¹⁶¹ Under the auspices of the QICA, the finality of an arbitral award is maintained: it is binding on the parties and not subject to appeal. QICA, therefore, is the forum indicated in the majority of arbitration clauses signed by commercial parties in Qatar as well as by Qatari government entities.¹⁶²

¹⁵⁹ Ibid.

¹⁶⁰ As mentioned by the Secretary General of the QIAC, arbitration becomes the preferred method instead of litigation in Qatar. Since the launch of the QIAC, more than 150 arbitration cases have been filed with total of QR 1.3 bn. See Meanafn- the Peninsula, 'Qatar- Contractors go for arbitration, avoid litigation' *Meanafn- the Peninsula* 26 June 2009 <http://adresources.com/doc/headlines/20110626_Qatar_Contractors_go_for_arbitration_avoid_litigation.pdf> at 15 May 2014.

¹⁶¹ As mentioned above, there CCP is considered as an inadequate because it lacks many essential provisions that can be found in a modern arbitration rules. The CCP does not contain any provisions, for example, regarding the use of institutional rules and the principle of competence- competence and principle the autonomy of the arbitration agreement.

¹⁶² See M. A. Raoul, *The European & Middle Eastern Arbitration Review* 2012.

3.4.1.4 Comparing the Roles of the UAE and Qatar Governments in Developing International Arbitration

In general, it is apparent that the State of Qatar law, the *Civil and Commercial Procedures Code 1990*, Art. 190–210 (CCP) does not match the best practices of international arbitration. Implementation of the UNCITRAL Model Law on arbitration is necessary for Qatar. It is recommended that, in the near future, Qatari lawmakers propose a new arbitration law that is consistent with international best practice (i.e. based on the UNCITRAL Model Law on arbitration). This will assist Qatar to accommodate and meet the particular needs of international commercial arbitration. It will also portray Qatar as a proactive state in developing its dispute resolution system. Nevertheless, the arbitration rules of the QFC and QICA are positive developments for international commercial arbitration in Qatar, as they provide foreign investors and their representatives with avenues for settling such disputes.

Briefly, the UAE and Qatar are similar in a number of aspects. First, both have already acceded to the New York Convention. Second, neither have their own separate arbitration code, and instead arbitration is governed by a small number of provisions. Third, both have modern institutional arbitration rules; however, the difference is that the UAE Government has taken an active step in developing its national arbitration law in line with international best practice. While the Qatari Government has introduced laws that permit foreign investment in all sectors of Qatar's economy, and that also allow foreign investors to choose domestic or international arbitration to settle any disputes,¹⁶³ still there has been no announcement of a proposed Qatari arbitration law. In conclusion, the UAE should enact its

¹⁶³ *Foreign Investment Law* No 13 of 2000.

proposed Federal arbitration law as soon as possible, while Qatar should invest substantial effort in producing a new national arbitration law.

3.4.2 Kingdom of Bahrain

Historically, the Kingdom of Bahrain was one of the first Gulf Arab States to accede to the New York Convention, on 6 April 1988.¹⁶⁴ It is also recognised as the first Gulf State to enact statutory laws on arbitration, particularly with the implementation of Bahraini Law No 12 of 1971 on Civil and Commercial Procedures.¹⁶⁵ In addition, since 1994, under Decree No 9/1994, Bahrain has adopted an international commercial arbitration law based on the UNCITRAL Model Law.¹⁶⁶

The Kingdom of Bahrain is in the process of furthering the development of its dispute resolution system. On 2 July 2009, under Decree No 30, Bahrain established a new free arbitration zone in the form of the Bahrain Chamber for Dispute Resolution (BCDR).¹⁶⁷ The centre operates with the assistance of the AAA, in a partnership known as BCDR–AAA. The purpose behind the establishment of the BCDR–AAA is to encourage international investment by establishing an arbitration-friendly environment in Bahrain.

The BCDR–AAA has direct jurisdiction to hear disputes for any claim within the jurisdiction of the Bahraini courts that exceeds the sum of BD 500.000 (approximately

¹⁶⁴ Abd al-Hamid Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 2011) 102.

¹⁶⁵ Ibid. Articles 252-253 of the *Bahraini Law No 12 of 1971 on Civil and Commercial Procedures* regulates the enforcement of domestic and foreign arbitral awards.

¹⁶⁶ Ibid.

¹⁶⁷ John M. Townsend, 'The New Bahrain Arbitration Law and the Bahrain 'Free Arbitration Zone'' (2010) vol. 65 *Dispute Resolution Journal* No 1, p. 74.

USD \$1.3 million). The dispute should involve at least one international party or a party licensed by the Central Bank of Bahrain. Another situation where the BCDR–AAA has jurisdiction is where the parties have a written agreement to settle their disputes in the BCDR–AAA.¹⁶⁸

Under Decree No30, the new legislation of the BCDR–AAA

gives parties to an agreement calling for international arbitration the option of holding the arbitration in Bahrain without concern that the court of Bahrain might interfere with, or set aside, the resulting award, as long as the parties seek to enforce the award only in other country.¹⁶⁹

In other words, arbitration conducted under the BCDR–AAA rules is beyond the control of local courts, especially if the parties choose to enforce their arbitral awards outside Bahrain and the governing law is not the Bahraini law.

To summarise, the UAE and the Kingdom of Bahrain have some similarities. First, both have already acceded to the New York Convention. Second, both have modern institutional arbitration rules, and both have arbitration centres engaged in a joint venture with well-known arbitral institutions globally (i.e. the LCIA and AAA). The main difference between them, however, is that Bahrain was the first country in the region to adopt the UNCITRAL Model Law on arbitration, while the UAE has not yet done so, and does not have a separate arbitration code as yet.

¹⁶⁸ See *Bahraini Decree No 30 2009*, art. 9 and 19.

¹⁶⁹ This decree ensures that when parties agree to arbitration the result will be binding and beyond challenge in the Bahraini courts. For example, in the case that the parties have agreement that any dispute arise between them will be submitted to arbitration in Bahrain, but under Swiss law, and that any challenge to the award must be brought in the courts of Swaziland and not in the courts of Bahrain, then there will be no concern that the Bahrain courts will interfere. This is what so called ‘Free Arbitration Zone’. See Townsend above n 167.

The Kingdom of Bahrain has been a proactive state and has made considerable efforts to develop its dispute resolution system, particularly for international commercial arbitration. It continues its development with the aim to become a recognised hub for international arbitration.

3.4.3 Kingdom of Saudi Arabia

For most of the past 30 years, Saudi Arabia applied the Arbitration Law of 1983 (the Old Arbitration Law). However, under Royal Decree No M/34 on 24/05/1433 AH, corresponding to 16/04/2012AD, Saudi Arabia enacted a new arbitration law.¹⁷⁰ The new arbitration law of 2012 replaced the old arbitration law completely. Saudi Arabia had previously acceded to several international conventions and treaties regarding dispute settlement, including the New York Convention (acceded in 1994), the ICSID Convention (acceded in 1997).¹⁷¹ Notably, while several Gulf Arab States including the UAE, Bahrain and Qatar have established institutional arbitration and provide services for dispute settlement, Saudi Arabia has no arbitration institutions as yet.¹⁷²

¹⁷⁰ Khalid Alnowaiser, 'The New Arbitration Law and its Impact on Saudi Arabia' (2012) Vol.29 *Journal of International Arbitration (Kluwer Law International)* No 6, pp. 723-725. 'In 2011 and 2012, 59% of the Organisation for Economic Co-operation and Development (OECD) economies and 43% of Eastern Europe and Central Asia(ECA) economies have amended, adopted, or are about to adopt new laws/provisions on international commercial arbitration, mediation, or conciliation. On the other hand, only 11% of Middle East and North Africa (MENA) and 12.5% of Sub Saharan Africa (SSA) economies have reformed their laws in that time period'. See Sophie Pouget, 'Arbitration and Mediation Regimes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment'(2013) *Policy Research Working Paper 6632, the World Bank, the Global Indicators and Analysis Department, Financial and Private sector Development Network*.

¹⁷¹ Abdul Hamid El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' (1994) Vol. 11 *Journal of International Arbitration*, No 3, pp. 87–91. Also, Saudi Arabia is a member of the Riyadh Convention and GCC Convention. It has also entered into a number of bilateral treaties.

¹⁷² Belal T Al Ghazzawi and MerielBuxto, 'The European and Middle Eastern Arbitration Review: Saudi Arabia' (2011) *Global Arbitration Review*, p.79.

A comparison of the old and new laws shows that several negative aspects of the former law have been changed. First, in Article 3, the new law clearly acknowledges international arbitration.¹⁷³ For example, the new law provides parties with the right to arbitrate under an institutional set of arbitration rules. It also gives the parties greater autonomy to choose their governing law, language and arbitrators. This means that the arbitral tribunal is bound to apply the substantive law selected by the parties to the relevant contract even if they do not choose the Saudi arbitration law.

Second, the new law contains provisions that increase the efficiency of the arbitral process. For example, when there is a challenge to the jurisdiction of the arbitral tribunal, the new law recognises the principle of *kompetenz-kompetenz*.¹⁷⁴ This principle empowers the tribunal to decide on its own jurisdiction, lessening the power of the national courts (i.e. Saudi Courts) in hearing jurisdictional challenges. Previously, under the old law, if an arbitrator was challenged, the arbitration proceedings were suspended until a substitute arbitrator was appointed. In contrast, the new arbitration law of 2012 grants arbitrators the capacity to continue the arbitration proceedings. This reflects the modern practice of international arbitration.

¹⁷³ Alnowaiser, above n 170.

¹⁷⁴ Article 20 of the Saudi Arbitration Law (2012) states that the arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the disputed subject matter in the agreement. This principle may be also known as *competence-competence*.

Despite some improvements in the new Saudi arbitration law, some other issues remain. For instance, enforcing foreign arbitral awards in Saudi Arabia remains difficult due to public policy¹⁷⁵ and judicial involvement in arbitral proceedings.¹⁷⁶

The new Saudi arbitration law adopts many of the grounds of the UNCITRAL Model Law, in which an arbitral award held in Saudi Arabia may possibly be null and void. Also, under the UNCITRAL rules, the courts have no right to examine the facts or the subject matter of the dispute when they must make a decision on the validity of any challenge.¹⁷⁷ However, it remains the case that arbitration awards, including foreign awards, can be annulled if the award contains any violation of the provisions of Shari'a law and Saudi public policy.

Overall, the new arbitration law of Saudi Arabia constitutes a significant step forward in the development of its dispute resolution system. Additionally, it is significant that the Saudi Government has acceded to a number of international arbitration conventions. However, in order to meet the specific requirements of international commercial arbitration, Saudi Arabia needs to provide for institutional arbitration and address the issues of enforcement and interpretation of public policy. Overall, it appears that the role of the UAE Government in developing the dispute resolution system, particularly regarding international commercial arbitration, has been more sophisticated than that of Saudi Arabia.

¹⁷⁵ The public policy in Saudi Arabia can be a reason to refuse enforcement of foreign arbitral awards. See Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non- Domestic Arbitral Awards?' (1994) 18 *Fordham Int'l L.J.* 920.

¹⁷⁶ Essam Alsheikh, *Court intervention in commercial arbitral proceedings in Saudi Arabia: a comparative analytical study of Shari'ah based statutes and international arbitral practices* (PhD thesis, University of Portsmouth, 2011).

¹⁷⁷ Article 50(4) of the *Saudi Arbitration law of 2012* expressly states that during any proceeding initiated to set aside the award of the tribunal, the competent court may not review the documents submitted in the proceedings, nor may it review the merits of the case. The previous law did not expressly prohibit a review on the merits.

3.5 Conclusion

This chapter has analysed problematic issues related to the previous legal frameworks governing dispute resolution in the UAE at the Federal and Emirate levels. In particular, it has examined issues related to the involvement of Shari'a law in the process of arbitration; issues related to the existing legal frameworks, particularly the *UAE Federal Law 1992, No 11* (UAE Federal Law); issues related to rules in various existing institutions engaged in arbitration (i.e. DIFC arbitration rules of 2004, DIFC Arbitration Law No 8 of 2004, and DIAC arbitration rules of 1994);¹⁷⁸ procedural issues related to the role of the local court in supporting dispute resolution process; and the unpredictability of the enforcement of legal rights.

In view of these issues, some changes have been made to the previous legal frameworks governing dispute resolution in the UAE at the Federal level. For example, the UAE has taken practical steps to enact a new arbitration law based on the UNCITRAL Model Law. The enactment of the new UAE Federal arbitration law will meet the requirements of modern arbitration practice and increase the UAE's attractiveness as an arbitral seat. At the Emirate level, the Dubai Government also has addressed the issues related to the rules in two existing institutions involved in arbitration by modernising its international commercial arbitration laws to be in line with the international standards. However, other issues at both

¹⁷⁸ The rules of the existing arbitral institutions (i.e. Dubai International Financial Centre arbitration rules of 2004 (*DIFC Arbitration Law* No 8 of 2004) and *Dubai International Arbitration Centre arbitration rules of 1994*) were outdated and not working efficiently.

Notably, the establishment of the Dubai International Arbitration Centre (DIAC) was in 1994. It was before as the 'Centre for Commercial Conciliation and Arbitration'. See Hunter, above n 4; The Dubai International Financial Centre (DIFC) was found in 2004 by the Government of Emirate of Dubai with the intention to promote Dubai as a recognized hub for institutional finance and commerce, comprises an autonomous judicial system. See the website of both the DIAC and the DIFC available at <http://www.diac.ae>; <the <http://www.difc.ae>>.

levels need to be addressed, including the inefficiency of the arbitral procedural rules and the unpredictability of the enforcement of legal rights.

In comparison, developments in the other Gulf States have been uneven. For example, Saudi Arabia has changed its arbitration law, but has not established a special arbitral institution, while Qatar has created arbitral institutions, but has not appropriately modified its national arbitration law in accordance with modern international arbitration and best practice (i.e. UNCITRAL Model Law).

However, the developments in arbitration laws that took place in the UAE, particularly the Emirate of Dubai, are more attractive than those of other states in the region. The DIFC–LCIA Arbitration Centre and its new arbitration law is a good example, because the DIFC–LCIA is open to any parties who have agreed to have their disputes settled with the Centre. The Centre boasts nationally and internationally experienced judges and arbitrators. Moreover, DIFC arbitration law is based on the UNCITRAL Model Law on International Commercial Arbitration. Most importantly, the DIFC Court judgments can be enforced through the Dubai Courts, as both Courts have signed the Protocol of Enforcement linking the DIFC and Dubai Courts. DIFC judgments are also enforceable in the wider UAE and in the GCC member states, under the 1983 Riyadh Convention and the 1987 GCC Convention. Finally, the DIFC courts have been established based on a common law system that is relatively familiar to most foreign investors, rather than the UAE civil jurisdiction. Of the two major international arbitral institutions in Dubai, namely the DIAC and DIFC, the DIFC is likely to be the more attractive for international commercial arbitration, as the DIFC has the benefit of being a free zone that is independent of the UAE.

The analysis in the present chapter enables an assessment of the suitability of the DIFC model as the preferred model of arbitration in the wider Gulf Arab Region, and more specifically within the UAE. In the following chapter I use examples from a number of international jurisdictions to assess how the results of Dubai's initiatives in developing international commercial arbitration laws compare to those of another international jurisdiction (the ICC) and an economically developed country (Australia).

Chapter 4:

Comparison of the UAE's Initiatives in Developing International Commercial Arbitration Laws With Those of Other International Jurisdictions: Australia and the International Chamber of Commerce's International Court of Arbitration (ICC)

4.1 Introduction

Arbitration has been increasingly recognised by international entities and communities as a valuable technique for solving complex international commercial disputes. In recent years, there has been wave of modifications to the laws and practices of international arbitration; many countries and arbitral institutions have changed and updated their arbitration rules. For example, Australia is one of the latest countries in the Asia Pacific region to have changed its arbitration law. In the Gulf Arab Region, the UAE, particularly the Emirate of Dubai, is the leading place of arbitration, as a result of the significant changes and developments that have occurred to its arbitration rules via the DIFC and DIAC. Most recently, the world's leading arbitral institution (i.e. the ICC) revised its arbitration rules in 2012. The main aim of this chapter is to assess Dubai's initiatives in developing its international commercial arbitration laws, with assistance from examples from other non-Gulf forums.

As arbitration gains a reputation as the preferred dispute resolution mechanism for settling international commercial disputes, states and arbitral institutions have several motivations

for changing and modernising their arbitration rules. This chapter identifies and analyses the reasons behind the changes in the arbitral rules of Australia, the UAE and the ICC. This will enable a deeper understanding of their motivations for changing their arbitration rules. First, the chapter discusses significant changes to the arbitration rules of Australia, the UAE and the ICC. Second, it analyses the reasons that have contributed to these changes. These jurisdictions have been selected due to the likelihood that they could emerge as leading hubs for international commercial arbitration in their regions. This thesis highlights lessons derived from the experiences of Australia and the ICC in order to illuminate its primary case study of Dubai. This is because both the Australian and ICC jurisdictions have reformed their laws to enable them to function as preferred regional centres for situating arbitration. Since Dubai also aspires to be a regional leader in this regard, it is worthwhile to learn from the experiences of these two jurisdictions.

4.2 Australia

Due to the importance of arbitration to global commerce, many countries have recently changed and reformed their arbitration legislation. One of these countries is Australia. On 6 July 2010, the *International Arbitration Act* (2010) (Cth) replaced its previous *International Arbitration Act* (1974) (Cth). In light of this recent law reform in Australia, it is important to identify the reasons behind it. It is argued that a number of motivations contributed to these changes, including commercial competitive advantage; improving Australia's reputation regarding arbitration, as its arbitration law was outdated and contained uncertainties; and finally, minimising court intervention and promoting the finality of foreign arbitral awards.

As a result of developments in commerce and trade within the Asia Pacific region, international commercial arbitration has evidently developed as a sophisticated system for the resolution of commercial disputes. For example, Asian arbitral institutions in Hong Kong, such as the Hong Kong International Arbitration Centre, and in Singapore, most notably the Singapore International Arbitration Centre (SIAC), have become major players in international commercial dispute resolution, comparable to the long-established players in the field such as LCIA in London and the International Chamber of Commerce: International Court of Arbitration in Paris (ICC). While Australia has not achieved prominence as a seat of arbitration¹ in contrast to the other major centres in the region, it does have the capability to do so;² accordingly, after the recent amendments to its International Arbitration Act (IAA) of 2010, Australia hopes to become a significant centre for international commercial arbitration, at least within the region.

Therefore, it is claimed that one of Australia's motives for changing its original IAA, particularly in regard to procedural issues, is the desire to accrue commercial competitive advantages within the region.³ Most jurisdictions in the Asia Pacific region that are in trade

¹ In terms of a number of cases conducted in Australia, it is still not attractive venue for international arbitration. See Luke Nottage and Richard Garnett, 'The Top 20 Things to Change in or Around Australia's International Arbitration Act' in Luke Nottage and Richard Garnett (ed), *International Arbitration in Australia* (the Federation Press, 2010) p. 189. According to a survey conducted in 2008 only seven international arbitral awards were rendered under the rules of the most know Australia's arbitral institution, the Australian Centre for Commercial Arbitration (ACICA). These arbitration cases were conducted between 2003 and 2007. In comparison with other major arbitral institutions in the region, it can be seen that Hong Kong rendered (1,690) cases and Singapore (263) cases. See School of International Arbitration of Queen Mary, University of London and PricewaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices* (2008) <www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf> at 15 May 2013.

² Peter Megens and Adam Peters, 'International Arbitration Amendment Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration' (2011) 30 *The Arbitrator and Mediator* 43. Also see Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29.

³ According to Garnett and Nottage, the amendments to the International Arbitration Act 1974 (Cth) ('IAA') is enacted on 6 July 2010 and aimed to change the reposition of Australia as a leading Asia-Pacific venue for international commercial arbitration. See Luke Nottage and Richard Garnett, 'What Law (If Any) Now

with Australia have changed and reformed their arbitration legislation.⁴ Statistically, Singapore has become the preferred arbitration seat in Asia, followed by Hong Kong.⁵ Consequently, Australia has been under pressure to change and develop its arbitration legislation to compete with these major players. However, if Australia seeks to become a major player in the field of arbitration or a hub for arbitration within the Asia Pacific region, it will need not only to update and develop its international arbitration law, but also to show the world that these amendments are comprehensive, innovative and consistent with international standards and best practice. Therefore, the amendments made to the IAA were intended to draw attention to the significance of procedural issues such as speed, fairness, cost effectiveness and limiting the involvement of the courts in the arbitral process.

An additional reason that impels Australia to reform its international arbitration law is that it seeks to enhance its reputation as a hub for international commercial arbitration. To bolster its reputation as an arbitration-friendly jurisdiction and a desirable seat for international arbitration, particularly in the Asia Pacific region, Australia was required to change its international arbitration law, as the substantive content of the previous law was generally seen as outdated and prone to uncertainties. Previously, since the adoption of the UNCITRAL Model Law in 1989, the IAA had not been substantially altered.⁶ Therefore, there was a need to reform the IAA regime towards harmony with international standards

Applies to International Commercial Arbitration in Australia?’ (2012) 35 *University of New South Wales Law Journal*, No 3, pp. 953-978.

⁴ For example, Singapore and Hong Kong have recently reviewed their arbitration legislation with intention to be in line with Model Law. *The Singaporean International Arbitration Act* (2009) and *The Arbitration Ordinance* (Hong Kong) came into force in 2011.

⁵ See School of International Arbitration, Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration (2010) <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> at 20 May 2014.

⁶ Clyde Croft, ‘Recent Arbitration in Australia’ (2011) 28 *Journal of International Arbitration* Kluwer Law International 6, p.599.

and best practice.⁷ A number of provisions of the previous IAA had required some degree of clarification to facilitate the operation of commercial arbitration in Australia and promote Australia as a seat of international arbitration. For instance, among other things, the amended IAA clarifies the writing requirement, the circumstances in which the enforcement of a foreign award can be contrary to the public policy (i.e. the definition of the public policy), the interpretation of the Model Law and the impartiality or independence of arbitrators.⁸ These changes to the IAA are analysed in the following discussion.

The uncertainty of the previous IAA was a major issue that undermined the position of Australia as an attractive venue for international commercial arbitration. This is because the previous rules of the IAA did not guarantee parties that the choice of rules in their agreements would be given effect. For example, section 21 of the old IAA was described as confusing because it gave parties to an arbitration agreement the right to resolve their disputes under an arbitral law other than the Model Law. This contributed to a number of practical uncertainties, especially regarding what would happen ‘when another law was nominated ... [of] which provisions conflicted with the IAA or what law applied when an alternative law was not nominated’.⁹

Another cause of confusion arising from section 21 is found in the judicial interpretation of the Queensland Court of Appeal in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*. In this case, the Queensland Court of Appeal held that the parties had excluded the Model Law because of their adoption of the ICC rules. The

⁷ Richard Garnett, ‘International Arbitration Law: Progress Towards Harmonisation’ (2002) Vol. 3 *Melbourne Journal of International Law* 400-413.

⁸ Robert Kovacs, Putting Australia on the Arbitration Map, (2012) 86 *Law Institute Victoria* 3, p.36.

⁹ James Whittaker, Colin Lockhart and Jin Ooi, ‘Australia’ in James H Carter (ed), *The International Arbitration Review* 3rd edition, (Law Business Research Ltd, 2012) 36.

decision was criticised as inconsistent with Article 19 of the Model Law, which gives the parties the right to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. The decision also contradicted Article 28, which provides the parties the right to choose the substantive law that will apply to their dispute. The decision had a negative impact on Australia's reputation.

However, the amended IAA of 2010 has taken into account the issue of uncertainty in section 21, and gives the Model Law exclusive application for international commercial arbitrations with an Australian seat.¹⁰ After the amendment, it is now clear that international commercial arbitration in Australia is exclusively governed by the Model Law, so parties no longer have the choice to 'opt out' or exclude the Model Law.¹¹ This change departs from the decisions of Australian courts where it has previously been held that the Commercial Arbitration Act of an Australian State or Territory could also apply to international arbitrations in Australia.¹² Although this change limits parties' autonomy or freedom of choice, it introduces a higher degree of certainty and consistency for international arbitration in Australia, especially regarding the courts' supervision. It is, however, worth noting that confusion about the applicable law persists for parties who entered into arbitration agreements before 6 July 2010 (the date of effect of the amended IAA).¹³

¹⁰ Now, in any arbitration in Australia the UNCITRAL Model Law is applicable.

¹¹ Garnett and Nottage, above n 3, pp.953-978. This article provides extensive information about the issue of section 21 of the original IAA. However, some found that giving the parties the scope to exercise their free choice is very important. See Luke Nottage, 'International Commercial Arbitration Reform in Australia, Japan and Beyond', *Sydney University Blogs* 12 July 2010
<http://blogs.usyd.edu.au/japaneselaw/2010/07/international_commercial_arbit.html> at 20 May 2014.

¹² This issue will be detailed later.

¹³ This because of the contradictory interpretation given by both the Supreme Court of New South Wales and the Queensland Court of Appeal. The Supreme Court of New South Wales reviewed the decision made in case of *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*. The Queensland Court of Appeal gave a different interpretation to the case of *Cargill International SA v Peabody Australia*

Another problem addressed in the new IAA is that of domestic courts giving interpretations that are not compatible with international arbitration practice. It is significant that Australian courts must now have consistency with international arbitral norms, as well as predictability in international arbitral processes and awards, in order to present the jurisdiction as arbitration-friendly and make it an attractive centre for arbitration.

Previous to the amendments of the IAA of 2010, there were a number of problematic decisions by the Australian courts, including *Australian Granites Limited v Eisenwerk*,¹⁴ *Resort Condominiums International Inc v Bolwell and Another*¹⁵ and *American Diagnostica Inc v Gradipore*,¹⁶ which had created uncertainty regarding interpretation of the law. However, due to the new IAA, recent cases exhibit a new approach of non-interference with arbitral awards. This is clear in the broader interpretation of the arbitration agreement and the limited interpretation of the grounds for refusing the recognition and enforcement of foreign arbitral awards.¹⁷ A good example of this wide interpretation by the Australian courts in matters related to the arbitration agreement is in a recent decision of the New South Wales Court of Appeal, *Rinehart v Welker*.¹⁸ In this case, the court suggested that ‘consistently with the interpretation of any terms in a commercial contract, the interpretation of an arbitration clause must start with the terms used by the parties, rather

Mining in Wagners Nouvelle Calédoine Sarl v Vale Inco Nouvelle Calédoine SAS. For more detailed information see Sophocles Kitharidis, ‘Australia’s Reputation as a Centre for International Commercial Arbitration: *Wagners Nouvelle Calédoine Sarl v Vale Inco Nouvelle Calédoine SAS*: Missing a Critical Opportunity to reverse the Eisenwerk Decision’ (2011) Vol. 23 *Bond Law Review* 1.

¹⁴ *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-ing Burkhardt GmbH*, [1999] QCA 242; [2001] 1 Qd R 461.

¹⁵ *Resort Condominiums International Inc v Bolwell and Another* [1995] 1 QdR 406.

¹⁶ *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312.

¹⁷ It should be noted that before the amended IAA, particularly in 2006, Australian courts had adopted a wide approach in the interpretation to the construction of the scope of an arbitration clause. This adoption is clear in the decision of the Full Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping Ltd*.

¹⁸ *Rinehart v Welker* [2012] NSWCA 95.

than a particular presumption or rule of construction irrespective of the plain meaning of the words'.¹⁹

Further, in supporting the process of arbitration, a well-known judge in New South Wales stated that

the former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created... the court should be astute in ensuring that, where parties have agreed to submit their disputes to arbitration, they should be held to their bargain even if this may involve additional costs and expense.²⁰

Additionally, the Hon Justice P A Keane emphasised the recent shift in the Australian judiciary's approach to the enforcement of international arbitration agreements, stating that 'Australian Courts now accept that properly made arbitration agreements should be subject only to the minimum judicial review necessary to ensure the integrity of the arbitral process'.²¹

In addition, the amended IAA introduced a number of new sections with the purpose of facilitating international arbitral processes and awards, minimising the courts' intervention and eliminating uncertainties in the previous law.²² An example of these new sections is the additional section 2D. One of the objectives of the additional section is to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes.²³ Another objective is to make sure that the Australian courts will

¹⁹Address by the Honorable Michael Ball Judge of the Supreme Court of New South Wales Australian Centre for International Commercial Arbitration Seoul, 2 October 2014.

²⁰ P A Keane, 'Judicial support for arbitration in Australia' (2010) 34 *Australian Bar Review* 1.

²¹*Ibid.*

²²Peter Megens and Beth Cubitt, 'The Continuing Role of State Supreme Courts in domestic International Arbitration in Australia' (2010) 21 *Australasian Dispute Resolution Journal* 124.

²³ See the Revised Explanatory Memorandum, *International Arbitration Amendment Bill 2010* (Cth), incorporating the Amendments made by the House of Representatives to the Bill as Introduced (Revised Explanatory Memorandum).

perform in accordance with the pro-enforcement and pro-arbitration approaches. The new section is an addition to section 39 of the IAA. It explains the matters that the courts must incorporate in interpreting and exercising their role and power under the IAA, including the enforcement or setting aside of arbitral awards. Section 39(2) (a) requires courts to bear in mind the objects of the IAA.

In order to support the enforcement of foreign arbitral awards, the amended IAA addresses a number of issues related to the jurisdictional uncertainty regarding the application of the IAA and the States and Territories Commercial Arbitration Acts to the enforcement of international arbitral awards: '[f]or example, in *Brali v Hyundai Corp*, the NSW Supreme Court held that a foreign award gives rise to a cause of action under state law thereby conferring jurisdiction on the state court to enforce the arbitral award'.²⁴ This uncertainty can arise when different State and Territory Supreme Courts must interpret the same legislative framework, potentially resulting in contradictory findings among different jurisdictions within Australia. For this reason, it was suggested that an exclusive jurisdiction for all matters arising under the IAA should be given to the Federal Court of Australia.

Another uncertainty in the enforcement of the arbitral award arose from section 8(2) of the previous IAA. The section provided that a foreign award could be enforced in the court of a state or territory as if the award had been made in that state or territory in accordance with the law of that state or territory. In the case of *Brali v Hyundai Corp, International Movie Group Inc and Anor v Palace Entertainment Corporation Pty Ltd*, this provision had been interpreted to mean that an application for enforcement of a foreign award had to be made

²⁴Megens and Cubitt, above n 22. P.160.

with consideration to the applicable State or Territory legislation rather than under the IAA. The issue here was that this provision gave the courts broad discretion to reject the enforcement of an award. For the purpose of enhancing the certainty of the law, the new IAA eliminates any reference to the law of a State or Territory in section 8(2). This clarifies that the courts should no longer apply the laws of States and Territories in enforcing awards, and may only refuse to enforce awards on the limited grounds listed in sections 8(5) and (7) of the IAA.

The image of Australia as an arbitration-friendly jurisdiction was also affected by the issue of residual discretion. The amended IAA introduces section 8(3A), which makes clear the circumstances where the enforcement of a foreign arbitral award can be refused by the court. This new section removes the residual discretion of a court to refuse enforcement, which means that the court may only refuse to enforce an award in the circumstances provided for in sections 8(5) and 8(7). The purpose of this new section is to eliminate an existing issue that is the effect of the decision in *Condominiums Inc v Bolwell*. In this case, the Queensland Supreme Court held that ‘a court retains a discretion to refuse to enforce a foreign arbitral award even if none of the grounds in section 8 of the IAA are made out’.²⁵

The residual discretion for the court to refuse the enforcement of foreign arbitral awards was a critical issue that created uncertainty in Australian arbitration law, as well as resulting in an inconsistency between Australian law and the New York Convention. Consequently, the amendments to the IAA overcome this issue by eliminating the residual discretion of the court to refuse the enforcement of foreign awards in Australia.

²⁵Ibid. p.164.

In addition to the above amendments relating to the grounds for refusing to enforce awards, the amended IAA provides a definition of ‘public policy’, which was not defined previously, creating uncertainty.²⁶ Previously, under section 8(7) of the IAA, a court could refuse the enforcement of a foreign arbitral award if the award would be contrary to public policy. In order to address uncertainty about what is meant by ‘public policy’, section 8(7A) of the amended IAA clarifies the term as grounds for refusing the enforcement of foreign arbitral awards.²⁷ This is a considerable development, as it offers guidance and a higher degree of predictability for parties seeking to enforce their awards in Australia when that award would be refused on the grounds of violation of public policy. The definition overall enhances the efficiency and effectiveness of the process of the enforcement of foreign arbitral awards in Australia.

It is clear that these revisions to international arbitration law in Australia have made it a more attractive destination for companies looking to resolve disputes. These amendments are a positive step towards the future of arbitration in Australia, having dealt with a number of issues present in the original legislation, and indicate Australia’s desire to strengthen its position as a hub for international arbitration. The new law provides parties with greater flexibility and clarity concerning the procedures and processes for resolving disputes by arbitration in Australia. Finally, the amendments to the regulatory framework promote compatibility with the ways in which international arbitration matters proceed and are supervised. This is achieved by minimising the court’s involvement in the enforcement of foreign arbitral awards and thus promotes the autonomy and finality of the arbitral process of awards. While the focus of this thesis is Dubai’s arbitration laws, this analysis of

²⁶ See *the International Arbitration Act 2010* s 8 (7).

²⁷ Notably, the new section 8 (7A) should be read with section 19 of the IAA with the purpose to ensure a consistent interpretation of the word contrary to public policy.

Australia's amended IAA is relevant as a source of potential suggestions for ways in which the law could change in Dubai.

4.3 UAE (the Emirate of Dubai)

In the UAE, the ECC has recognised that international investors increasingly favour arbitration over litigation as a preferred dispute resolution mechanism. Therefore, the UAE Government, particularly in the Emirate of Dubai, has identified arbitration as a key priority area for legislative development. Accordingly, the Emirate of Dubai has developed its arbitration legislation to overcome problematic issues with the previous laws and to compete effectively with the new arbitral institutions in the region and more widely around the globe. The UAE Government also has become aware of the need to change the ways in which laws and regulations are viewed and enforced.²⁸ It is believed that this would contribute to changing undesirable perceptions of the UAE regarding dispute resolution, overcome the issues of the legal frameworks of the settlement system, enhance efficiency and facilitate transactions.

Notably, a number of significant developments occurred between 2006 and 2008, including that the UAE acceded the New York Convention, the UAE Federal Government drafted a new arbitration law, the DIFC amended its arbitration law, the DIAC changed its arbitration law and, finally, the DIFC and the London Court of International Arbitration came together to create the DIFC–LCIA Arbitration Centre. All these developments were important to establish the UAE's reputation as an arbitration–friendly jurisdiction. The following

²⁸ John Bentley, *Egyptian Legal and Judicial Sector Assessment: Report and Recommendation*, submitted to USAID/Egypt in association with Kamel, Yehia, Abul Ela and Sakr, Vol 4, February 1994.

discussion analyses the reasons behind these related developments and how these changes have helped the UAE to change its reputation. First, a brief description of the developments in the UAE, particularly in the Emirate of Dubai, is provided.²⁹ This is followed by an analysis of the probable reasons for these changes.

The changes that have been undertaken by the UAE to reform and modernise their arbitration laws and practice can be discussed on two specific levels: changes at the Federal level and the Emirates level (see Chapter 3). At the Federal level, the UAE Government has made two significant moves: the accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2006,³⁰ and the new proposed Federal arbitration law, which is based on the UNCITRAL Model Law.³¹ At the Emirates level, the Emirate of Dubai has made a number of significant changes, including amendments to the arbitration rules of the DIAC in 2007, modification of the arbitration rules of the DIFC in 2008 and the DIFC–LCIA Arbitration Centre.³² All these developments are substantial steps forward in promoting the suitability of the UAE, and particularly Dubai, as a hub for international arbitration.

There are a number of probable motivations behind the UAE's changes to its arbitration laws, both at the Federal level and the Emirate level (i.e. in Dubai). At the Federal level, it

²⁹ See details in Chapter 3. A brief re-consideration of these developments here would be helpful in the understanding of the necessity of these changes.

³⁰ Ian Clarke and Charles Lilley, *The European, Middle Eastern and African Arbitration Review* 2013, [2013] Global Arbitration Review.

³¹ It should be noted that the new draft of the federal arbitration law in the UAE will replace the existing provisions of the UAE Civil Procedure Code. See Quinn Smith and Omar Ibrahim, 'Arbitrating at the Crossroads of East and West: An Overview of Prominent Arab National Arbitration Laws' (2008) 24(3) *Int'l Lit. Quarterly* 20.

³² James Kwan, 'The New DIAC Arbitration Rules: Adopting International Best Practice In the Middle East' (2007) 22, 12 *Mealey's International Arbitration Report*; See also Mark Beeley, 'Arbitration in the Dubai International Financial Centre: A Promising Law, But Will It Travel Well?', (2009) *International Arbitration Law Review*, See Arbitration Law, DIFC Law No 1 of 2008.

has been claimed that the UAE does not have its own separate arbitration law. The law governing arbitration in the UAE is rather found in a number of provisions of the *UAE Federal Law 1992, No11* (UAE Federal Law), which can be described as inadequate in the context of modern international commercial arbitration. The provisions of the *UAE Civil Procedure Code* do not address the necessary aspects of modern, complex arbitral proceedings.³³ Therefore, the UAE was required to introduce a comprehensive Federal arbitration law based on the UNCITRAL Model Law that could remedy the significant uncertainty associated with the *UAE Federal Law 1992, No11* (UAE Federal Law). As a result, in February 2008, the UAE's Ministry of Economy released a draft Federal Law on arbitration and the enforcement of arbitral awards (the proposed law).³⁴ It is believed that the proposed law was intended to change the general perception that the UAE is an unpredictable arbitration forum, principally in relation to the enforcement of arbitration awards.³⁵

Another reason for the change at the Federal level is the situation created by the decision of the UAE's Court of Cassation in the case of *Dubai Aviation Corporation v Bechtel* (2004). This decision was a major cause behind the UAE's accession to the New York Convention.³⁶ In this case, the Court of Cassation annulled an arbitral award made two years earlier in Dubai on the basis that the witnesses in the arbitration had not been sworn.³⁷ The outcomes of this decision were, on the one hand, a serious negative impact on

³³ See Chapter 3, pp. 11-20.

³⁴ A copy of the draft law can be found at the UAE's Ministry of Economy website <www.economy.ae> at 25 September 2013.

³⁵ John Gaffney & Dalal Al Houti, 'Arbitration in the UAE: Aiming for excellence', *Al Tamimi & Company*, May 2014, <http://www.tamimi.com/en/magazine/law-update/section-8/may-7/arbitration-in-the-uae-aiming-for-excellence-1.html>> at 12 November 2014.

³⁶ On November 19, 2006, the UAE Federal Government has acceded the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

³⁷ See Chapter 3, p.17.

arbitration presumption in Dubai; on the other hand, however, it put significant pressure on the UAE to ratify the New York Convention.

Most importantly, the regulatory and legal barriers to foreign investment and the impact of the global financial crisis were main reasons that influenced the UAE Government to improve and change its legal framework for arbitration and associated laws. One issue facing foreign investors in the UAE was that the regulatory and legal framework gave preference to local over foreign investors.³⁸ For example, the Government tendering process gave preference to local suppliers and contractors in federal projects, requiring a supplier or contractor to be either a UAE national or a company in which UAE nationals own at least 51 per cent of the capital, or to have a local agent or distributor. In order to attract foreign investment and gain investors' confidence in doing business in the UAE, the Government had to provide foreign investors with legal frameworks that are generally accepted and in accordance with the international standards. Therefore, the UAE has updated a number of its domestic laws and has taken into account the priorities of foreign investment in doing so.

The other issue that impelled change was the financial and real estate crisis, which resulted in increased number of disputes and cases in the local courts. In response to this emerging issue and to reduce the number of cases arising from the financial crisis, the UAE Government recognised the value of alternative dispute resolution, particularly arbitration.³⁹ Thus, the UAE Government, particularly the Government of Dubai, has

³⁸ Judith Baker, '2014 Investment Climate Statement', U.S. Department of State Report, June 2014. <<http://www.state.gov/documents/organization/227510.pdf>> at 15 May 2-13.

³⁹ According to the Al Mansouri, the Minister of Economy in his speech at the Draft Federal Law of Arbitration Conference in Abu Dhabi 'the legislation is intended to provide a legal benchmark for arbitration

encouraged the use of arbitration, and has amended arbitration laws such as the DIAC arbitration rules of 2007 and the DIFC arbitration rules of 2008. The UAE Government has also announced a proposed Federal arbitration law. In general, at the Federal level, it is clear that the proposed law and the accession to the New York Convention are significant developments, as both will further enhance the efficiency and certainty of international arbitration and the enforcement of arbitration awards within the UAE.⁴⁰

At the Emirate level, in Dubai, the relevant developments took place via amendments to institutional arbitration laws (i.e. the amendment of the arbitration rules of the DIAC in 2007, the amendment of the arbitration rules of the DIFC in 2008 and the joint venture between the Dubai International Financial Centre and the London Court of International Arbitration to create the DIFC–LCIA Arbitration Centre). The reason behind the amendment of the DIAC arbitration rules in 2007 was that the previous rules were not appropriate to meet the needs of modern international arbitration, did not conform to best practices and did not address key matters represented in the rules of world-class arbitral institutions.⁴¹ In other words, the rules were principally aimed at domestic arbitration and were not designed to deal with commercial arbitration involving a foreign business. Consequently, in May 2007 by Decree No 11, the DIAC amended its arbitration rules to pursue the trends of modern and international practice, like other arbitration centres around

centres in the Emirates as the number of commercial disputes rises after the global financial crisis. Arbitration is one of the key instruments to resolve disputes amicably and thus enhance investor confidence in the economy's fundamentals to support businesses'. See Tom Arnold, 'Increase in legal cases spurs effort to arbitrate' *The National Business*, (Abu Dhabi), 24 May 2010
<<http://www.thenational.ae/business/property/increase-in-legal-cases-spurs-effort-to-arbitrate>> at 15 June 2013.

⁴⁰ Since the UAE's accession to the New York Convention, there have been several occasions where the UAE Courts have ratified a foreign arbitral awards under the New York Convention. These examples are Case No 35/2010 in the Fujairah Courts and case No 268/2010 – *Maxtel International FZE v. Airmec Dubai LLC* in the Dubai Courts. See Michael Black QC, 'Dubai: a regional arbitration centre? An Introduction to the legal systems in Dubai and the UAE arbitration law and the need for reform' (2012) *American Bar Association*.

⁴¹ Essam Al Tamimi and Emma Van Son, 'The DIAC Rules and the New U.A.E. Arbitration Law' (2008) 25 *Journal of International Arbitration/Kluwer Law International* 2, 211-217.

the globe. The 2007 DIAC arbitration rules replaced the previous law No (2) of 1994 (Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry). The objective of adopting the new DIAC arbitration rules was to help the institution to cope with domestic as well as international arbitration. Notably, the new DIAC arbitration take into account a number of problems with the previous rules:⁴² for example, the limitation of the scope of application,⁴³ the language of the arbitration,⁴⁴ the authority of arbitrators in ordering interim measures protection⁴⁵ and confidentiality.⁴⁶

Regarding the DIFC, other motivations can be suggested for the DIFC to update its arbitration rules, including the extension of the jurisdiction of the DIFC courts, facilitating the enforcement of foreign arbitral awards, and enhancing commercial competitive advantage with the purpose of establishing itself as a leading arbitral institution in the region.⁴⁷ The first reason behind the amendment of the DIFC arbitration law of 2004 was the limitation placed on its application. Although the previous DIFC law was based on the UNCITRAL Model, its application was limited to arbitrations in which the dispute or one of the parties was connected to the DIFC. The amended DIFC arbitration law of 2008 offered a jurisdictional extension to the DIFC as an arbitration seat. Since the amendments, parties anywhere in the UAE and beyond are able to choose the DIFC as the seat of their

⁴² See Chapter 3, p. 20-24.

⁴³ *The Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry 1994* No (2), art.2, available at <www.diac.ae/idias/rules/1994/>.

⁴⁴ *Ibid*, art.43.

⁴⁵ *Ibid*, art. 42

⁴⁶ The previous rules of DIAC did not address the issue of a specific disclosure for production of documents. The parties' concern can be clear if the disclosure of arbitral materials is, for example, reveals trade secrets. See Samuel Estreicher and Steven C. Bennett, 'The Confidentiality of Arbitration Proceedings' (2008) Vol.240 *New York Law Journal* No 31.

⁴⁷ See Chapter 3, p. 24-32.

arbitration. This was not possible before.⁴⁸ There is no doubt that the extension of the DIFC's jurisdiction was necessary to establish a new arbitration environment within Dubai.

Several reasons can be put forward as to why the DIFC's jurisdiction was extended. First, a large number of business transactions are conducted in English, while their arbitration cases were heard in the official language (i.e. Arabic). Also associated with language is the need to translate whole documents into Arabic if they are originally in a different language. In this case, the merit of the case may be affected, as translation cannot always reproduce meaning exactly. Thus, there was a need for an available arbitral body that could hear cases in English. Second, international legal practitioners, specifically Western practitioners, are not familiar with the UAE civil system; they are more familiar with the common law system. The DIFC has the advantage that it applies the common law system. For example, the UAE legal system does not apply the principle of precedents. This can limit the predictability of the outcomes of any case. Many foreign investors in the UAE and in Dubai have experienced a number of these issues in their arbitration cases.⁴⁹ Therefore, the extension of the DIFC's jurisdiction gave foreign investors a new option for settling their disputes within Dubai using English and a familiar legal system. This is in step with the general principle of international arbitration law to provide parties with freedom to have their disputes resolved in a jurisdiction of their choice.

An additional reason for the amendments to the DIFC arbitration law was to facilitate the enforcement of foreign arbitral awards.⁵⁰ For the purpose of enforcement, it should be

⁴⁸ *DIFC Law (Law No 12 of 2004 (as amended))*, art. 5 (A) (2)

⁴⁹ See Chapter 3, p. 13 and 17.

⁵⁰ See *the DIFC Arbitration Law 2008*, art. 42(1), 43 and 44. Also, see *the DIFC Law No 10 of 2004*, art. 24 which confirms that the DIFC Court of the First Instance has jurisdiction to ratify a recognized arbitral

noted that a DIFC arbitral award is treated in the same way as a UAE arbitral award. Enforcing a DIFC award within the DIFC is straightforward: once the award is submitted to the DIFC Court, the latter has the capacity to issue execution orders within the DIFC. However, in the case of enforcing a DIFC arbitral award in Dubai,⁵¹ an added process is required. First, the award must be ratified by the DIFC Courts, and second, it must be submitted to the Dubai courts for enforcement. The DIFC Court judgments will be enforced by the Dubai courts in accordance with the protocol signed by the DIFC Court and Dubai Courts, which explains the procedure that must be followed in order to carry out such enforcement.⁵²

A DIFC Court judgment can also be recognised and enforced outside the UAE through bilateral treaties for the reciprocal enforcement of judgments to which the UAE is a party.⁵³ Notably, the enforcement of DIFC Court judgments can be difficult in jurisdictions that have not yet made such an arrangement with the UAE, including the US and the UK. In view of this, the DIFC has proposed a Draft Practice Direction to facilitate the enforcement of its Court judgments. The proposed Draft Practice Direction would amend the existing

awards, including a DIFC awards and foreign awards where the UAE has entered into treaties on the enforcement of judgments and/or awards such as GCC Convention and the New York Convention.

⁵¹ The connection between DIFC Courts and the Dubai Courts can be found in Article 7(2) of the Judicial Authority Law (Law No 12 of 2004), Pursuant to this Article, DIFC judgments and awards are enforceable by Dubai Courts if the judgment or award is final and appropriate for enforcement. One added requirement for enforcing a DIFC arbitral award in Dubai Courts is that the award must be translated into Arabic language.

⁵² The Protocol between DIFC Courts and Dubai Courts was signed on 7th December 2009. The purpose of this Protocol is to clarify and interpret jurisdictional issues that are not defined in the law. Another reason is that to identify the legal procedures for transferring cases between the DIFC Courts and Dubai Courts. See Rita Jaballah, 'A New Era in Dispute Resolution in Dubai', *Al Tamimi & Company*,(UAE), 17 March 2010 <<http://altamimi.newsweaver.ie/Newsletter/i02ye1a5o8qk5sbre148h0>> at 20 June 2014.

⁵³ For example, the UAE is a party of the GCC Convention 1996 on the enforcement of judgments with all Gulf Arab States such as Saudi Arabia, Oman, Bahrain, Kuwait and Qatar. There are also other treaties signed by the UAE related to the enforcement of arbitral awards, including the Riyadh Arab Agreement for Judicial Cooperation as well as bilateral treaties with other countries such as Morocco, Syria, Egypt, Jordan, Tunisia, India, France, Somalia and Sudan. See Mohammed El Ghatit, 'Enforcement of Local Arbitration Awards in the Arab World and Overseas', *Hogan Lovells*, September 2013, <http://www.hoganlovells.com/files/Publication/ecf4b4aa-1da1-4176-a692-03b9788c47ba/Presentation/PublicationAttachment/b1dc0c36-9848-424f-833b-08ca2ac7d3c4/DUBLIB01-%2393514-v1-Client_Note_-_Enforcement_of_local_arbitration_awards.pdf> at 15 May 2014.

Practice Direction No2 of 2012. If the Draft Practice Direction comes into effect, then parties who choose to submit to the jurisdiction of the DIFC courts will have the option to refer any dispute relating to the enforcement of a decision of the DIFC courts to the DIFC–LCIA arbitration. As a result, the issue of those jurisdictions where there are difficulties in enforcing a DIFC Court judgment outside the UAE will be eliminated, as the arbitral award rendered by the DIFC–LCIA would be enforceable under the New York Convention.⁵⁴

Another recent change made by the DIFC with the aim of endorsing the enforcement of foreign arbitral awards is found in Article 7 of the DIFC of 2008 as amended by DIFC amendment law No 1 of 2013. As background to this issue, in one former case, the first of its kind, the DIFC Court held that it had no capacity to order a stay to DIFC litigation for an arbitration seated outside the DIFC.⁵⁵ In another case, the Court concluded that it did not have the capacity to stay proceedings in support of a foreign arbitration agreement.⁵⁶ In the light of these two decisions, the DIFC amended its arbitration law to overcome this issue by giving the DIFC courts the power to stay court proceedings in favour of a foreign arbitration agreement, regardless of the seat of the agreement. This confirms the DIFC’s commitment to implementing its treaty obligations under the New York Convention. Most importantly, in January 2014, the DIFC launched a new Department (i.e. DIFC Courts

⁵⁴ The main purpose of this proposal is to facilitate the enforcement of the DIFC Court judgments. This is can be done by converting the DIFC judgments into arbitral awards. See The European, Middle East and African Arbitration Review 2015, ‘Arbitration in the United Arab Emirates’, ‘DIFC draft practice direction for the conversion of DIFC Court judgments into DIFC–LCIA arbitration awards’.<http://globalarbitrationreview.com/shop/product/851/european-middle-eastern-african-arbitration-review-2015/> at 20 August 2015.

⁵⁵ *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co (a firm)*, CFI 019/2010.

⁵⁶ *International Electromechanical Services Co. LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC*, CFI 004/2012.

Enforcement Department) with the purpose of expediting the enforcement of decisions made by the DIFC courts and the courts of other jurisdictions.⁵⁷

Generally, the DIFC has become more advanced than other players in the field of arbitration within the region in facilitating the enforcement of arbitral awards. This is because the DIFC enjoys a straightforward ratification procedure (i.e. DIFC Courts), the Protocol of Enforcement between the Dubai Courts and DIFC Courts and the recent and proposed changes facilitating the enforcement.

The third impetus motivating the DIFC to amend its arbitration law is the commercial competitive advantage of arbitration as a technique for solving international disputes, and the hope of becoming a leading hub for international arbitration locally and within the region. Locally, Dubai has two arbitration centres in the DIAC and DIFC. The two have a common goal, which is to attract international arbitrations to Dubai, and both have modernised their arbitration laws in accordance with international standards and best practice. The DIAC also attracts an enormous number of arbitration cases every year.⁵⁸

However, since the joint venture between the DIFC and the LCIA and the creation of the DIFC–LCIA Arbitration Centre, the DIAC has faced serious competition. Considering this competition, it is appropriate to question whether it is in fact healthy competition. To answer this, it is important to understand the main differences between the two institutions. The main difference between is that the DIFC has a supervisory court, while the DIAC

⁵⁷ With the new DIFC Courts Enforcement Department, the enforcement procedure of DIFC Courts become more flexible and also can be completed online.

⁵⁸

arbitrations that take place in Dubai are supervised by the Dubai Court.⁵⁹ This means that the Dubai Court will conduct its role in Arabic, and will apply UAE law, which is derived from civil law. In contrast, the DIFC has its independent court that conducts its work in English and applies the DIFC law, which is based on common law.

It is believed that the presence a range of arbitral institutions within Dubai would create healthy competition, and thus encourage the growth of arbitration services, for the benefit of users. It is submitted that the DIFC as an arbitral institution has the potential to become the leading centre for arbitration in Dubai, as it governs the actual conduct of arbitral proceedings and the recognition and enforcement of foreign arbitral awards within the DIFC(i.e. through its own law and independent courts). Moreover, it uses English, and its law is based on a familiar legal structure (i.e. common law).The DIFC also has the advantage of the reputation of the LCIA as a result of the joint venture between the DIFC and LCIA. Thus the DIFC–LCIA provides its users with access to the LCIA’s expertise and its databases of world-class legal and non-legal arbitrators.⁶⁰

Recently, the Gulf Arab Region has achieved a significant role in international commercial arbitration and investment. Several arbitral institutions using modern arbitration rules have been established around the region. A number of these institutions have been providing arbitration services since the 1990s, including the Gulf Cooperation Council Centre in Bahrain, established in 1993. The other institutions are considered recent institutions,

⁵⁹Chief Justice Sir Anthony Evans, ‘The Future for Arbitration in Dubai’, Dec 31, 2008
<<http://difccourts.ae/the-future-for-arbitration-in-dubai/>> at 15 May 2014.

⁶⁰ Dubai International Financial Centre, Doing Business in the Dubai International Financial Centre- Chapter:2 Introduction to the DIFC, PricewaterhouseCoopers (PwC)
<http://www.difc.ae/sites/default/files/attached/3412/6769/9402/090114_DIFC_PWC_Book%20final%20updated.pdf> at 20 June 2014.

including the DIAC, DIFC, the Qatar International Arbitration and Conciliation Centre, established in 2007, and the Bahrain Chamber for Dispute Resolution with the AAA (BCDR–AAA), established in 2009. Indeed, all countries in the Arab region are now signatories to the New York Convention. There is stiff competition among these institutions, as each institution has its own set of rules and takes the role of administering the arbitration process. It is the choice of the parties who can afford institutional arbitration to select the most suitable institution that can provide them with the most important advantages of institutional arbitration.⁶¹

Comparing the arbitral institutions in the region, the DIFC enjoys a superior position, as the latter has pre-established rules and procedures based on the UNCITRAL Model Law, offers administrative assistance (i.e. an independent court that conducts its role in English and applies the DIFC law, which is based on common law) and provides its users with access to the LCIA's expertise and databases. Most importantly, the DIFC continues to develop its rules and procedures, as well as mechanisms for the enforcement of arbitral awards. Therefore, the DIFC is the most appropriate arbitral institution within the region, especially for foreign investors conducting business not only in Dubai or the wider UAE, but in the region as a whole.⁶²

⁶¹ The most important advantages of institutional arbitration are the availability of modern rules and procedure which ensure the flexibility of the arbitration proceedings, administrative assistance such as a secretariat or court of arbitration (i.e. an effective mechanism to enforce arbitral award) and providing a list of well qualified arbitrators and experts. See William K. Slate, 'Institutional Arbitration: Do Institutions Make a Difference?' (1996) Vol. 31 *Wake Forest Law Review*, p.52. Also See George H. Friedman, 'The Administered Proceeding' (1994) *N.Y. L.J.* at 3.

⁶² Foreign investors can enjoy a number of benefits when they choose the DIFC as their arbitration seat, including first the familiarity with the arbitration rules and procedure as the rules are based on the UNCITRAL Model Law. Most importantly, the DIFC Courts are modeled on the English Commercial Court. The advantages for foreign investors of having courts modeled on the English Commercial Court in Dubai or widely in the Arab region are they can conduct their procedures in English, the familiarity with the court procedure as the courts' rules are based on a common law system and the court's staffs mostly are international judges from common law jurisdictions.

Overall, the introductions of new arbitration rules at both Federal and Emirate levels were significant moves that altered the UAE's reputation regarding arbitration. The UAE offers local and foreign investors access to high-quality arbitration resources. The developments in arbitration in the UAE have increased foreign investors' confidence in using these resources, particularly in Dubai as a centre for arbitration. The developments have also eliminated a number of issues with the previous laws and practices of arbitration. The UAE should continue its forward thinking regarding arbitration for a number of reasons—chiefly the positive effects of arbitration on investment and business growth within the UAE, and the ambition to play a leadership role in this field of law and become a regional and global centre for arbitration.

In the following section, the ICC's model of arbitration is discussed. This will enable the argument that the amended ICC arbitration rules of 2012 took into consideration most of the features of effective and efficient conduct of international arbitration. The following section discusses the main changes represented in the new ICC arbitration rules, followed by an explanation of the reasons for the introduction of these new rules.

4.4 The ICC

The International Chamber of Commerce, also known as the International Court of Arbitration, possesses the most widely used institutional arbitral rules in the world (ICC arbitration rules), specifically in relation to complex international disputes in fields such as energy and construction. Recent changes to the ICC arbitration rules came into force on 1 January 2012, replacing the previous version of the arbitration rules enacted on 12

September 2011. Historically, in 1922, the ICC published its first set of arbitration rules. Following that, three significant modifications were made in 1955, 1975 and 1998.⁶³ This shows the continual nature of development of the ICC's arbitration rules. With the recent amendments to the ICC rules in 2012, it is appropriate to consider these changes and to identify their aim. The 2012 amendments to the ICC rules targeted a number of aspects, specifically time and cost efficiency introduced through case management and practices, dealing with urgent measures and addressing complex and multi-party disputes.⁶⁴

4.4.1 Time and Cost Efficiency

First, in the case of making arbitration processes cost-effective and expeditious, the new ICC rules require parties to provide additional, detailed information about their dispute or claim in their documentation in the early stages of the process. Defining further aspects of the claim and the facts of the dispute at the commencement stage of arbitration would allow parties and tribunals to avoid delays, allowing settlements to arrive more quickly.⁶⁵

Second, the amendments have taken into account jurisdictional challenges. The previous arbitration rules of 1998 provided the ICC Court with the power to decide on jurisdictional challenges, which determine the validity of the arbitration agreement. However, the new rules of 2012, particularly Article 6(3), shift this power to the arbitral tribunal, who can now make decisions on such challenges directly.

⁶³ ArzuOngurErgan, 'the New [2012] Arbitration Rules of International Chamber of Commerce [ICC]' (2011) *Ankara Bar Review*, p. 85.

⁶⁴ International Court of Arbitration of the International Chamber of Commerce, 'The 2012 ICC Rules of Arbitration- An Accelerated Procedure and Substantial Changes' (2012) Vol.29 *Journal of International Arbitration* Kluwer Law International Iss.3, pp.323-344.

⁶⁵ See *the ICC Arbitration Rules 2012*, art. 4 and 5. Also, see Karl-Heinz Bockstiegel, 'Commercial Investment Arbitration: How Different are they Today?' (2012) Vol. 28 *Arbitration International (LCIA)* Iss4, pp. 577-590.

Moreover, the new rules give the ICC Court extensive power in relation to the composition of the arbitral tribunal, especially in arbitrations involving states or state entities.⁶⁶ The ICC Court is now permitted to appoint arbitrators directly without referring to the National Committee, provided that there be no National Committee, or that the President of the National Committee finds justification for the direct appointment.

The new rules also emphasise that both parties and the arbitral tribunal must employ every possible effort to accomplish an expeditious and cost-effective arbitration process under the auspices of the ICC.⁶⁷ A significant aspect of the management system is the set of rules that require the arbitral tribunal to organise a case management conference at the outset of the arbitration to address procedural matters.⁶⁸ A second case management conference can take place at any stage of the arbitration process to make sure that the arbitration process is being conducted in an efficient and effective manner.⁶⁹ Management techniques and measures are also found in Appendix IV, and can be used by the arbitral tribunal to ensure the efficient conduct of the arbitration process.

An additional provision of the new ICC rules to ensure time and cost savings is Article 27, which requires the arbitral tribunal to declare proceedings closed and to inform parties and

⁶⁶ See the *ICC Arbitration Rules 2012*, art. 13.

⁶⁷ *The ICC Arbitration Rules 2012*, art. 22(1), it generally states that the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. Other provisions of the new rules are in line with the general approach of Article 22(1), including Article 24 (1) and (3), Article 27 and Article 37(5).

⁶⁸ Paul Friedland, 'The New ICC Rules: Continuing Evolution of Case Management Powers to Control Costs and Delays in International Arbitration', *Kluwer Arbitration Blog*, 13 September 2011, <<http://kluwerarbitrationblog.com/blog/2011/09/13/the-new-icc-rules-continuing-evolution-of-case-management-powers-to-control-costs-and-delays-in-international-arbitration/>> at 15 February 2014.

⁶⁹ *The ICC Arbitration Rules 2012*, art.24(1) and(3).

the Secretariat of the expected submission date of the draft of the award.⁷⁰ This leads to another provision in Article 2(2), which requires the ICC Courts to take into consideration the efficiency of the tribunal and timeliness of the submission of the draft award when setting the arbitral tribunal's fees.⁷¹ It is anticipated that Articles 27 and 2(2), as well as Appendix III, will increase the chances of completing the arbitration procedures within the expected time and avoiding requests for extensions. This is because the Secretariat and the ICC Court have the right to make sure that the arbitration process is going smoothly, and the arbitral tribunal will not exceed its expected submission timeline. A new provision has also been inserted with regard to the costs of arbitration, requiring the arbitral tribunal to consider each party's compliance in conducting the arbitration procedure in an expeditious and cost-effective manner.⁷²

Ultimately, to save parties' time, the new rules, particularly Article 3(2), expressly permit the arbitral tribunal and the Secretariat to make use of electronic case management (i.e. email) to communicate with parties.⁷³ The rules also encourage the tribunal to utilise video conferencing at hearings if meeting in person is not necessary. All of the above provisions are designed to encourage participants to conduct arbitration process quickly and without undue expense. This is meant to increase the effectiveness of the arbitration process.

⁷⁰*The ICC Arbitration Rules 2012*, art.27 (a) and (b). Previously, the arbitral tribunal was not obliged to inform the parties, they were just required to provide the Secretariat an approximate date for the submission of the draft award. See *the ICC Arbitration Rules of 1998*, art. 22 (1) & (2).

⁷¹*The ICC Arbitration Rules 2012*, art.2 (2), Appendix III.

⁷²*The ICC Arbitration Rules 2012*, art.37(5).

⁷³*The ICC Arbitration Rules 2012*, art.3 (2).

4.4.2 Dealing with Urgent Measures

The new ICC arbitration rules of 2012 have also introduced significant provisions dealing with the procedure for the appointment of emergency arbitrators for urgent interim or conservatory measures.⁷⁴ There are a number of situations in which a party may need an urgent interim or conservatory measure that cannot wait until the constitution of the arbitral tribunal.⁷⁵ Therefore, Article 29 has been inserted to provide for the appointment of an emergency arbitrator who can issue orders regarding such measures.⁷⁶ According to Appendix V (Emergency Arbitrator Rules), the application for an emergency arbitrator must be submitted within 10 days; otherwise, the application will be terminated. The emergency arbitrator's decision will take the form of an order. The emergency arbitrator rules will only apply to arbitration agreements concluded after 1 January 2012. They will not apply if the parties decide to opt out of the provisions, and ultimately the procedure for appointing an emergency arbitrator should be completed within a short time, consistently with the urgent nature of the proceedings.

4.4.3 Dealing with Complex and Multi-Party Disputes

As international business grows and becomes increasingly complex, arbitration rules need to meet its new and evolving requirements. They must be able to deal with issues arising out of increasingly complex arbitration disputes, which may include the joinder of

⁷⁴Ergan, above n.62, pp.87-88.

⁷⁵Interim measures, for example, can include orders to ensure that certain evidence is not destroyed, orders to prevent disposal of assets or to enjoin the other party from conduct which might cause irreparable harm. See Mathew Stulic, 'Court or tribunal? - Issues in interim and conservatory measures in international arbitration', *CLAYTON UTZ*, 20 October 2006, <http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20061020/court_or_tribunal-issues_in_interim_and_conservatory_measures_in_international_arbitration.page> at 15 November 2014.

⁷⁶*The ICC Arbitration Rules 2012*, art.29 and Appendix V (Emergency Arbitrator Rules).

additional parties, consolidation, multi-party disputes and multi-party contracts. The new ICC rules of 2012 have taken these issues into account and introduced a number of provisions, particularly Articles 6–10, to deal with such complexity and avoid additional costs and the risk of inconsistent decisions.⁷⁷

Fundamentally, any submission to arbitration must be agreed upon by all parties; thus the new rules concerning multi-party disputes, additional party joinders and consolidation of the arbitration require that the ICC Court confirm that all parties involved are subject to the arbitration agreement.⁷⁸ Pursuant to Article 7 of the new rules, a party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party. The application for joinder must be submitted to the Secretariat prior to the confirmation or appointment of any arbitrator, or at any time after that on condition that all parties, including the party to be joined, have agreed to the joinder.

The new rules under Article 8 relate to claims between multiple parties. In this regard, in an arbitration involving multiple parties, claims may be made by any party against any other party provided that no new claims can be made after the terms of reference are signed or approved by the Court without the authorisation of the arbitral tribunal.⁷⁹

⁷⁷ It should be noted that the new rules give the ICC Court the power to decide on the appropriate manner of fixing and allocating advances on costs in complex multi-party arbitrations. See Herbert Smith, 'The New ICC Arbitration Rules: Promoting a Modern View of International Arbitration', *Herbert Smith LLP* October 2011 < <http://www.herbertsmithfreehills.com/-/media/HS/P13101141821.pdf> > 20 November 2012.

⁷⁸ *The ICC Arbitration Rules 2012*, art.6(4). Also, see Lukas Wyss, 'Multi- party contract and multi-party arbitration proceedings in Switzerland: What commercial users should know' *Bratschi Wiederkehr & Buob Ltd Arbitration Newsletter* (Switzerland), August 2014, < https://www.bratschi-law.ch/fileadmin/daten/dokumente/newsletter/2014/2014-08-21_05_Finaler_Beitrag_LWY.pdf > at 20 November 2014.

⁷⁹ *The ICC Arbitration Rules 2012*, art. 8.

In addition to the above mentioned, the new rules also include a provision dealing with multiple contracts. Under Article 9, multiple contracts claims arising out of or in connection with more than one contract may be made in a single arbitration, regardless of whether such claims are made under one or more than one arbitration agreement.⁸⁰ In multiple contracts claims, it is essential that the Court be satisfied that the arbitration agreements are compatible, that all parties are agreed that the claims can be decided in a single arbitration, and that the arbitral tribunal has jurisdiction in one or more of the claims.⁸¹

Most importantly, under Article 10, the new rules provide the ICC Court with extensive power to consolidate arbitral proceedings.⁸² In this respect, the Court may, at the request of a party, consolidate two or more pending arbitrations into a single arbitration, provided that the parties have agreed to the consolidation. This can also be done if all claims in the arbitration are made under the same arbitration agreement; or if the arbitration is between the same parties, the disputes in the arbitration arise in connection with the same legal relationship, and the Court finds the arbitration agreement to be compatible.⁸³

Finally, under the revised rules in Article 1(2), the ICC Court now has extensive power to administrate arbitrations. The revision seeks to discourage the use of hybrid clauses where parties wish to have arbitration conducted under the ICC rules, but administrated by another arbitral institution. The use of hybrid clauses in the new ICC rules is risky, as such clauses can be invalidated.

⁸⁰*The ICC Arbitration Rules 2012*, art. 9.

⁸¹Smith, above n 77.

⁸²Ergan, above n. 62.

⁸³*The ICC Arbitration Rules 2012*, art.10, (a), (b) and (c).

Generally speaking, the new ICC rules of 2012 are welcome developments aiming to change the existing practices of the ICC in conducting international arbitration. As discussed previously, the most significant changes of the new ICC rules are that the new rules attempt to address the growing complexity of disputes and make sure that the arbitration procedure is rapid and cost-effective. In summary, the new rules suggest that they have been designed to reduce the cost and length of arbitral proceedings, improve case management techniques, solve urgent issues and deal with the growing complexity and diversity of disputes.

4.4.4 Reasons for the Amendments to the ICC Rules of 2012

There are a number of expectations behind the reasons for the amendments to the ICC rules of 2012, including increasing the effectiveness and efficiency of the arbitration process and maintaining and sustaining the position of the ICC as a leading global arbitral institution. Regarding the objective of increasing the effectiveness and efficiency of the arbitration process by facilitating more rapid and affordable arbitration procedures, the following discussion relies on Okekeifere's argument about effective and efficient dispute resolution methods. Okekeifere stated that an effective dispute resolution method must make the process more expeditious and cost effective.⁸⁴ Accordingly, it is reasonable to assume that one reason behind the amendments to the ICC rules was to make them more effective and more efficient by improving their speed and reducing costs.⁸⁵ It is not always the case that

⁸⁴ Andrew I. Okekeifere, 'Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a myth?', (1998) 15 *Journal of International Arbitration* (Kluwer Law International), pp.81-106. For more discussion see Chapter 2, p. 17.

⁸⁵ 'the objectives of the new Rules are to further accelerate the proceedings by 'updating' the case management procedure, in order to address the litigants' needs as well as to take into account the claims that

arbitration is faster and cheaper than other dispute resolution methods; this can depend on the conduct of the parties and the tribunal. It is for this reason that the new rules emphasise that both parties and the arbitral tribunal must employ every possible effort to accomplish an expeditious and cost-effective arbitration process under the auspices of the ICC. Therefore, the new rules impose new obligations on parties and arbitral tribunal to work together cooperatively with the purpose of eliminating unnecessary costs and delays in the procedures.

Another important aspect of effective and efficient arbitration is the accommodation of third-party interests. With the rising complexity of modern business, the new rules of the ICC enable third-party proceedings and an approach to joinders of parties.

The second reason for the changes made to the ICC arbitration rules was to maintain and sustain the ICC's position as a leading global arbitral institution. In a 2010 survey conducted by the School of International Arbitration at the Queen Mary University of London on Choices in International Arbitration, participants were interviewed about their preferred arbitration institutions. The participants' responses indicated that the ICC was the most preferred institution (50 per cent), followed by the LCIA (14 per cent), AAA/ICDR (8 per cent) and SIAC (5 per cent).⁸⁶

Also according to the survey, a number of other factors influenced the participants' choices regarding the selection of an arbitration institution, including its neutrality, reputation and

ICC arbitration is long and expensive, and in particular, to remedy the difficulties arising from multi-party claims and contracts'. See International Court of Arbitration of the International Chamber of Commerce, above n. 63, p.323.

⁸⁶ See School of International Arbitration, above n 5.

recognition, arbitral rules and the law governing the substance of the dispute, previous experience, expertise in certain types of cases, free choice of arbitrators, effective enforcement mechanisms, involvement in managing cases and ensuring that parties keep to the timetable and cost. On the basis of this survey, it can be concluded that the ICC has accommodated most of these factors in its new arbitration rules in order to maintain and sustain its position as a leading arbitral institution for international commercial disputes.

For example, neutrality was the most important factor in the survey, with 66 per cent indicating its high priority. Neutrality has been addressed in the new amendments to the ICC arbitration rules; in particular, Articles 11(1) and (2) require arbitrators to be and remain impartial and independent.⁸⁷ This means that arbitrators are required to disclose in writing any facts or circumstances that might call into question the arbitrators' independence, as well as any circumstances that could give rise to reasonable doubts as to the arbitrators' impartiality. Additionally, the new provisions require prospective arbitrators to sign a statement of acceptance, availability, impartiality and independence before their appointment and confirmation, with the aim of reducing procedural delays. Moreover, another provision introduced obliges the arbitral tribunal in all cases to act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.⁸⁸ Generally, it is clear that the ICC as an arbitral institution has recognised the importance of the factor of neutrality in its new rules. This is likely to contribute to the ICC retaining its position as the leading institution for international arbitration.

⁸⁷ As stated by Rustamova, the neutrality of the arbitral tribunal is one of the key elements of fair arbitration proceedings. It is the mandatory requirement of all arbitration rules that the member of the tribunal should be and remain independent, impartial and natural through-out the whole arbitration proceedings. Also, she emphasises that neutrality of the arbitrators is a crucial element of the just and effective arbitral proceedings. See Amina Rustamova, *Neutrality of Arbitrators* (LLM Thesis, Central European University 2009), p.1., <http://www.etd.ceu.hu/2009/rustamova_amina.pdf>.

⁸⁸ *The ICC Arbitration Rules 2012*, art.22 (4).

The new rules have taken into consideration another factor included in the survey: the involvement of the institution in managing cases and ensuring that parties keep to the timetable. Indeed, a majority of the changes to the ICC arbitration rules aim to ensure effective case management.⁸⁹ In respect of case management, the new rules authorise the tribunal to adopt appropriate procedural measures, provided that these measures are not in contradiction with any agreement of the parties. The new rules require parties to attend an early case management conference to define any procedural issues at an early stage. In determining the efficient conduct of the arbitration process, the arbitral tribunal are also authorised to use the comprehensive case management techniques found in Appendix IV of the ICC 2012 arbitration rules and in an ICC report titled *Techniques for Controlling Time and Cost in Arbitration*.

Among the many factors mentioned in the survey, the cost of arbitration was demonstrated to be extremely important. The survey indicated that ICC arbitration is excessively expensive. Thus, it is rational to claim that the amendments to the ICC arbitration law of 2012 have been made in recognition of the need to consider innovative techniques for reducing arbitration costs. Accordingly, the new ICC arbitration law includes a number of measures concerning arbitration costs. First, parties must provide additional and precise information in the request for arbitration and answer. Second, a study conducted internally in the ICC found that an unusually high number of negative decisions concerning jurisdiction were rendered by the ICC Court. This is a result of referring jurisdictional challenges directly to the arbitral tribunal instead of the ICC Court. Third, speeding up the process of arbitrator appointment, especially in disputes involving states and state entities is

⁸⁹*The ICC Arbitration Rules 2012*, art.22, 24, 27, 37 and Appendix IV.

accomplished by extending the ICC Court's power to appoint arbitrators directly without going through the National Committees. Fourth, both arbitral tribunal and parties are required to make every effort to conduct the arbitration in an expeditious and cost-effective manner; This is facilitated by enabling the arbitral tribunal to convene a case management conference at the commencement stage of the arbitration proceedings to discuss any procedural matters; requiring the arbitral tribunal to declare the close of proceedings immediately after the last hearing; authorising the arbitral tribunal to consider the extent to which each party has complied with its obligation to conduct the arbitration in an expeditious and cost-effective manner; and allowing the arbitral tribunal and the Secretariat to communicate with the parties by email and/or certain technological means, such as video conferencing at the hearing where attendance in person is unnecessary.

In summary, all these innovative techniques, such as providing additional and precise information in the request for arbitration and answer, referring jurisdictional challenges directly to the arbitral tribunal instead of the ICC Court, speeding up the process of arbitrator appointment and requiring both arbitral tribunal and parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, are demonstrated in the new the ICC arbitration rules. These techniques will enable the ICC to conduct arbitrations more quickly and at lower cost.

4.5 Conclusion

In the main, there is no doubt that international arbitration becomes a significant means of solving complex commercial cross-border disputes. This chapter has underlined the importance of the changes made to arbitration legislation in Australia, the UAE and the

ICC through a comparative analysis. It also has discussed the objectives and impetus that motivated Australia, the UAE and the ICC to revise their arbitration rules. The main goal of these changes has been to create effective and efficient legal frameworks and mechanisms that can deal with and resolve complex commercial cross-border disputes.

The basis for making changes to arbitration rules differed among jurisdictions. In order to become a hub for international arbitration, Australia was required to change its arbitration rules with the aim to compete with other arbitration players in the Asia Pacific region, eliminate uncertainties in its previous arbitration laws, and minimise court intervention and promote the finality of its foreign arbitral awards.

In contrast, the UAE was required to make changes regarding the legal frameworks governing arbitration at the Federal and Emirate levels. At the Federal level, the accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2006, and the new proposed Federal arbitration law were significant steps taken by the UAE Government, and represent fundamental features of an arbitration-friendly jurisdiction. The UAE does not have a separate arbitration law, and was not a party to the New York Convention prior to 2006. Moreover, two other reasons at the Federal level motivated the UAE to review its regulatory and legal frameworks: first, the existing legal framework gave unequal preference to local over foreign investors. Second, the impact of the global financial crisis resulted in an increased number of disputes and cases at the local courts. At the Emirate level (i.e. Dubai), most businesses affected by the financial crisis had at least one claim in the local courts. Therefore, Dubai recognised the need for an alternative mechanism (i.e. arbitration) for solving these disputes. As arbitration was a

priority, Dubai supported its use and made changes to its constitutional law to create the power to offer proper arbitration services such as the DIFC. It is submitted that all developments are substantial steps forward in promoting Dubai and the UAE as an international hubs for arbitration.

In the case of the ICC, the amendments to its arbitration law target a number of aspects concerning case management, urgent measures and complex and multi-party disputes. These amendments were necessary to increase the effectiveness and efficiency of the arbitration process and maintain the position of the ICC as a leading arbitral institution in the world.

This chapter has provided useful background context on how and why changes have taken place in these three jurisdictions. This context will underpin the analysis of the DIFC arbitration rules and the development of proposals for suitable future changes in the following chapters. Chapter 5 assesses the DIFC model, in part by comparing it to the international model used by the ICC and the example of Australia as an economically developed country.

Chapter 5:

Comparison of the Procedural Rules of International Commercial Arbitration at ACICA, the DIFC and the ICC

5.1 Introduction

The goal of this chapter is to first assess whether the rules of the DIFC Arbitration Law 2008 conform to contemporary international developments or whether they require further changes. To answer this question, it is necessary first to make a distinction between the substantive and procedural laws of arbitration. Therefore, this chapter is divided into two parts. The first part (Section 5.2) provides a brief overview of the literature discussing the differences and relationship between procedural and substantive laws of arbitration. The chapter focuses more on the procedural issues pertaining to the DIFC arbitration law than the substantive issues, as the aim of this thesis is make the arbitration process under the DIFC Arbitration Law 2008 more effective and efficient. Therefore, it is beyond the scope of this thesis to cover the substantive issues of the DIFC Arbitration Law.

The second part (Section 5.4) undertakes a comparative study of the procedural rules of three arbitral institutions. These rules are the DIFC arbitration law of 2008, the ICC arbitration rules of 2012 and ACICA arbitration rules of 2011. As an initial step, a list is provided of a number of essential procedural issues that are intended to make the arbitration process more effective and efficient. The selection of the procedural issues predominantly relies on the recent amendments to the ICC arbitration rules of 2012, and

for certain circumstances the ACICA arbitration rules of 2011.¹ The selection also makes use of the criteria mentioned in Chapters 1 and 2 in measuring the effectiveness and efficiency of arbitration law.² It is argued in this chapter that the procedural rules of the DIFC arbitration law of 2008 contain specific deficiencies. Therefore, further changes are required to meet recent trends in the conduct of international arbitration and to develop more effective and efficient arbitral proceedings for international commercial disputes.

5.2 The Differences and Relationship between Procedural and Substantive Laws of Arbitration

There are numerous advantages of using international commercial arbitration rather than litigation, especially for complex international commercial disputes. The benefits of choosing arbitration for parties who have potential international disputes can be found in the flexibility of the procedural and substantive rules provided by arbitral institutions such as the ICC. The benefits of these procedural and substantive rules can lead parties who have potential international commercial disputes to compromise their legal rights and consider negotiating an international arbitration clause.³ Therefore, it is necessary to understand the differences and relationship between procedural and substantive laws.

¹ In this thesis, the comparison of the procedural rules of international arbitration in ACICA and the ICC will be used as model, in order to suggest refinement to any possible deficiencies in the procedural rules of arbitration of the UAE (the Emirate of Dubai), particularly the Dubai International Financial Centre (the DIFC Arbitration Law of 2008).

² Andrew IOkekeifere, 'Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a myth?', (1998) 15 *Journal of International Arbitration Kluwer Law International* pp.81-106; Margaret Wang, 'Are Alternative Dispute Resolution Methods Superior to Litigation In Resolving Dispute in International Commerce?' (2000) 16 *Arbitration International Kluwer Law International* 2, pp. 198-212; The World Bank Group, *Arbitrating Commercial Disputes Methodology*, (2012) <<http://iab.worldbank.org/Methodology/Arbitrating-disputes>> Retrieval on 10 of September 2014.

³ Tom Cummins, 'Anatomy of an arbitration Part I: Why arbitrate?', *Ashurst international arbitration group*, February 2013

<https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CCcQFjACahUKEwjGjOGDxPrHAhUFL6YKHQcHCxU&url=https%3A%2F%2Fwww.ashurst.com%2Fdoc.aspx%3Fid_Content%3D8851&usg=AFQjCNGswhE_QqEcrKN0kCAPaUk47c26Qw&bvm=bv.102829193,d.dGY> at 12 July 2014. In this article Cummins mentioned the word of leading practitioner, Jan

There is a distinction between the procedural law and the substantive law of arbitration. The procedural law of arbitration is referred to by the term *lexarbitri*, or the ‘curial law’⁴ that is applicable to arbitration proceedings and the judicial seat of arbitration, while the substantive law refers to the law governing the subject and merits of the dispute.⁵ Redfern and Hunter provided a comprehensive account of the difference, stating that international commercial arbitration can involve several systems of law, including:

- (i) the law governing the parties’ capacity to enter into an arbitration agreement; (ii) the law governing the arbitration agreement and the performance of that agreement; (iii) the law governing the existence and proceedings of the arbitral tribunal *the lexarbitri*; the law, or the relevant legal rules, governing the substantive issues in dispute—generally described as the ‘applicable law’, ‘the governing law’, ‘the proper law of the contract’ or ‘the substantive law’; (v) the law governing recognition and enforcement of the award.⁶

The following section analyses the differences and relationship between the procedural and substantive rules of arbitration.

5.2.1 Procedural Law of Arbitration

In considering the procedural rules or the term *lexarbitri*, it is also necessary to understand that there is a significant difference between the two terms.⁷ In an international arbitration, the procedural rules usually deal with the details of the procedure that will be implemented by parties with the purpose of achieving fair and

Paulsson who states that ‘We can be certain that lawyers’ cupboards across the globe are filled to bursting with myriad contracts referring to international arbitration even though each side actually preferred courts. You all see why international arbitration finishes first even though it was perhaps never better than second best in anyone’s mind. The problem was that the most preferred alternative of each side was the least acceptable to the other’. See Jan Paulsson, ‘International arbitration is not arbitration’ (Brierley Memorial Lecture at McGill University, Montreal, 28 May 2008).

⁴Ibid. Generally, English lawyers use the term ‘curial law’, p. 91.

⁵Ibid, pp.89-141.

⁶See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, 4th ed, 2004) p.91.

⁷ The difference between the two terms (the procedural rules) and/or (the term *lexarbitri*) will be explained further in the following paragraph.

efficient conduct of the proceedings. It is essential for parties coming from different jurisdictions, with different perspectives and perhaps different legal systems, to be familiar with the procedural rules that will be followed or applied in an arbitration. For example, the procedural rules that parties to international disputes should have knowledge of may deal with the following:

any formalities to be complied with; the extent to which the arbitration agreement excludes court jurisdiction; how much autonomy and discretion the parties have in choosing the arbitral procedure; what support the court will give to the arbitration; whether the decision of the arbitral tribunal can be appealed, and what timescales will apply; and finally enforceability of the award.⁸

It should be noted that one advantage of the rules of arbitral institutions such as the ICC is that such an institutional set of rules offers a comprehensive framework through which parties can conduct arbitration proceedings efficiently.⁹ In contrast, the term *lex arbitri* is used to refer to the general provisions of the law governing the arbitration. According to a well-known English judge, the term *lex arbitri* can be defined as ‘a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of arbitration’.¹⁰ It covers the rules governing interim measures, the rules for court assistance if any difficulties arise, and the rules giving the local court power to exercise its supervisory jurisdiction over the arbitration.¹¹ Nevertheless, the laws governing arbitration and international arbitration in

⁸ See Pinsent Masons, ‘International arbitration: substantive, procedural and mandatory rules’, *Pinsent Masons Legal News and Guidance*, 2011, <http://www.out-law.com/en/topics/projects--construction/international-arbitration/international-arbitration-substantive-procedural-and-mandatory-rules/> at 20 June 2014.

⁹ Similarly, the UNCITRAL Arbitration Rules provides a comprehensive framework for parties to conduct arbitration proceedings efficiently. However, both the rules of arbitral institution and the UNCITRAL Arbitration Rules in some circumstances will need to be supplemented by additional detailed provisions.

¹⁰ See Redfern and Hunter, above n 6, p.93.

¹¹ Ibid. The content of the *lex arbitri* is differed from state to other. Each state will determine its own law to govern the conduct of arbitrations within its jurisdiction. For example, in international arbitration some states have a short code of law which just define the concept of international arbitration such as the code of France, Swiss and Colombia, while other states have introduced an extensive code of law which clarifies most aspect of international arbitration, particularly those states which enacted the UNCITRAL Model Law. It should be noted that most countries that have modernised the law governing international

some countries, such as the UAE, Germany and France, are merely part of the country's Code of Civil Procedure. In France, Germany and the UAE, the *lexarbitri* is considered a law of procedure,¹² creating confusion as to whether the *lexarbitri* is a procedural law.

A number of traditional commentators have argued that both the procedural rules adopted by the parties and tribunal and the *lexarbitri* are necessary for conducting international arbitration.¹³ This is because the arbitration cannot be insulated from the place of arbitration.¹⁴ However, in the modern practice of international arbitration, especially in countries with highly developed arbitration law and practice, there is a tendency to eliminate the state's control over international commercial arbitration process. In this case, the local courts in these countries have no jurisdiction to intervene in arbitration except when authorised to do so. The role of the local courts is thus one of support to the arbitration process rather than interference.

Additionally, there is another development that separates international commercial arbitration from the control of the law of the place where the arbitration process is conducted. This is referred to as *delocalisation* in arbitration; the term represents a theory that has gained the support of a number of commentators since its establishment.¹⁵ The notion of delocalisation theory in arbitration is that international commercial arbitration is being released from the control of the *lexarbitri* and the courts

commercial arbitration have either adopted the Model Law completely, or as minimum taken considerable aspects of it.

¹²Ibid. As it has been considered earlier that there is a difference between procedural law and the *lexarbitri*, the *lexarbitri* is more than a procedural law. For instance, in the UAE and other Gulf Arab States, a local agency agreement is not capable of settlement by arbitration under the national law and this explains it is not a matter of procedure.

¹³William Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 Int'l & Comp. L.Q. 21. In this article Park has arguments against the idea of delocalisation in arbitration.

¹⁴Ibid.

¹⁵Jan Paulsson, 'Arbitration Unbound: An Award Detached from the Law of the Country of Origin' (1981) 30 Int'l & Comp. L.Q. 358; Jan Paulsson, 'Delocalization of International Commercial Arbitration: When and Why it Matters' (1983) 32 Int'l & Comp. L.Q. 53; Jan Paulsson, 'Rediscovering the New York Convention: Further Reflections on Chromalloy' (1997) 12 Int'l Arb. Rev. 20.

of the place of enforcement of the award.¹⁶ In other words, the arbitration will be unrestricted by national jurisdictions.

5.2.2 Substantive Law of Arbitration

The substantive law (or the *lexcausae*) is the law governing the subject and merits of the dispute. It is common in most jurisdictions that parties to arbitration have the freedom to choose the law that will apply (i.e. party autonomy).¹⁷ Where this is so, it is because national courts in different legal systems, whether common law or civil law, have adopted the principle. In other words, party autonomy has gained widespread recognition in national systems of law. Hence, international conventions such as the UNCITRAL Model Law and the rules of arbitral institutions on international commercial arbitration generally include a clause regarding party autonomy, which gives parties the freedom to choose for themselves the law applicable to their

¹⁶Pippa Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) Vol 10 *the American Review of International Arbitration*, No 2; As discussed by Brazil-Davida, the establishment of the delocalization theory was in the 1960s with purpose to detach the international arbitration from the local laws. 'This theory involves freeing an international arbitration from the constraints of the procedural laws of the place of arbitration. The main argument of the supporters of the delocalization theory is that international arbitration should not be restricted by mandatory procedural rules of the forum and should be detached from the country of origin'. See Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration', (2011) Vol. 8 *Journal of International Arbitration Kluwer Law International Iss.* 28 p.456.

¹⁷ Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' (2002) Vol 3 *Melbourne Journal of International Law* 2, p.410; It should be noted that there is still some restrictions on party autonomy, specifically the choice of law will be subject to first the qualification of the legality and secondly it does not violate the public policy or mandatory rules of the place settlement. Mandatory rules can be defined as a statutory provision that requires national law to be applied on a contract, without taken into consideration the parties' choice of law. It can affect the merits of a dispute such as anti-corruption rules or competition rules as well as it can influence procedural rules such as the enforcement matter. In Australia, for example, mandatory rules can be found in section 11(1) of the *Carriage of Goods by Sea Act 1991* (Cth).

In the UAE, for instance, either by the existing legislation, or as a matter of public policy by the courts, there are certain types of disputes are excluded and may not referred to arbitration. By the existing legislation, disputes arising out of commercial agency, distributorship, and labour agreements are considered as non arbitrable. Moreover, in the UAE courts have jurisdiction over the question of arbitrability. Also, in a case in the UAE for example, enforcement of an award was denied because a particular wording of oath, required by witnesses, was not used. See Article 211 of the CPC the witnesses must be placed under oath.

contract.¹⁸ Initially, it was assumed that the parties would choose the applicable law early on, at the time of entering their contract; however, this has not always been the case. It is essential for parties to select the law applicable to their dispute, as overlooking that choice can cause an award to be set aside on various grounds, including that the arbitrators have exceeded their authority or that the arbitral procedure was not in compliance with the agreement of the parties.¹⁹ Nonetheless, the international conventions and rules give parties the power to choose the applicable law when a dispute has arisen.

By providing the parties a freedom of choice of law, the question arises as to which system of law the parties should select to govern the subject and merits of the dispute (i.e. applicable law). In the context of international commercial arbitration, there are a number of laws available to be chosen by parties as applicable to the dispute. These include:

national law; public international law (including the general principle of law; concurrent laws (and combined laws- the *tronccommun* doctrine); transnational law (including international development law; the *lexmercatoria*; codified terms and practices; and trade usages); equity and good conscience.²⁰

In international commercial contracts, it is common that parties choose a system of law as the law governing their contract. Therefore, it would be consistent for them to choose an appropriately comprehensive system of law. This means that the law chosen should be a comprehensive legal system that can address any matter that may arise between the

¹⁸ For example, the Rome Convention on the Law Applicable to Contractual Obligations (1980), Another source is Article 28(1) of the UNCITRAL Rules as amended in 2006 (*Rules applicable to substance of dispute*) provide that ‘the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules’. See the UNCITRAL Rules as amended in 2006, art.28; Also, Article 21 of the ICC Arbitration Rules of 2012 (*Applicable Rules of Law*) provide that ‘the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute.....’. See *the ICC Arbitration Rules 2012*, art.21.

¹⁹ These grounds can be found in *the New York Convention* art. V (I).

²⁰ See Redfern and Hunter, above n 6, p.115.

parties. One suggestion is to use a national system of law, which provides a set of rules allowing parties to know their rights and obligations. Nevertheless, it is recommended that when parties choose a national system of law, they should consider the suitability of the chosen national law to the needs of international commerce. Other contracting parties may decide that a contract is not to be governed by the national law, and choose instead, for example, the UNIDROIT principles.²¹ Notably, in some cases, when parties or arbitrators intend to choose a law applicable to their contract or dispute other than the national law, they may make reference to terms that differ from the *lexmercatoria*, or the law of merchants; these may include the general principles of international commercial law.²²

In the context of international business transactions and choice of applicable law, it can be questioned whether parties should select an international commercial law or *lexmercatoria* with the aim of solving the substance of their dispute. In response to this question, it is suggested that preferences in selecting the substantive law for a contemporary international commercial dispute should generally be based on the avoidance of uncertainties and unpredictable effects caused by the application of complicated, potentially conflicting doctrines and of domestic substantive rules.²³ In other words, the reason why parties should choose the applicable law early on is that it

²¹ The UNIDROIT principles of International Commercial Contracts are available at <http://www.unidroit.org>.

²² Michael Pryles, 'Appilcation of the *lexmercatoria* in International Commercial Arbitration' (2008) vol.31 *UNSW Law Journal* No 1, p. 320; As stated by Moses the *lexmercatoria* is not based on any legal system, however, it integrates international commercial rules, general principles, standards and trade usages. Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press, 2008), p. 64.

²³ The *Lex Mercatoria* has been criticised by a number of practitioners and commentators on the basis that it does not have a comprehensive legal standards and the principles and rules are uncertain and unpredictable. In other words, these principles are not law. This is because these principles have not been adopted or accepted by any jurisdiction as a law. Klaus Berger, *The Creeping Codification of Lex Mercatoria* (Kluwer Law International, 1999); Moses, above n. 21, p. 65. However, there are those who support *Lex Mercatoria*, for instance, Goldman and Mustill. See Goldman, 'Lex Mercatoria' (1983) Vol.3 *Forum Internationale*, p.3; Lord Michael Mustill, 'The New Lex Mercatoria: the First Twenty- Five Years', (1988) 4 *Arbitration International* 86. p.109.

can help avoid later complications and disputes arising from different doctrines of conflict of laws, as well as the rules of domestic substantive law.

Alternatively, when parties select the law applicable to their dispute, they have the choice to direct the arbitral tribunal to determine any issues that arise by way of *amiable compositeur*, or *ex aequo et bono*. Both expressions mean that the arbitral tribunal has no obligation to apply the law, but can decide a matter in an equitable and reasonable manner.²⁴ Many modern arbitration rules apply this approach, provided that this power is expressly permitted by the parties. For example, Article 21(3) of the ICC arbitration rules 2012 stipulates that ‘the arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers’.²⁵ Interestingly, most parties do not grant this power for arbitrators, because they consider that the arbitral tribunal has adequate discretion, so there is no need to add additional power. According to a study of the ICC arbitration clauses conducted by Stephen Bond, in 1987 just 3 per cent of parties authorised arbitrators to decide on the basis of *amiable compositeur* or *ex aequo et bono* or in equity, and in 1989 just 4 per cent.²⁶

Generally, institutional arbitration provides parties with appropriate principles, including procedures for selecting arbitrators, the rules of procedure for conducting the arbitration, the rules for determining the merits of the dispute, facilities for arbitrators such as administrative assistance and, finally, a measure of supervision over the arbitrators, such as the court of arbitration in the ICC. Therefore, making use of the arbitral institution’s rules would reduce the impact of the procedural law at the seat of

²⁴ Moses, above n 22, p. 74.

²⁵ See the *ICC Arbitration Rules 2012*, art.21(3); similarly, this approach is found in article 28 (3) of the UNCITRAL Model Law on Arbitration.

²⁶ See Stephen R. Bond, ‘How to Draft an Arbitration Clause’ (1989) 6 *Journal of International Arbitration*, Iss. 2, pp.65–78; also refer to Moses, above n 22, p. 74.

the arbitration, as a number of these institutions provide comprehensive frameworks for parties to conduct arbitration proceedings efficiently. At the same time, the content of the rules has a tendency to be reasonably general, giving both the parties and the tribunal a fair degree of discretion in the procedure to be applied. Moreover, various international conventions and institutional rules preserve the parties' right to select the law applicable to their dispute.

The following section compares the procedural rules of international commercial arbitration in three institutions: the ICC, DIFC and ACICA. It discusses the relevant issues of arbitral proceedings and substance. This comparative study of the international arbitration rules of these jurisdictions contributes to the field of international commercial arbitration in the Gulf Arab Region as it provides standards for measuring whether the international arbitration legislation of the DIFC is progressive, effective, sufficient, or matches modern practice in international commercial arbitration. It is also necessary to identify the necessary tasks for minimising any obstacles to the implementation of international commercial arbitration in Dubai.

5.3 Comparison of the Procedural Issues of the Arbitration Rules of the ICC, ACICA and DIFC

This section aims to analyse and compare some selected issues with regard to procedural aspects of international arbitration. For reasons of space, some selection must be made, and will be based on the amended arbitration rules of the ICC, which contain innovative new provisions to make the arbitration process more effective and efficient. Therefore, it is useful to use the ICC arbitration rules of 2012 as a model for achieving efficiency and effectiveness in the DIFC rules. The ACICA arbitration rules

of 2011 will also be used, when possible, with the purpose of improving the arbitration law of the DIFC.

The following subsections discuss a number of essential procedural issues intended to make the arbitration process more effective and efficient. Since not all issues can be discussed in the space available, the following have been chosen: commencement of arbitration, the arbitral tribunal, confidentiality, multiple parties, multiple contracts, joinders and consolidation, conduct of the arbitration, terms of reference, case management and procurable timetable, and emergency measures.

5.3.1 Commencement of Arbitration: Request and Answer for Arbitration

The provisions relating to the commencement of arbitration under the rules of the DIFC mention some specific issues, including the process of initiating the arbitration. The rules also address the issue of the limited and ambiguous information required in the initial statement, or the request and answer for arbitration.

According to Article 4 of the ICC arbitration rules, a party wishing to have recourse to arbitration under the rules shall submit its request for arbitration to the Secretariat.²⁷ The latter will be responsible for notifying both the claimant and the respondent of the request for the commencement of the arbitration proceedings. Article 4(2) provides that the date of the commencement of the arbitration is the date that the Secretariat received the request.²⁸ Similar conditions appear in the ACICA arbitration rules.²⁹ In comparison, the only provision that deals with the commencement of arbitration in the DIFC arbitration rules is Article 28, which stipulates that ‘unless otherwise agreed by the

²⁷ See *the ICC Arbitration rules 2012*, art.4 (1).

²⁸ See *the ICC Arbitration rules 2012*, art.4 (2).

²⁹ See *the ACICA Arbitration rules 2011*, art.4.

parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent'.³⁰

It is clear that the DIFC arbitration rules do not contain an express provision regarding the notice of arbitration, unlike that in the ICC and ACICA rules. Moreover, the DIFC rules' specified process for initiating arbitration differs from the process used by the ICC and ACICA. For example, in the DIFC rules, the claimant is the one in charge of sending the notice of arbitration to the respondent, whereas in the ICC the claimant sends the notice of arbitration to the Secretariat, who will be liable to deliver it to the respondent. In the case of ACICA, the claimant will send the notice to the ACICA registry, and it is then the registry's responsibility to deliver it to the respondent.

By comparison, under the ICC and ACICA arbitration rules, the arbitration begins when the notice of arbitration is received by the ICC Secretariat or the ACICA registry. In contrast, under the DIFC arbitration rules, arbitration begins once the respondent receives the notice of arbitration.³¹ The date of the beginning of the arbitration is of crucial importance, as it can have procedural implications; for example, the commencement date of arbitration can affect the tribunal and the procedural rights of the parties. It can also influence the determination of costs (under Articles 39 and 41 of the ACICA Rules, and Article 37 of the ICC).³²

³⁰ See *the DIFC Arbitration rules 2008*, art.28.

³¹ According to the rules of ICC the request must be accompanied by a filing fee found in APPENDIX III, otherwise the request will not be accepted. The same criteria also used by the ACICA and DIFC arbitration rules.

³² Article 37 (5) of the ICC, for example, states that 'In making decisions as to costs, the arbitral tribunal may make into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner'. See *the ICC Arbitration rules 2012*, art.37(5).

The same provision of the ICC, Article 4(3), contains several requirements regarding the information that should be included in the request for arbitration at the beginning of the arbitration procedure.³³ Similar requirements can be found in the request for arbitration under the ACICA rules, except that the ACICA rules do not include significant requirements, particularly any proposal as to the place of the arbitration, the applicable rules of law and the language of arbitration. In contrast, Article 30 of the DIFC arbitration rules requires a brief statement describing the nature and circumstances of the dispute.³⁴

Moreover, the rules of ICC requiring information with the request for arbitration are mandatory, using the word ‘shall’. This means that the requirements must be complied with, otherwise the request for arbitration will be incomplete for the purposes of Articles 4(2), 4(3) and 4(4)(b) of the ICC arbitration rules.³⁵ In comparison, the DIFC

³³ Article 4(3) of the ICC arbitration rules states that ‘The Request shall contain the following information:

- a) the name in full, description, address and other contact details of each of the parties;
- b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;
- c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
- d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
- e) any relevant agreements and, in particular, the arbitration agreement(s);
- f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;
- g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
- h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute’. See *the ICC Arbitration rules 2012*, art.4 (3).

³⁴ Article 30 (1) of the DIFC arbitration rules stipulates that ‘Within the period of time agreed by the parties or determined by the Arbitral Tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit’. See *the DIFC Arbitration rules 2008*, art.30(1).

³⁵ The situation under the arbitration rules of ACICA is to certain extent similar to the rules of ICC in using the word ‘shall’, however, the ACICA arbitration rules use the word ‘may’ with the requirement of the appointment of arbitrators. This means that the inclusion of the appointment of arbitrator is optional

arbitration rules in Article 30(1) also use the word ‘shall’, but it is limited to the requirement of the statement describing the nature and circumstances of the dispute. The other requirements in Article 30 of the DIFC rules, particularly the requirements to submit relevant documents, references or evidence with the request, seem to be optional, as the Article uses the word ‘may’. This means that a failure to include any of these requirements will not render the request for arbitration incomplete.

Regarding the answer of the respondent, the same issue of limited information exists under the DIFC rules. Article 30 briefly requires that the respondent state his or her defence in respect of these particulars.³⁶ In the case of the ICC, the respondent is required to provide the same information as the applicant. In other words, the answer of the respondent shall provide the same information required for the request within 30 days.³⁷

In the final analysis regarding the provisions dealing with the commencement of the arbitration, the arbitration rules of the ICC, ACICA and DIFC all include these rules. However, the rules of the DIFC differ with regard to the process of initiating the arbitration, as the claimant is required to send the notice of arbitration to the respondent, not to the Secretariat (under the rules of ICC), or the registry (under the rules of ACICA). As a consequence, the date of the commencement of arbitration may be affected and may cause the parties to the arbitration to incur more expenses and consume more time. In addition, under the DIFC arbitration rules related to the initial

and not compulsory. So a failure to include the appointment of arbitrator in the request of the arbitration under the ACICA rules (Article 4 (4)) will not affect the request to be incomplete for the purpose of Article 4(5) under ACICA rules.

³⁶See the *DIFC Arbitration rules 2008*, art. 30(1).

³⁷See Article 5 (1) of the ICC arbitration rules. It should be noted that the 30 day time limit for the answer is the same under ACICA arbitration rules. The requirements of the answer to the request and counterclaims under ACICA arbitration rules, specifically Article 5 (2) are mostly the same as Article 5(1) under the ICC arbitration rules.

statement or the request and answer, the information required in the request and the answer appears limited and ambiguous compared to what is specified in the ICC and ACICA rules. The provisions of the ICC and ACICA rules regarding the commencement of the arbitration, that is, the request and answer, are more precise and detailed than the same provisions under the DIFC arbitration rules. For example, the rules of the ICC, particularly Article 4(3), require the claimant to specify on what basis claims are made. This can help in situations where a respondent faces a complex and high claim without identifying whether such a claim is based on a contract or otherwise. Having advance information about the basis of the claim would put the respondent in a better position to assess the claim and prepare its defence.

If the DIFC arbitration rules could include the aspects represented in the ICC rules at the stage of the commencement of arbitration, it would make the DIFC arbitration rules more explicit and easier to interpret. Further, having these aspects, such as providing additional information along with the request for arbitration at the initial stages of the proceedings, benefits parties in the sense that it enables them to make informed decisions from the beginning of the arbitral proceedings. Thus, the inclusion of such information increases the possibility of expeditious and cost-effective settlement. For example, the provisions regarding the information in the request and answer for arbitration under the ICC arbitration rules may enable parties to avoid delays caused by further required submissions of documents, while the parties will be able, whenever possible, to determine the extent and limits of the dispute and claim at the early stages of the proceedings.³⁸

³⁸ One of the significant amendments of the ICC arbitration rules is the additional information in the request and answer for arbitration. See Article 4(3) and Article 5(1). Previously, under the ICC arbitration rules of 1998, most of the documents and materials used to be submitted at a later stage of the arbitration proceedings.

The criteria of effective arbitration law in the resolution of international commercial disputes used in this thesis³⁹ indicates that arbitration rules should make the process for the parties conducting arbitration proceedings flexible, rapid and cost-effective. In comparing it is submitted that the provisions of the DIFC concerning the commencement of the arbitration, the request and answer for arbitration should be amended similarly to those found in the rules of the ICC and ACICA. This will make the DIFC arbitration rules more comprehensible, and the process will be more efficient.

5.3.2 The Arbitral Tribunal

The provisions of the arbitral tribunal under the DIFC arbitration law contain a number of procedural issues, including delays in the procedure of the appointment of the third arbitrator, where the dispute is to be referred to three arbitrators. The rules also address the issues of the limited duties of arbitrators and limited grounds for challenging them. Finally, they address issues regarding the procedure for making such challenges and the issue of repeating the original nominating process on occasions where an arbitrator is being replaced. The following section discusses these issues and provides suggestions for improvement.

5.3.2.1 Constitution of Arbitrators

The arbitral tribunal section in the amended arbitration rules of the ICC deals with the confirmation of arbitrators nominated by the parties, the appointment of arbitrators by the ICC Court, the number of arbitrators and challenges to the arbitrators. The new rules of the ICC 2012 represent a significant change from the rules of the ICC 1998. This

³⁹ See Chapter 2, 'Criteria for Determining the Effectiveness of Dispute Resolution Processes', p. 18.

change is found in Article 12(5), where the parties have agreed on a panel of three arbitrators. It provides that

where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.⁴⁰

In contrast, the DIFC arbitration rules provide that

in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint an arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the DIFC Court of First Instance.⁴¹

The difference between the two rules is found in the method of appointment of the third arbitrator (i.e. the chairperson or president). According to the ICC arbitration rules, the third arbitrator will be appointed directly by the ICC Court, while under the rules of the DIFC the third arbitrator will be appointed by the party-nominated arbitrators. Notably, parties who wish that, in a three-member panel, the third arbitrator or president be nominated by the party-nominated arbitrators, the parties must agree on the procedure for such an appointment, either in their arbitration agreement or after the filing the request for arbitration.⁴²

The procedure of the appointment of the third arbitrator under the ICC rules seems to be faster than the procedure under the DIFC and ACICA arbitration rules. This is because

⁴⁰ See *the ICC Arbitration rules 2012*, art.12(5).

⁴¹ ACICA arbitration rules use the same criteria in the appointment of the third arbitrator. See *the ACICA Arbitration Rules 2011*, art. 10 ;*the DIFC Arbitration rules 2008*, art.17(3) (a).

⁴² Under the ICC arbitration rule Article 12 (5), if the parties have chosen another procedure for the appointment of the third arbitrator or the president different than the appointment by the ICC Court, it is compulsory for parties to nominate the third arbitrator within 30 days of the confirmation or the appointment of the co-arbitrators. This is to ensure that process of the arbitrator's constitution be time-efficient. See Nathalie Voser, 'Overview of the Most Important Changes in the Revised ICC Arbitration Rules' (2011) 29 *ASA Bulletin* 4, 783-820.

the ICC Court has the power to nominate the third arbitrator directly and immediately, whereas under the DIFC rules, the DIFC Court will make the appointment of a third arbitrator if a party fails to appoint an arbitrator within 30 days of receipt of a request, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment.

Consistent with the criteria of effective arbitration law, which point out the speed of proceedings as a significant features of effective dispute resolution and law,⁴³ it is suggested that Article 17(3) (a) of the DIFC rules should be revised with the intention to give extended power to the DIFC Court to directly and immediately nominate the third arbitrator, instead of leaving this authority to the party-nominated arbitrators. Changing this provision will enable the appointment process to be conducted in an expeditious manner.

5.3.2.2 Duties of Arbitrators

In addition to the rules regulating the arbitral tribunal, the ICC arbitrators have a number of duties, including the following:⁴⁴

- remain impartial and independent of the parties involved in the arbitration (Article 11(1));
- conduct the proceeding fairly, impartially and in an expeditious and cost-effective manner, and ensure that each party has a reasonable opportunity to present its case (Articles 22(1) and (4));⁴⁵

⁴³ See Chapter 2, 'Speed of Proceedings'.

⁴⁴ Under Article 15 of the ICC rules of 1998, the arbitrators had to be independent of the parties involved in the arbitration, however, now under the ICC amended rules of 2012 the arbitrators have to be impartial as well as independent. See *ICC Arbitration Rules 2012*, art.11(1), and art. 14 (1).

⁴⁵ The concepts of conducting the proceeding fairly, impartially in Article 22 (4) of the ICC arbitration rules are in line with the Universal Declaration of Human Rights (Art.10). See International Court of Arbitration of the International Chamber of Commerce, 'The 2012 ICC Rules of Arbitration- An

- establish the facts of the case (Article 25(1));
- determine and apply the applicable provisions of the contract and relevant trade usages the applicable rules of law (Article 21(1) and (2));
- deliver an award and make every effort to ensure that the award is enforceable under the law (Article 41);
- keep the arbitration confidential (Article 22(3)).

The duties of arbitrators under the rules of the DIFC consist of the following:

- remain impartial and independent of the parties involved in the arbitration (Article 18);
- conduct the proceeding fairly and give each party a full opportunity to present his or her case (Article 25);
- keep the arbitration confidential (Article 14);
- determine and apply the applicable provisions of the contract, relevant trade usages and applicable rules of law (Article 35 (4)).

In comparing the duties of arbitrators under the arbitration rules of the ICC, ACICA and DIFC, it can be recognised that there are a number of similar duties imposed on arbitrators, such as impartiality, independence confidentiality.⁴⁶ However, the amended arbitration rules of the ICC cover more ground than the rules of the DIFC and ACICA. First, under the ICC rules, the arbitrators have the responsibility to conduct the arbitration proceeding in an expeditious and cost-effective manner.⁴⁷ This duty is not found in the arbitration rules of the DIFC or ACICA. Second, the ICC arbitrators are required immediately to establish the facts of the case by all appropriate means. This

Accelerated Procedure and Substantial Changes' (2012) 29 *Journal of International Arbitration* 3, pp. 323-344.

⁴⁶ Under ACICA arbitration rules, the arbitrators have duty to remain impartial and independent (Art.13.1)); conduct the proceeding fairly and give each party a full opportunity of presenting his case (Art.17); confidentiality (Art.18); determine and apply the applicable provisions of the contract relevant (Art.34).

⁴⁷ The duty of arbitrators to conduct the arbitration proceeding in an expeditious and cost- effective manner is expressly considered under the arbitration rules of the ICC.

duty is not expressly considered under the rules of the DIFC and ACICA. Third, the ICC arbitration rules expressly require the arbitrator when delivering an award to make every effort to ensure that the award is enforceable by law. This is different to the position under the DIFC and ACICA arbitration laws, which do not expressly require arbitrators to make such an effort to ensure the enforceability of the award. Fourth, under the ICC arbitration rules, the written disclosure or statement by the arbitrators specifically covers several forms of statements, including a statement of acceptance, availability, impartiality and independence.⁴⁸ In contrast, the written disclosure or statement by the arbitrators under the DIFC and ACICA arbitration rules is limited to the statement of impartiality and independence, and does not expressly include the disclosure of acceptance and availability.

Focusing on the statement of availability under the ICC arbitration rules, the disclosure of availability requires the prospective arbitrator to specify the number of arbitrations he or she will perform as sole arbitrator, co-arbitrator, president arbitrator or counsel. Also, it requires the prospective arbitrator to disclose the number of cases in which he or she is involved at the moment as a counsel in court litigation.⁴⁹ The main purpose of including this type of disclosure in the ICC arbitration rules is to give the parties the opportunity to challenge the confirmation of the arbitrators, especially if the arbitrator seems to have a full schedule, such that he or she will not be able to conduct the proceeding in an expeditious and cost-effective manner. The forms of disclosure required of any prospective arbitrator under the ICC rules are very significant in modern arbitral practice. This is because they inform parties in the circumstance where possible

⁴⁸ Article 11 (2) of the ICC arbitration rules states that ‘.....a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence...’.

⁴⁹ See Rolf A Schütze, *Institutional Arbitration: A Commentary*, (Verlag C. H. Beck, 2013) 73.

conflicts of interest exist.⁵⁰ This allows parties at the initial stages of arbitration to exclude those arbitrators who may lack impartiality, independence and availability, rather than allowing the proceedings to continue with the risk of a challenge at a later stage.

Generally, the ICC rules impose more strict obligations on their arbitrators than other arbitral institutional rules, including those of the DIFC and ACICA. The additional obligations found in the ICC rules meet the criteria of effective arbitration law in obliging arbitrators to conduct arbitration proceedings in an expeditious and cost-effective manner, as well as to make every effort to ensure that the award is enforceable by law. These two requirements distinguish the ICC rules from other arbitral institutional rules. It is submitted that the DIFC rules should include similar requirements, as this will contribute to improving the speed of arbitration proceedings. Moreover, the rules of the DIFC would be more reliable if they took into account disclosure of the availability of arbitrators. This helps to avoid the risk of a challenge to the arbitrators at a later stage of the arbitral proceeding, which may cause delays and complicate the arbitration process.

5.3.2.3 Challenges to Arbitrators

The provisions for challenging arbitrators are covered by the rules of ICC, ACICA and DIFC.⁵¹ The differences between these rules relate to the possible grounds on which the challenge may be based and the procedure for making the challenge.

⁵⁰Ibid, p.73. According to Schütze, ‘disclosure is the only means by which the parties can become aware of potential conflicts of interest. The parties are under no obligation to investigate whether conflicts of interest might exist’.

⁵¹ See the ICC Arbitration rules 2012, art. 14; the ACICA Arbitration rules 2011, art.13 and 14; the DIFC Arbitration rules 2008, art.18 and 19.

The first difference is that the ICC arbitration rules provide the parties with broad rights to challenge arbitrators. These can be found in Article 14(1), which allows for ‘a challenge of an arbitrator, whether for an alleged lack of independence or otherwise’.⁵² However, the DIFC and ACICA rules restrict the grounds for challenge to certain circumstances, such as the lack of independence or impartiality.⁵³ Evidently, challenges to ICC arbitrators have been granted for a wide range of reasons, including independence and impartiality, but also others, such as ‘an arbitrator who failed to advance an arbitration with reasonable dispatch, in accordance with the Rules’ requirements’.⁵⁴

The second point of difference among the three sets of rules is relates to the procedure for making the challenge. For example, the time limit for submitting an application to challenge an arbitrator under the ICC rules is 30 days from the receipt submitted by the party raising the challenge,⁵⁵ while under the DIFC and ACICA, it is only 15 days.⁵⁶ This initially gives an idea that the procedure for challenging arbitrators under the ICC arbitration rules is more time-consuming than the procedure under the DIFC and ACICA. However, the ICC justifies that time limit, as it offers legal certainty and provides the concerned party with an opportunity to consider carefully his or her decision before filing an inadequate challenge.⁵⁷

⁵² This can be compared with Article 18 (1) and (2) of the DIFC which states (When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence). And the similar provisions in Article 13 of ACICA Arbitration Rules. It should be noted that the word ‘otherwise’ does not specify any possible grounds for a challenge; therefore, there are a variety of grounds for a challenge under the ICC arbitration rules which can be granted, including the impartiality.

⁵³ The common grounds used by arbitral institutional rules are including an arbitrator’s lack of independence or impartiality. See Yves Derains and Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration*, (Kluwer Law International, 2nd ed, 2005) 187.

⁵⁴ Ibid, pp. 187-188.

⁵⁵ See the *ICC Arbitration Rules 2012*, art. 14(2).

⁵⁶ the *ACICA Arbitration Rules 2011*, art.14(1); the *DIFC Arbitration law 2008*, art. 19 (2).

⁵⁷ As stated by Schütze, ‘this rule is clear and foster legal certainty as compared to the rules of other arbitral institutions or national legal systems which merely require the challenge to be filed ‘immediately’ or ‘without delay’. In addition, the time limit of 30 days allows the concerned party to carefully consider and re-think its options, instead of filing a hasty, insufficiently considered challenge in the midst of the

Giving the parties broad rights to challenge arbitrators in a wide range of circumstances, as the ICC rules do, would add to the reliability of the DIFC rules. Also, the better option for the time limit on the procedure for making the challenge is 30 days instead of 15 days. This helps ensure the completeness and adequacy of a challenge submitted by a party.

5.3.2.4 Replacement of Arbitrators

The ICC, ACICA and DIFC rules provide procedures for situations in which an arbitrator may need to be replaced, including the outcome of a successful challenge, an arbitrator's death or resignation, his or her revocation by all parties or the inability of the arbitrator to perform his or her function according to the rules. The rules also provide the procedure to be followed in the case of the complete reconstitution of the arbitral tribunal.

As a general observation, it can be said that the provisions concerning the replacement of arbitrators under the ICC rules clearly require the Court's acceptance of an arbitrator's resignation, and state a number of circumstances in which the Court may, on its own initiative, replace an arbitrator.⁵⁸ Moreover, these rules designate the procedure to be followed by the Court in the event of a need to replace arbitrators. They go further and provide the ICC Court with extended discretion first to determine the question of whether or not to repeat the original nominating process, when an arbitrator is being

proceedings, merely to avoid the objection that the challenge might be time barred. A party might legitimately fear that a situation which is already critical due to a suspicious bias might become worse if a challenge submitted and subsequently denied'. See According to Schütze, disclosure is the only means by which the parties can become aware of potential conflicts of interest. The parties are under no obligation to investigate whether conflicts of interest might exist. See Schütze, above n 49, pp. 90-91.

⁵⁸ See the ICC Arbitration Rules 2012, art.15(1).

replaced,⁵⁹ and second to make the replacement decision, in the number of circumstances when an arbitrator who has died or been removed needs to be replaced.⁶⁰

One comparative observation to be made is in relation to the resignation of an arbitrator. The resignation of an arbitrator can cause disruption to the arbitration, especially if it happens at a late stage of the proceedings. For this reason and with the aim of preventing unreasonable resignations, Article 15(1) of the ICC arbitration rules expressly requires that the resignation of an arbitrator must be accepted by the ICC Court. Comparing Article 15(1) of the ICC rules with the provisions of Article 15 of the ACICA rules and Article 21 of the DIFC rules, it can be observed that the rules of ACICA and the DIFC do not expressly restrict the rights of arbitrators to resign.⁶¹

A second observation on the provisions for the replacement of arbitrators is that the ACICA and DIFC arbitration rules do not permit truncated tribunals as the ICC arbitration rules do, pursuant to Article 15(5), which offers the possibility for continuation with the remaining arbitrators.⁶² Third, Article 15(1) of the ACICA rules and Article 21(b) of the DIFC rules require that replacement arbitrators must be appointed via the original nominating process,⁶³ while the rules of the ICC avoid this requirement. For instance, Article 15(4) provides that in the event that the ICC Court determines that an arbitrator is to be replaced for any reason, the ICC Court shall have

⁵⁹ See *the ICC Arbitration Rules 2012*, art.15(4).

⁶⁰ See *the ICC Arbitration Rules 2012*, art.15(5).

⁶¹ ACICA and DIFC rules follow the UNCITRAL Model Law. See Gaillard Emmanuel, 'Laws and Courts Decisions in Civil Law Countries' *ICCA Congress Series* No 5 (Kluwer, 1991) pp.274-275.

⁶² It should be noted that both the ICC and AAA permit the continuance of the arbitration proceeding and of the arbitral tribunal's activities at the time the tribunal is truncated. See Claudine Helou, 'The New Arbitration Law of the Dubai International Financial Centre' (2009) Vol. 1 *International Journal of Arab Arbitration* no.1.

⁶³ The same principle applied under the rules of the DIFC. Article 21(b) stipulates that 'a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, unless otherwise agreed by the parties'. See *the DIFC Arbitration Rules 2008*, art. 21 (b).

complete discretion to decide whether or not to follow the original nominating process, under Articles 12–14 of the ICC rules.

In line with the above regarding replacement provisions, it is clear that the ICC rules aim to ensure that the process of replacing an arbitrator need not delay the arbitration. They do this by making restrictions on abusive resignation for possible partisan reasons, and by permitting the continuance of the arbitration proceeding and of the arbitral tribunal's activities if the tribunal is truncated. This saves time for the parties and the remaining arbitral tribunal, as well as preventing unnecessary costs due to repeating the process. Lastly, it provides an institutional appointment, which means that the nomination of the replaced arbitrator will be decided by the ICC Court.

The above described features of the ICC arbitration rules are in line with the criteria for effective arbitration law used in this thesis, as they contribute to increased flexibility and speed of arbitration proceedings. Thus, it is suggested that the provisions for the replacement of arbitrators under of the ICC rules should be taken into account to advance the same provisions under the DIFC arbitration rules.

5.3.3 Confidentiality

One of the main advantages of international commercial arbitration is the principle of confidentiality. As previously mentioned, arbitration can be distinguished from litigation in that the court decisions are commonly available to the public, and can be used as precedents.⁶⁴ Participants involved in arbitration broadly support the view that the privacy and confidentiality of arbitration should be appreciated and respected.⁶⁵

⁶⁴ See HansSmit, 'Confidentiality in Arbitration' (1995) 11 *Arbitration International* 337; Patrick Neill, 'Confidentiality in Arbitration' (1996) 12 *Arbitration International* 287; HansBagner, 'Confidentiality –

From examining the obligation of confidentiality in a number of institutional arbitration rules, including those of the ICC, ACICA, DIFC, SIAC and LCIA, it can be observed that most, if not all, institutional arbitration rules refer to confidentiality in arbitration. However, the most comprehensive provisions on confidentiality can be found in the institutional rules of the SIAC,⁶⁶ ACICA⁶⁷ and LCIA.⁶⁸ For example, the SIAC

A Fundamental Principle in International Commercial Arbitration?’ (2001) 18 *Journal International Arbitration* 2, p.243. It should be noted that there are those who find publication of arbitral awards can be useful as it will be used as precedents, provided that the award should be without references to the names of the parties or other information identify them exactly. This will help to the development of arbitration. See Klaus Peter Berger, ‘The International Arbitration’ Application of Precedents’ (1992) 9 (4) *Journal International Arbitration* 5.

It is worth noting that the ICC follows this trend and makes awards available for research purpose without including any names of the parties. See *the ICCA Yearbook of Commercial Arbitration or the ICC Bulletin*.

⁶⁵ Derains and Schwartz, above n 53, p. 285.

⁶⁶ Article 35 of the SIAC arbitration rules stipulates that:

35.1 the parties and the tribunal shall at all times treat all matters in relating to the proceeding and the award as confidential.

35.2 A party or any arbitrator shall not, without the prior written consent of all parties, disclose to a third party any such matter except:

for the purpose of making an application to any competent court of an State to enforce or challenge the award;

pursuant to the order of or a subpoena issued by a court of competent jurisdiction;

for the purpose of pursuing or enforcing a legal right or claim;

in compliance with the provisions of laws of any State which are binding on the party making the disclosure;

in compliance with the request or requirement of any regulatory body or other authority; or

Pursuant to an order by the tribunal on application by a party with proper notice to the other parties.

35.3 In this Rule, ‘matters relating to the proceedings’ means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.

35.4 the tribunal has power to make appropriate measures, including issuing an order or award for sanctions or costs, if a party breaches the provisions of this rule.

⁶⁷ Article 35 regarding the confidentiality under the ASIC Arbitration Rules of 2013 can be contrasted with Article 18 of ACICA Arbitration Rules 2005, which states that :

18.1 Unless the parties agree otherwise in writing, all hearings shall take place in private.

18.2 The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:

(a) for the purpose of making an application to any competent court;

(b) for the purpose of making an application to the courts of any State to enforce the award;

(c) pursuant to the order of a court of competent jurisdiction;

(d) if required by the law of any State which is binding on the party making the disclosure; or

(e) if required to do so by any regulatory body.

18.3 Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.

arbitration rules deal with many issues relating to confidentiality. First, these rules require of the parties and the tribunal that they will keep all matters in relation to the proceeding and the award confidential and not disclose them to a third party without written permission or agreement from all parties; nevertheless, some exceptions are available to this general prohibition.⁶⁹ Second, the rules go further and define comprehensively what is meant by ‘matters relating to the proceedings’, which can include the existence of the proceedings, the pleadings, evidence and other materials, and all documents produced by another party in the proceedings or the award arising from the proceedings. Finally, they empower the arbitral tribunal to issue an order in circumstances in which a party violates the provisions of this rule.

In contrast, the provisions concerning confidentiality under ACICA arbitration are relatively comprehensive. This is because they attempt to deal with the potential issues that can arise from conflicting case law. The rules first differentiate between the terms ‘privacy’ and ‘confidentiality’; the latter provides that all hearings shall take place in private.⁷⁰ Similarly, the ACICA rules require the parties and the tribunal to keep all matters relating to the proceeding and the award confidential and not to disclose these to

18.4 To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

⁶⁸ 30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.

30.2 The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.

30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.

⁶⁹ It should be noted that the rules of ACICA and SIAC list a number of circumstances, where confidentiality cannot be applied or enforced.

⁷⁰ Michael Collins, ‘Privacy and Confidentiality in Arbitration Proceedings’, (1995) 11 *Arbitration International* 321. As stated by Rana and Sanson, privacy ‘means that proceedings take place ‘in camera’, meaning behind closed doors, open only to those involved in and concerned with the arbitration: the parties, their representatives, the arbitrators and witnesses. See Rashda Rana and Michelle Sanson, *International Commercial Arbitration*, (Thomson Reuters, 2011) p.206. This approach is also found in Article 26 (3) the ICC Arbitration Rules, which provides a specific requirement of confidentiality concerning hearings.

a third party without written permission or agreement from all parties, with some exceptions pursuant to Article 18(2). Both the SIAC and the ACICA rules have a broad definition of the concept ‘all matters’ in their provisions on confidentiality. One noteworthy advantage of the ACICA rules regarding the duty of confidentiality is that they require the parties, the arbitral tribunal, ACICA and even the witnesses to keep all matters relating to arbitration confidential, while other institutional rules such as the SIAC and LCIA rules simply include the parties and the tribunal. Moreover, the provisions of confidentiality under the ACICA rules can be distinguished from other institutional arbitration rules by an unusual provision found in Article 18(4). The article provides that parties intending to call witnesses to give such evidence before the ACICA tribunal should ensure that their witnesses sign confidentiality agreements and are subject to the same degree of confidentiality as the parties and tribunal.

The ICC rules deal with the topic of privacy and confidentiality in a number of provisions.⁷¹ For example, Article 22(3) states:

upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.⁷²

Clearly, this provision allows the arbitral tribunal to apply such measures with the purpose of protecting trade secrets or confidential information. Another provision is Article 26(3), which stipulates that ‘the arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not

⁷¹ It is worth noting that the ICC Arbitration Rules of 1998 (the previous Rules) did not include an express provision regarding confidentiality; the only provision was Article 20(7) which states that ‘the arbitral tribunal may take measures for protecting trade secrets and confidential information’. Importantly, the scope of the ICC Arbitration Rules of 2012 regarding the issue of confidentiality is wider than the previous ICC Arbitration Rules of 1998. The old ICC Rules of 1998 was limited to trade secret, while the new ICC Rules of 2012 have a wide range of matter that can be included. See International Court of Arbitration of the International Chamber of Commerce, above n 45, pp. 323-344.

⁷² *The ICC arbitration Rules 2012*, art.22 (3).

be admitted'.⁷³ As mentioned above, the approach of this provision is similar to that of the ACICA rules, particularly Article 18(1), which excludes from hearings strangers or persons not involved in the arbitration proceedings, stemming from the concept of privacy.

In comparing the ICC provisions in relation to confidentiality with those of SIAC and ACICA, it can be seen that the ICC arbitration rules do not provide confidentiality for the awards, materials produced and information divulged in the proceedings. As summarised by Rana and Sanson, 'ICC Arbitration Rules, Article 6 of Appendix I and Article 1 of Appendix II make the work of the ICC and the Court of Arbitration confidential, but do not apply to the parties and arbitral tribunal or its representatives involved in the arbitral proceedings'.⁷⁴

The rules of the DIFC pertaining to confidentiality are included in Article 14 of the DIFC arbitration law, which states that 'unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court'.⁷⁵ This provision, on one hand, makes all arbitral proceedings subject to confidentiality. On the other hand, it does not provide for the confidentiality of the award or even the confidentiality of the deliberation between the arbitrators.

In line with the abovementioned issues regarding the obligation of confidentiality, it is obvious that a number of institutional rules provide comprehensive provisions of confidentiality. However, there is a trend in support of restricting the confidentiality issue to the parties, as the latter can, with the assistance of the arbitrator, examine issues

⁷³ *The ICC arbitration Rules 2012*, art.26 (3).

⁷⁴ See Rana and Sanson, above n 70, p.217.

⁷⁵ See *the DIFC Arbitration Rules 2008*, art. 14.

case by case, depending on their interests as regards whether the arbitration should be kept confidential.

It is suggested that the DIFC arbitration rules should include a comprehensive provision on the duty of confidentiality similar to those found in the arbitration rules of SIAC, ACICA and LCIA. This is justified in that these rules consider the duty of confidentiality of all participants in the arbitration process, including the parties, the tribunal, the administrator, the witnesses and the experts. Another reason is that these rules make provisions concerning the confidentiality of the awards and the deliberation between arbitrators. Finally, they give the arbitral tribunal competence to issue an order or award for sanctions or costs in the circumstances in which a party violates the provisions of confidentiality.

The arbitration rules of the DIFC could provide the DIFC's users with comprehensive provisions on the duty of confidentiality, in line with the criteria for effective arbitration rules, which consider confidentiality as one of the most important features of such rules.⁷⁶

5.3.4 Multiple Parties, Multiple Contracts, Joinders and Consolidation

The issues of multiple parties, multiple contracts, joinders and consolidation in arbitration has become increasingly common as the complexity of contractual arrangements increases.⁷⁷ Modern rules of arbitration should accommodate third-party

⁷⁶ See Okekeifere, above n 2, pp.81-106; Wang, above n 2, pp. 198-212.

⁷⁷ Firstly, multi-party can be referred to the situation where multiple parties have dispute with each other, and this disputes may arise from the same facts, while multi- contract deal with disputes arising from the same facts, but involving different contracts between different parties. Secondly, a joinder is, for example, when party A commences arbitral proceedings against party B with respect to an arbitration agreement between both parties. However, party B wishes to involve party C into the arbitration on the grounds that party C must cover party B for such loss. Finally, consolidation of arbitration means that multiple

interests and be capable of dealing with the above issues.⁷⁸ It is considered advantageous when several parties are involved in a dispute, because the multiple issues of the dispute can be dealt with in the same proceedings, rather than in a number of separate proceedings. This accordingly saves time and money, as well as avoiding the possibility of conflicting decisions on the same issues under dispute. In this regard, a number of institutional arbitral rules, such as those of the ICC, provide extensively for these issues in arbitration, whereas the DIFC and ACICA arbitration rules do not expressly do so. For example, Articles 7–10 of the new ICC arbitration rules deal with procedural frameworks for cases involving multiple parties, multiple contracts, joinders and consolidation in arbitration. Also, Articles 6(3–7) address jurisdictional issues involving multiple parties, joinders of additional parties and consolidation.⁷⁹

By way of clarification, Article 7 of the ICC gives a party the opportunity to request that an additional party be joined to the arbitration by submitting such a request to the ICC Secretariat.⁸⁰ The request must be submitted prior to the confirmation or appointment of any arbitrator, or at any time after that date, provided that all parties to the arbitration,

arbitrations before different arbitral tribunal can be heard and determined in one arbitration and, of course, one arbitral tribunal. See Rana and Sanson, above n 70, pp.94-95.

⁷⁸Ibid, p. 95. There are two ways for parties involving in arbitration to accommodate the third party interests or the issue of multiple parties, multiple contracts, joinders and consolidation in arbitration, first is to adopt a carefully drafted arbitration clause which consider these issues, second is to adopt arbitral institutional rules, especially those provide for multiple parties, multiple contracts, joinders and consolidation in arbitration.

In regard to the first way or suggestion, it should be noted that the IBA Guidelines for Drafting International Arbitration Clauses suggested an arbitration clause which deal with the issue of multiple parties, multiple contracts, joinders and consolidation in arbitration. See the International Bar Association IBA Guidelines for Drafting International Arbitration Clauses, available at <<http://www.ibanet.org/search/Default.aspx?q=drafting>>.

⁷⁹As the arbitration is a consensual process, the new rules of ICC are subject to the ICC Court's *prima facie* satisfaction that an arbitration agreement binding all parties may exist this is found in Article 6(4). Therefore, the Article 7, 8, 9 and 10 which deal with multiple parties, joinders of additional parties, and consolidation of the arbitration are all subject to Article 6(3) to Article 6(7), which require the Court to be satisfied that parties are party to an arbitration agreement.

⁸⁰ The provisions on the request for joinder is the same as those which deal with the request for arbitration.

including the party to be joined, have agreed to the joinder.⁸¹ Under Article 7, joinders can be used by both the respondent and the claimant,⁸² but are usually employed by the respondent, as the claimant may file its claims directly against multiple respondents at the commencement of the proceedings. There is an exclusion under Article 7 that occurs when a third party requests to be joined to the proceedings (i.e. intervention).⁸³ Article 7(2) also sets forth the procedural issues of a joinder (e.g., the requirement of a formal request). Importantly, Article 7(1) introduces a safeguard provision that enables the Secretariat to fix a time limit for the submission of a Request for Joinder. This is because there is a possibility of delays when, for example, a repetitive joinder is involved in the proceedings.⁸⁴

In addition to Article 7, the ICC arbitration rules address the issue of claims between multiple parties.⁸⁵ This is introduced by Article 8(1), which states:

in an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the terms of reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).⁸⁶

Further, the rules under Article 9 confirm that claims arising out of or in connection with more than one contract can be determined in one and the same arbitration.⁸⁷

⁸¹ This is because the joinder of the additional party must be provided with a chance to participate in the constitution of the arbitral tribunal pursuant to Article 12 (7). Therefore, it is important that the request for a joinder of additional party must be submitted prior to the confirmation or appointment of any arbitrator.

⁸² In a number of occasions, the ICC Court has heard an applications form a claimant who seeks to name an additional party at some stages after filing its request. See Schütze, above n 49, p.61.

⁸³ This can be clear in the situation when a contracting party that is not party to an arbitration commenced under the clause may wish to join in the proceedings. See Rana and Sanson, above n. 67, p.95.

It should be noted that the third- party intervention can be accepted, if it is permitted under the mandatory provisions of the law applicable to the arbitration. For example, Article 1045 the Dutch Code of Civil Proceedings.

⁸⁴ See *the ICC Arbitration Rules 2012*, art.7(1) last sentence.

⁸⁵ An effective dispute resolution system should allow for involvement of multiple parties and multiple contracts. Richard Power and Berwin Leighton, 'Briefing note on ICC Rule changes', *Kluwer Arbitration Blog* (6 October 2011) <http://kluwerarbitrationblog.com/blog/2011/10/06/briefing-note-on-icc-rule-changes/> at 15 May 2014.

⁸⁶ See *the ICC arbitration Rules 2012*, art. 8(1).

⁸⁷ Article 9 of the ICC Arbitration Rules stipulate that 'Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single

Finally, the ICC arbitration rules provide for consolidation in arbitration. Consolidation in arbitration can be described as a situation where at least two separate ICC arbitrations are pending, and one or more parties to one of the arbitrations request that they come together in a single arbitration.⁸⁸ According to Article 10, consolidation in arbitration is possible in a number of situations; specifically, where there is an agreement between all parties who wish to consolidate; where all parties to arbitrations to be consolidated are bound by one and the same agreement; where claims are made under more than one arbitration agreement; where the arbitrations are between the same parties; where the claims arise in connection with the same legal relationship; and where the arbitration agreements are found by the Court to be compatible.⁸⁹ Moreover, consolidation in arbitration under the ICC rules can only be granted when a party requests it, which means that the ICC Court has no jurisdiction or power to make consolidation in arbitration upon its own motion.⁹⁰

In contrast, the provisions under the arbitration rules of ACICA and DIFC seem to be limited, as they are merely concerned with the issue of the appointment of arbitrators in multiple parties. The main and direct provision under the ACICA arbitration rules on the issue of multi-party arbitration is Article 11, which concerns the appointment of arbitrators in multi-party disputes. Under the DIFC arbitration rules, the equivalent

arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules'. See *the ICC Arbitration Rules 2012*, art.9.

⁸⁸ As stated by Schütze, consolidation in arbitration has a practical solution, especially in the cases in which both parties to a dispute at the same time file a request for arbitration, and they do not know that the other side having taken step, or in the situation when both parties want to participate in the case as a claimant in the arbitration. See Schütze, above n 49, 65.

⁸⁹ In deciding the consolidation in arbitration under the ICC arbitration rules, the ICC Court must take into account all the circumstances of the case. It also must find out whether the requested consolidation will be time- efficient and will avoid the possibility of conflicting decisions. Importantly, the decision of the ICC Court concerning consolidation (i.e. under Article 10) is not a *prima facie* decision, it is final.

⁹⁰ See International Court of Arbitration of the International Chamber of Commerce, above n 45, pp. 323-344.

provision can be found in Article 17(3)(c), which also deals with the appointment of arbitrators in multi-party disputes.⁹¹

However, there are other indirect provisions under the ACICA arbitration rules where the issue of multiple parties is addressed. For example, Article 5(1) of the ACICA rules indirectly refers to multiple parties, particularly in the word ‘Respondents’, which covers multi-party proceedings.⁹² Another indirect reference to multiple parties under the ACICA rules is found in Article 8, which deals with the number of arbitrators; specifically, it states at the end of the Article that ‘ACICA shall determine the number of arbitrators *taking into account all relevant circumstances*’ (emphasis added). One relevant circumstance, mentioned by Luttrell and Moens, could be a high-value multi-party dispute: in this situation, ACICA has the power to determine the number of arbitrators.⁹³ Further, the issue is expressed in Article 43, which deals with the decisions made by ACICA. Article 43 suggests that ACICA can make the final decision regarding the appointment of the full tribunal in multi-party disputes.⁹⁴

The above discussion shows that the ICC arbitration rules relating to the issues of multiple parties, multiple contracts, joinders and consolidation in arbitration are more comprehensive compared to the rules of ACICA and DIFC. This is because the ICC

⁹¹ See Article 17(3) (c) of the DIFC Arbitration Rules which states that ‘ where the Arbitration Agreement entitles each party to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the parties in dispute represent two separate sides for the formation of the Arbitral Tribunal as claimant and respondent respectively, the DIFC Court of First Instance shall appoint the Arbitral Tribunal without regard to any party’s nomination;’. The purpose of this provision is that it prevents the situations where there are multiple parties, and there is confusion With regard to which parties have the power to appoint arbitrators as well as issue related to the number of arbitrators.

⁹² According to Luttrell and Moens, ‘ The express reference to *Respondents* covers multi-party proceedings, and extends the Answer requirements to all parties named in the Claimant’s Notice of Arbitration’. See S R Luttrell and G A Moens, ‘Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration’ (2009) available at <<http://acica.org.au/assets/media/Resources/Commentary-on-the-Arbitration-Rules-of-ACICA-G-Moens-S-Luttrell.pdf>>, p. 11.

⁹³ Ibid, p. 15.

⁹⁴ Ibid, p. 71.

rules address the substitutive, procedural, jurisdictional issues regarding multiple parties, multiple contracts, joinders and consolidation in arbitration. Accommodating third-party interests and considering the above issues are significant features of effective arbitration law, as they help in conducting arbitration proceedings efficiently. Consequently, it is recommended that both ACICA and DIFC should introduce relevant rules on multiple parties, multiple contracts, joinders and consolidation in arbitration. This would make the ACICA and DIFC arbitration rules more efficient in dealing with the growing complexity and diversity of disputes.

The following section analyses and compares the provisions concerning the conduct of arbitration under the rules of the ICC, ACICA and DIFC. The purpose of this analysis is to identify procedural rules that can ensure that arbitration procedures are conducted efficiently. This is important to meeting practitioners' and users' expectations for more effective and efficient arbitration process.

5.3.5 Conduct of the Arbitration

An international arbitration can be carried out in different manners. The most important objective is that the procedure adopted must comply with the arbitration agreement of the parties, any mandatory rules, public policy or law of the place of arbitration and the provisions of the international conventions on arbitration.⁹⁵ In an institutional arbitration, the procedural framework is provided by the institution's rules, as the parties have agreed at the initial stages when they directed the resolution of their disputes to the rules of the chosen institution. According to most arbitral institutional rules, at the time the arbitral tribunal is constituted, it usually deliberates with the parties

⁹⁵ This is with the aim to ensure that the arbitral proceedings are conducted fairly and the arbitral award become recognised and enforceable. See Redfern and Hunter, above n 6, p.314.

on a number of procedural matters, decides on the necessary stages of the process and fixes the time limits. This is to ensure that the steps are completed within the scheduled time, and that the procedural issues are decided between the parties.

It is essential that arbitral institutions provide their users with a set of rules that ensure the arbitration procedure can be conducted efficiently.⁹⁶ In this section, the provisions of the ICC, ACICA and DIFC are compared to examine whether their provisions identify problems of delays and costs in the conduct of the arbitration proceedings.⁹⁷ In their recent amendments, the ICC arbitration rules introduced a number of essential principles and obligations, including the case management conference, case management techniques and procedural timetables that must be applied.⁹⁸ These changes aim to ensure that the conduct of arbitration is carried out an efficient way to resolve international commercial disputes (i.e. Articles 22 and 24).⁹⁹

Under the new ICC rules, Article 22(1) obliges both the parties and the arbitral tribunal to make every effort to conduct the arbitration proceedings in an expeditious and cost-

⁹⁶ It should be noted that the issues of delays and cost are not recent issues as it have been discussed among legislature and practitioners for a long time with aim to address it. Therefore, a number of arbitration rules introduced these issues earlier such as the English Arbitration Act 1996 in Article 33 (b). This provision expressly requires an increase in the efficiency and speed of the resolution of arbitral disputes. See Thomas H. Webster and Michael W. Buhler, *Handbook of ICC Arbitration*, (Sweet & Maxwell, 3rd ed, 2014) 323.

⁹⁷ Statistically, a number of studies indicate that there is dissatisfaction regarding the time spent in arbitration to render an award. Another study shows that the length of time to resolve disputes is considered as the second disadvantage of international arbitration. See Andreas Respondek, 'Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings' (2014) 31 *Journal of International Arbitration Kluwer Law International* 4, pp. 507-513; Queen Mary, University of London, *International Arbitration: Corporate Attitudes and Practices 2006*, available at < <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>>; Queen Mary, University of London & PWC, *International Arbitration Survey 2013: Corporate Choices in International Arbitration*, available at < <http://www.arbitration.qmul.ac.uk/research/2013/index.html>> at 15 May 2014.

⁹⁸ Under the ICC arbitration rules, the arbitral tribunal has duty to conduct a case management conference. This is because it is believed that it is an effective method towards promoting time and cost efficient proceedings. See Voser, above n 42, pp. 783-820. It should be noted that the provisions of the conduct of the arbitration under the ICC arbitration rules (Article 22) should be read with the provisions of Article 24 (Case management conference and procedural timetable) as well as Appendix IV which describe (the case management techniques).

⁹⁹ Worth nothing, one of the main objectives of the new ICC arbitration rules was reducing the time and costs of arbitration. Such objectives are reflected in the new Articles 22 and 24.

effective manner, in view of the complexity and value of the dispute.¹⁰⁰ There are many tasks during the course of the proceedings that represent opportunities for the arbitral tribunal to perform this duty, including reducing costs related to travelling, location hire for the hearing process, interpretation and translation services.¹⁰¹ If the arbitral tribunal does not do so, or the ICC Court finds that the arbitral tribunal has failed to comply with its obligations under Article 22(1), then the ICC Court has the power to decide on the amount paid for the arbitrators with reference to the arbitration, meaning that the tribunal's fees could be negatively affected, pursuant to Article 37(2).

Under the same ICC provisions, the parties have a duty to reduce the time and costs incurred in the proceeding. However, when engaging in proceedings, parties sometimes adopt a slow conduct.¹⁰² In this case, the rules give the arbitral tribunal the power to decide on the costs paid by the parties, taking into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.¹⁰³ This provision is significant, as it address the issue of delay and the costs of arbitral proceedings.

Another relevant provision designed by the ICC to ensure effective case management and efficient conduct of arbitral proceedings is found in Article 22(2), which states that

¹⁰⁰ See *the ICC Arbitration Rules 2012*, art.22(1).

Comparing this Article with Article 33 (b) of the English Arbitration Act, Article 33 (b) of *the English Arbitration Act* only requires the arbitral tribunal to adopt procedures that ensure the avoidance of unnecessary delay or cost, while under Article 22(1) of the ICC both the parties and the arbitral tribunal have the duty to avoid unnecessary delay or cost when engaging in arbitral proceedings. Under most institutional rules, it is expected that the tribunal has a duty to avoid of unnecessary delay or cost, but what is new here is that the parties have the duty to conduct the arbitral proceedings in an expeditious and cost effective manner.

¹⁰¹ See Webster and Buhler, above n 96, p. 324.

¹⁰² Ibid, p. 325.

¹⁰³ Ibid, p. 326; See *the ICC Arbitration Rules 2012*, art.37 (5).

It worth noting that with reference to Article 22(1), an arbitral tribunal can sometime refuse a party request in the case that the tribunal find the party request is not conducive in an expeditious and cost-effective manner. The obligation to conduct the proceedings in an expeditious and cost- effective manner has two limitations, including the tribunal shall comply with the arbitration agreement between the parties (Article 22(2)) and the tribunal shall give the parties a reasonable opportunity to present its case(Article 22(4)).See also Voser, above n 42, pp. 783-820.

‘in order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties’.¹⁰⁴ This article gives the arbitral tribunal the capacity to adopt procedural measures in order to contain time and costs, provided that these procedural measures are not in conflict with any agreement of the parties. Moreover, these procedural measures must be adopted in consultation with the parties.¹⁰⁵ However, at the initial stages of the proceedings, the tribunal may have the power to adopt procedural measures without referring to the parties. This power is provided by Article 24(1), which stipulates:

when drawing up the terms of reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.¹⁰⁶

Moreover, under the provisions of the conduct of arbitration of the ICC rules, Articles 22(3) and (4) require the arbitral tribunal when conducting the proceedings to apply a number of fundamental principles, such as confidentiality, fairness, impartiality and affording each party a reasonable opportunity to present its case. Article 22(5) also gives the arbitral tribunal a general authority to make orders, as it requires that ‘the parties undertake to comply with any order made by the arbitral tribunal’.¹⁰⁷ This means that the parties have duties to act in accordance with any procedural orders made by the

¹⁰⁴ See *the ICC Arbitration Rules 2012*, art. 22(2).

¹⁰⁵ There are two limitations when the tribunal takes procedural measures under Article 22(2), these include first the tribunal must comply with the arbitration agreement of the parties and second the tribunal should initially consult the parties on any procedural measures that they seek to adopt. There are many examples of procedural measures that can be adopted by the tribunal under Article 22(2), including ‘deciding up on the extension of deadlines, summary dispositions of claims or addressing issues not dealt with in the Term of Reference because, for instance, they were not deemed necessary at that stage, like having a document production stage or ensuring translation services during the evidentiary hearings’. See Webster and Buhler, above n 96, p. 327.

¹⁰⁶ See *the ICC Arbitration Rules 2012*, art. 24(1). This Article will be discussed further.

¹⁰⁷ See *the ICC Arbitration Rules 2012*, art.22(5).

tribunal.¹⁰⁸ In the event of non-compliance with the tribunal's order, this may lead to a claim for damages, pursuant to Articles 22(3) and (5). In addition to Article 22(5), there is Article 29(2), which stipulates that the parties must undertake to comply with any order made by the emergency arbitrator.

Comparing the ICC provisions regarding the conduct of the arbitration proceedings with similar provisions of ACICA and the DIFC, a number of observations can be made. First, the provisions of ACICA and the DIFC do not impose obligation on the arbitral tribunal and the parties to make every effort to conduct the arbitration proceedings in an expeditious and cost-effective manner. Therefore, under the ACICA and DIFC arbitration rules, the tribunal's fees would not be affected if they failed to comply with these principles, while in some circumstances the parties may take advantage of this limitation of the rules, and deliberately engage in slow procedural conduct.

Under Article 37(5) of the ICC rules, parties who conduct the arbitral proceedings in an expeditious and cost-effective manner may be able to reduce their costs subject to the arbitral tribunal determination. While this option is not expressly provided under the ACICA and DIFC rules, they do have general provisions regarding the costs of arbitration to be paid by the parties.¹⁰⁹

¹⁰⁸ Under the ICC Arbitration Rules of 1998, the authority for the arbitral tribunal to make orders was only limited to grant provisional relief. See the ICC Arbitration Rules 1998, Art. 23(1). It should be noted that Article 22(5) is a new provision introduced in the amended ICC Arbitration Rules of 2012 with the purpose to 'avoid the risk of an a *contrario* argument being made by the parties'. See Webster and Buhler, above n 96, p. 345.

¹⁰⁹ For example, Article 39 (e) of ACICA rules provides that the arbitral tribunal shall fix the costs of arbitration in its award. The term costs of arbitration includes only: 'the legal and other costs directly incurred by the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable'; Article 9 (a) of the arbitration costs of the DIFC states that 'The parties shall be jointly and severally liable to the Arbitral Tribunal and the DIFC-LCIA Arbitration Centre for the arbitration costs (other than the legal or other costs incurred by the parties themselves)'.

The second observation is that the ICC rules do not require the arbitral tribunal to treat the parties in the exact same way; the rules do require the tribunal to make sure that each party has every reasonable opportunity to present their case. In contrast, the ACICA rules under Article 17(1) state that ‘subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that each party is given a full opportunity of presenting its case’.¹¹⁰ The same approach is applied by the DIFC arbitration rules under Article 25, which stipulates that ‘the parties shall be treated with equality, and each party shall be given a full opportunity of presenting his case’.¹¹¹ With regard to this second observation, it is found that in practice, the approach applied by ACICA and DIFC is more certain than the approach applied by ICC rules.¹¹² However, the rules of the ICC give the arbitral tribunal the power to maintain the procedural requirements of the parties, in order to ensure that during the proceedings, they are provided with a reasonable opportunity to present their cases.

The third observation is that the ICC rules provide the arbitral tribunal with the general power to make procedural orders, and the parties have an obligation to comply with the same. The advantage of this provision is that it enables the arbitral tribunal to force compliance from the parties. For example, before the introduction of Article 22(5) in the ICC rules, the situation was that when the arbitrators requested the parties to produce a document, the arbitrators were incapable of forcing the parties to comply with the request; sometimes the parties would refuse to produce the document requested. Therefore, Article 22(5) was introduced in the ICC arbitration rules of 2012 to empower the tribunal at all times to make adverse inferences, especially in situations where

¹¹⁰ See *ACICA Arbitration Rules 2011*, art.17(1).

¹¹¹ See *the DIFC Arbitration Rules 2008*, art.25.

¹¹² Under some arbitration rules, the award can be set aside ‘if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced’. See Webster and Buhler, above n 96, p342.

parties refused to produce a requested document. The power to make general procedural orders, as provided by the amended ICC arbitration rules under Article 22(5), does not exist under the arbitration rules of ACICA and the DIFC.

In view of the aforementioned regarding the provisions of the conduct of arbitral proceedings, it is submitted that the ICC arbitration rules are more efficient than the ACICA and the DIFC arbitration rules. This is because the ICC arbitration rules contain express provisions related to the conduct of the arbitral proceedings to reduce their duration and costs, imposing on both the tribunal and the parties the obligation to conduct the proceedings in quickly and affordably. This provision does not exist in either the DIFC or ACICA arbitration rules.

In addition, ICC the rules go further and provide the tribunal with the power to adopt procedural measures in order to balance the time and costs dependent on the case, as well as a general power to make any procedural order. This general power to make procedural orders is a unique provision introduced by the ICC. The trend evident in the provisions for the conduct of arbitration under the ICC arbitration rules represents the right direction for making arbitration processes faster and less expensive. It is proposed that arbitral proceedings under the DIFC move in this direction also, starting by adopting provisions similar to ICC rules Article 22 into the DIFC rules.

The following section discusses the terms of reference provisions under the ICC arbitration rules. These provisions are relevant to the preceding discussion, as they provide parties with a framework for the arbitration proceedings. They identify the steps that shall be taken by the parties and the arbitrators ensure the efficiency of the arbitration.

5.3.6 Terms of Reference

The terms of reference can be defined as a document, formulated by the parties and the arbitral tribunal at the initial stages of the arbitration that generally covers the scope of the arbitral proceedings and the task of the arbitral tribunal.¹¹³ Specifically, this document contains information about the names and addresses of the parties and arbitrators, a summary of the parties' claims and of the relief sought by each party including the amounts claimed, a list of issues to be determined if the arbitrators consider it appropriate, the place of arbitration and the procedural provisions that will be applicable.¹¹⁴ Thus, the terms of reference are anticipated to provide parties with a framework for the arbitration proceedings as agreed on by the parties.¹¹⁵

The terms of reference can benefit parties to a dispute, as they ensure the dispute is well defined.¹¹⁶ This is because the parties must negotiate and settle several procedural issues, such as the place of arbitration and the language to be used in the proceedings. If these issues are agreed upon at the outset, disruption at later stages of the arbitration proceedings concerning these issues may be prevented.¹¹⁷ Additionally, the initial stage involves the preparation of the provisional timetable, and the identification of steps to be taken by the parties and the arbitrators with the purpose of ensuring an efficient

¹¹³ See Julian D M Lew, Loukas A Maistelis and Stefan M Kroll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003)528; Richard Garnett, Henry Gabriel, Jeff Waincymer and Judd Epstein, 'A Practical Guide to International Commercial Arbitration' (OceanaPublication, 2000).

¹¹⁴ See the ICC Arbitration Rules, art. 23 (1).

¹¹⁵ Under some rules, the term of reference will be valid if it is in writing agreed and signed by the parties, however, under the ICC arbitration rules the requirement of signing the term of reference is not mandatory with the purpose to proceed with the arbitration proceedings. It is also important to note that the agreement of the term of reference between parties will not require any party to accept provisions that go out of the scope of the arbitration agreement. The signature of the party to the terms of reference will be discussed further in this section. Lew, Maistelis and Kroll, above n 113, p. 528.

¹¹⁶ The topic of whether the terms of reference should be prepared was discussed by the United Nations Commission on International Trade Law. See the United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings*, (2012)p.17.

¹¹⁷ This is referring to Article 23(4) which will be discussed further in this section.

process. Moreover, the terms of reference may overcome inconsistencies or fill gaps arising in the arbitration agreement.¹¹⁸ The importance of the terms of reference can be seen in its potential to reduce the likelihood of a number of complications arising (at the early stages and during the arbitration) or of the arbitration decision being annulled (at later stages).¹¹⁹ However, it has been argued that the process of agreeing on the terms of reference can be time-consuming, and might create additional complexity in the arbitral proceedings.¹²⁰

With regard to the terms of reference in institutional arbitration, a number of arbitration rules require the parties and the arbitrators to establish terms of reference at the initial stages of the proceedings.¹²¹ The terms of reference are a significant aspect of ICC arbitration because they are the first assignment of the arbitral tribunal, and represent the commencement of the substantive process.¹²² Under the ICC rules, Article 23(2) requires the arbitral tribunal and the parties to have an agreement and sign the terms of reference within two months of the date on which the file has been submitted to the ICC.¹²³ After that, the signed terms of reference must be transferred to the ICC Court by

¹¹⁸ The reason of the establishment of the provision of the terms of reference is that to ‘overcome the French legal rule at the time that an agreement to arbitrate future disputes was invalid. By listing the issues in the terms of reference, which were agreed by the parties, there was a submission agreement of an existing dispute (*compromise*) which was valid. See Lew, Maistelis and Kroll, above n 113, p. 528.

¹¹⁹ Ibid, pp. 530-531. As stated by Lew, Maistelis and Kroll, the terms of reference have three different advantages, including firstly, the assistance for the parties and tribunal to summaries the claims, counterclaims and defences, secondly, the creation of agreed framework which identifies the issues in the beginning of the proceedings and thirdly, gathering the parties in the beginning of the proceedings.

¹²⁰ Hans Smit, ‘the Future of International Commercial Arbitration: A Single Transnational Institution’ (1986) 25 *Columbia Journal of Transnational Law* 9, pp. 21-23.

¹²¹ There are a number of arbitration rules provide for the terms of reference such as the the Belgian Centre for Arbitration and Mediation (CEPANI A) and Association for International Arbitration (AIA). Also, other arbitration rules apply the notion of the terms of reference, but the use it in different way as they use it regarding the appointment of an expert by the tribunal, for instance, the UNICTRAL Model Law. Interestingly, the (CEPANI A) is the only arbitral institution requires in the terms of reference a detailed list of issues. See Lew, Maistelis and Kroll, above n 113, p. 530.

¹²² Ibid, p. 528. The application of then provisions of Article 23 of the ICC (terms of reference) is very important as without it, the ICC Court will think carefully to administer arbitrations under the rules. See also Schütze, above n 49.

¹²³ As claimed by Cordero-Moss, the duration spent in completing the terms of reference in a great number of arbitration cases is a month. This can respond to the criticism that the ICC terms of reference can be time-consuming. See Giuditta Cordero-Moss, *International Commercial Arbitration: Different Forms and Their Features*, (Cambridge University Press, 2013) p. 213.

the tribunal.¹²⁴If, for instance, a party refuses to agree or sign the terms of reference, the arbitral tribunal will sign it and send it to the ICC Court for approval.¹²⁵In the event that both parties choose not sign the terms of reference, the document will not be used. The ICC rules under Article 23(4) state that

after the terms of reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the terms of reference unless it has been authorised to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.¹²⁶

This explains an exclusive function of the terms of reference in fixing the subject matter, and determining that the parties will not be able to change the content and nature of their claims repeatedly.

Comparing the provisions of the terms of reference under the ICC arbitration rules with the ACICA and DIFC arbitration rules, it is evident that both ACICA and the DIFC arbitration rules do not have any formal provisions concerning the terms of reference. Because of this fact and the enormous advantages of the terms of reference in bringing clarity, safety and organisation to the arbitration process, it is suggested that the DIFC and ACICA arbitration rules should include a provision prescribing the use of a terms of reference document. The following section examines the twin issues of the case management conference and the procedural timetable, as these are procedural aspects that can enhance the efficiency of arbitration.

5.3.7 Case Management Conference and Procedural Timetable

Increasing efficiency with respect to the time and costs of arbitration in an appropriate manner can be achieved by using proper case management techniques. The ICC

¹²⁴ See the *ICC Arbitration Rules 2012*, art. 23(2).

¹²⁵ See the *ICC Arbitration Rules 2012*, art. 23(3).

¹²⁶ See the *ICC Arbitration Rules 2012*, art. 23(4).

arbitration rules contain provisions and techniques for case management: for example, Article 24 requires the arbitral tribunal to convene a case management conference to consult with the parties on procedural measures. Such measures may include one or more of the case management techniques described in Appendix IV to the rules.¹²⁷ The case management conference enables the arbitral tribunal and the parties to discuss and initiate the most appropriate procedure for the arbitration, particularly in regard to ensuring time and costs efficiency. At the case management conference or immediately afterward, the tribunal must establish a procedural timetable.¹²⁸ The procedural

¹²⁷ See *the ICC Arbitration Rules 2012*, art. 24 (1); Also see Appendix IV. The appendix IV provides examples of case management techniques that can be used by the arbitral tribunal and the parties with the purpose to control the time and cost. 'Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute'. Examples of case management techniques referred to in the appendix IV include:

- a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.
- b) Identifying issues that can be resolved by agreement between the parties or their experts.
- c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.
- d) Production of documentary evidence:
 - (i) requiring the parties to produce with their submissions the documents on which they rely;
 - (ii) avoiding requests for document production when appropriate in order to control time and cost;
 - (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;
 - (iv) establishing reasonable time limits for the production of documents;
 - (v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.
- e) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.
- f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.
- g) Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing.
- h) Settlement of disputes:
 - (i) informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;
 - (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Additional techniques are described in the ICC publication entitled 'Controlling Time and Costs in Arbitration'. See Peter M. Wolrich, 'Techniques for Controlling Time and Costs in Arbitration Report from the ICC Commission on Arbitration', ICC Publication 843 -Techniques for Controlling Time and Costs in Arbitration

¹²⁸ See *the ICC Arbitration Rules 2012*, art. 24(2). It should be noted that the amended ICC arbitration rules change the word 'provisional timetable' under the previous arbitration rules of the ICC 1998 to the

timetable covers the entire proceedings up to the issuance of the award. The possibility of modifying the timetable is clearly available under Article 24(3), but the tribunal must communicate with the ICC Court and the parties in order to do so. Further, Article 24(3) of the ICC rules provides that the tribunal may adopt further procedural measures and modify the procedural timetable after consulting with the parties, on the condition that each party has a reasonable opportunity to present its case pursuant to Article 22(4). Finally, Article 24(4) provides the tribunal with the privilege to decide on the method to be used in the conference.

However, the position is different under the ACICA and DIFC rules. There is no equivalent provision for convening a case management conference under these rules. However, it should be noted that under Article 13(1) of the ACICA Expedited Arbitration rules, the parties and the arbitral tribunal are under a general obligation to avoid unnecessary expense and delay in conducting the arbitration proceedings.¹²⁹ As a result, the DIFC arbitration rules should consider the case management conference and techniques in order to ensure that the arbitration is conducted in an efficient manner.

5.3.8 Emergency Arbitration Procedures

In the attempt to improve the practical advantages of their arbitration rules, international arbitral institutions such as the ICC and ACICA have provided their users with expedited or emergency procedures. Such procedures assist parties and facilitate the arbitral process in circumstances where they require urgent interim measures or relief

word 'procedural timetable'. This is with the aim to ensure that the timetable is binding up on the parties and the tribunal. See Schütze, above n 49, p.129.

¹²⁹ See the *ACICA Expedited Arbitration Rules 2011*, art. 3 and art.13(1).

before the constitution of the arbitral tribunal.¹³⁰ Prior to the development of the rules on emergency arbitration procedures, parties essentially had two options for the granting of emergency relief: one was to apply to the national courts, and the second was to wait for the formation of the arbitral tribunal.

Now, the provisions introduced by various institutions concerning emergency arbitration procedures allow for certain measures, either through the appointment of an emergency arbitrator, as in the ICC and ACICA,¹³¹ or through the expedited formation of the arbitral tribunal, as in the Hong Kong International Arbitration Centre.¹³² Notably, a number of international arbitral institutions, including the Singapore International Arbitration Centre (SIAC),¹³³ the Stockholm Chamber of Commerce (SCC),¹³⁴ the Swiss Chambers Arbitration Institute (SCAI)¹³⁵ and the Netherlands Arbitration Institute (NAI)¹³⁶ apply both forms of emergency measures. Thus they provide for the expedited constitution of the arbitral tribunal plus the option of appointing an emergency arbitrator.

The importance of emergency arbitration procedures can be recognised in the need to provide means of granting protective measures, such as preserving evidence that may be relevant and material to the resolution of the dispute and providing security regarding

¹³⁰ Notwithstanding the usefulness of this development some scholars suggest that the emergency arbitration provisions may contain several issues that need to be considered. These include issues about the appointment of the emergency arbitrator, the enforcement of the emergency measures, interaction with the judicial authorities or the courts, the standards for granting the emergency measures and finally issues related to the procedural safeguards. See James Hosking, Erin Valentine and Chaffetz Lindsey, 'Pre-Arbitral Emergency Measures of Protection: New Tools for an Old Problem', published in *Commercial Arbitration 2011: New Developments and Strategies for Efficient, Cost-effective Dispute Resolution*, at 199 (PLI Litig. & Admin. Practice, Course Handbook Ser. No H- 865, 2011).

¹³¹ *The ICC arbitration Rules 2012*, art. 29 (1) and Appendix II; See also *ACICA Arbitration Rules 2011*, schedule 2 (1) Application for Emergency Interim Measures of Protection. The revised 2011 ACICA Arbitration Rules incorporating the emergency arbitrator provisions. The rules came into force on 1 August 2011.

¹³² *HKIAC Administered Arbitration Rules 2008*, art. 38.

¹³³ *SIAC Rules 2010*, art. 26 (2) and schedule I.

¹³⁴ *SCC Rules 2010*, Expedited Rules and Appendix II.

¹³⁵ *SCAI Rules 2012*, art. 42 and 43.

¹³⁶ *NAI Rules 2010*, art. 42 (a) and (b).

the legal or other costs of any party.¹³⁷ It is common that these measures are needed urgently at the outset of a dispute. At any stage of the arbitral proceedings, a party to a dispute may wish to make sure that the other party does not take certain actions prior to the formal commencement of the dispute. For example, a party may need to prevent the other party from destroying evidence.¹³⁸ Therefore, it is necessary to make sure that there can be no prejudice or ineffectiveness on the ultimate result of the dispute process because of the actions of a party.¹³⁹

In international arbitration, arbitral tribunals normally have the capacity to order interim measures of protection. The modern trend in the practice of international arbitration allows that parties to arbitration may require interim measures on an urgent basis, which means before the arbitral tribunal has been formed. This is because the constitution of the arbitral tribunal can sometimes take time, during which the position of each party to a dispute can change substantially, while assets to the dispute can be destroyed. Some arbitral rules, such as those of the ICC and ACICA, do not obstruct parties from requesting an interim measure in court.¹⁴⁰ Taking into consideration the time factor in seeking the application of the emergency arbitrator procedures, there is a need to provide parties with the opportunity to make applications for emergency arbitration procedures, both during the arbitral proceedings and before the formation of the tribunal.

¹³⁷ Andrea Sturini, 'Emergency Arbitrators under the ACICA', *Kluwer Arbitration Blog*, 04 August 2011, < <http://kluwerarbitrationblog.com/blog/2011/08/04/emergency-arbitrators-under-the-acica/>>at12May2014.

¹³⁸ Ibid. According to Sturini, 'the emergency arbitrator can order a party to: maintain or restore the status quo pending determination of the dispute; take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm; provide a means of preserving assets out of which a subsequent award may be satisfied; preserve evidence that may be relevant and material to the resolution of the dispute; provide security for legal or other costs of any party'.

¹³⁹ Ibid.

¹⁴⁰ *The ICC Arbitration Rules 2012*, art. 29(7); See also ArzuOngurErgan, 'The New [2012] Arbitration Rules of International Chamber of Commerce ['ICC']' (2012) 4 *Ankara Bar Review* 81, p. 88; See *The ACICA Arbitration Rules 2011*, Schedule 2, art. 7.

In the context of this thesis, the relevant developments are: the amended ICC arbitration rules of 2012 introduced emergency arbitration procedures, particularly in Article 29, supported by Appendix V.¹⁴¹ The provisions of the ICC for emergency arbitration cover a number of key principles.¹⁴² The first is that the emergency procedures are applicable when the parties agree to arbitrate their dispute under the ICC arbitration rules. Article 29(6) specifies the requirements for the successful application of emergency arbitrators.¹⁴³ A second important principle is found in Article 29(7), which clearly states that the emergency arbitrator provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the rules.¹⁴⁴ This means that the rules expressly make available applications for urgent measures before the state courts. Third, under Article 29(1), the scope of emergency arbitration application has been limited to genuine urgency circumstances. In particular, it is intended to deal with urgent situations where a party seeks relief that cannot await the formation of the arbitral tribunal.¹⁴⁵ This is to avoid exploitation or mistreatment of the emergency arbitration applications.

¹⁴¹ It is claimed that the first attempt to introduce emergency measures by arbitral institutions was in the 1990, when the ICC launched its 'Pre-Arbitral Referee Procedure'. Also, *the ICC Arbitration Rules of 1998* contained provisions permitting the application for urgent measures. See Raja Bose and Ian Meredith, 'Emergency Arbitration Procedures: A Comparative Analysis' (2012) *International Arbitration Law Review* Iss.5, p.187.

¹⁴² Ibid, p. 187; Voser, above n 42, pp.783-820; Herbert Smith, 'The New Arbitration Rules: Promoting a Modern View of International Arbitration', *Herbert Smith Arbitration e-bulletin*, October 2011, <http://www.herbertsmithfreehills.com/-/media/HS/P13101141821.pdf>>at12May2014.

¹⁴³ Article 29 (6) stipulates that 'The Emergency Arbitrator Provisions shall not apply if:

a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force;

b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or

c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures'. See *the ICC Arbitration Rules 2012*, art. 29 (6).

¹⁴⁴ *The ICC Arbitration Rules 2012*, art. 29(7);

¹⁴⁵ Voser, above n 42, pp. 783-820.

The fourth important feature is that the application for appointing an emergency arbitrator is available only for signatories to the arbitration agreement or their successors. This means that the ICC rules exclude investment treaty arbitrations and prevent harm against third parties.¹⁴⁶ Fifth, a decision rendered by an emergency arbitrator will take the form of an order, not an award. Hence, the parties are obliged to comply with any order made by the emergency arbitrator.¹⁴⁷

Finally, the emergency arbitration procedures, particularly Articles 2(1) and 1(6) of Appendix V, set forth a short time limit in which the procedures must be accomplished.¹⁴⁸ This is for consistency with the urgent nature of the emergency arbitration procedures. By way of example, the rules state that the appointment of an emergency arbitrator should be determined by the President of the Court no later than two days from the application.¹⁴⁹ They also provide that the emergency arbitrator is required to make an order no later than 15 days after the transmission of the file to him or her. However, this time limit may be extended by the President of the Court in some circumstances.¹⁵⁰

From the above discussion, it can be said that the amended ICC arbitration rules provide new procedures that offer an effective and efficient mechanism for granting interim measures before the constitution of the arbitral tribunal and without referring to the local courts. These rules are useful and significant in the modern practice of arbitration, and could be suitable in jurisdictions where the local courts are not known to be supportive of arbitration.

¹⁴⁶Smith, above n 142.

¹⁴⁷See *the ICC Arbitration Rules 2012*, art. 29 (2).

¹⁴⁸Smith, above n 142.

¹⁴⁹See *the ICC Arbitration Rules 2012*, Appendix V, art. 2(1).

¹⁵⁰See *the ICC Arbitration Rules 2012*, Appendix V, art 1 (6).

In contrast, the ACICA arbitration rules of 2011 responded to the need for urgent relief measures, with amendments to include provisions for emergency arbitration procedures. These can be found in Schedule 2 of the rules. The new provisions include the appointment of an emergency arbitrator in arbitrations initiated under the rules of ACICA. Article 1 stipulates that ‘a party in need of emergency interim measures of protection may make an application to ACICA for emergency interim measures of protection prior to the constitution of the arbitral tribunal’.¹⁵¹

The ACICA and ICC arbitration rules share many similarities in their provisions for an emergency arbitrator. A selection of these provisions on the procedural aspects of international arbitration are compared next. For example, the ICC and ACICA have similar provisions for ensuring the availability of opportunity to make an application to state courts. Article 29(7) clearly states that the emergency arbitrator provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority. The same statement is found in the ACICA rules, particularly Schedule 2, Article 7, which do not prejudice a party’s right to apply to any competent court for interim measures.¹⁵² Additionally, both rules emphasise the limitation of the scope of the emergency arbitration provisions: both narrow their scope to deal only with situations that truly cannot wait for the formation of the arbitral tribunal.¹⁵³

Furthermore, the rules of ACICA and the ICC deal expressly with the potential for challenges to an emergency arbitrator. By way of illustration, Schedule 2, Article 2

¹⁵¹ See *the ACICA Arbitration Rules 2011*, Schedule 2, art. 1.

¹⁵² Article 7 states that the power of the Emergency Arbitrator under this Schedule 2 shall not prejudice a party’s right to apply to any competent court or other judicial authority for emergency interim measures. See *the ACICA Arbitration Rules 2011*, Schedule 2, art. 7.

¹⁵³ See *the ICC Arbitration Rules 2012*, art. 29 (1); See *The ACICA Arbitration Rules 2011*, Schedule 2, art. 3, 3(3).

states that a prospective emergency arbitrator shall immediately in writing disclose to ACICA any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Similarly, Articles 2(4) and (5) of Appendix V in the ICC arbitration rules provide that every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute. Also, both rules require that before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence.

Despite these similarities, there are some differences. For instance, the ACICA arbitration rules specify expressly that the application for emergency measures shall be made in writing,¹⁵⁴ while the ICC rules do not mention the writing requirement for the emergency measures application.¹⁵⁵ In terms of the time limit required for the emergency arbitrator application, the ACICA rules are more rapid than the ICC arbitration rules. This is because Article 2 states that an appointment of the emergency arbitrator should be determined by ACICA no later than one business day from the receipt of the application. Also, the rules provide that the emergency arbitrator is required to make his or her decision no later than five business days from the date upon which the application was referred to the emergency arbitrator.

Another difference is that the ICC rules emphasise expressly that the emergency arbitrator's decision shall take the form of an order.¹⁵⁶ In contrast, the ACICA rules state that the emergency arbitrator shall have the power to order or award any interim measure of protection on an emergency basis.¹⁵⁷ The perception of making the decision in the form of an order differentiates the judgment of the emergency arbitrator from an

¹⁵⁴ See *the ACICA Arbitration Rules 2011*, Schedule 2, art. 1, 1(2) (a).

¹⁵⁵ See *the ICC Arbitration Rules 2012*, Appendix V, art. 1.

¹⁵⁶ See *the ICC Arbitration Rules 2012*, art. 29 (2).

¹⁵⁷ See *the ACICA Arbitration Rules 2011*, Schedule 2, art. 3, 3(3) .

arbitral award issued by the arbitral tribunal.¹⁵⁸ It also eliminates any possible uncertainties concerning the need for scrutiny by the court of any decision rendered by an emergency arbitrator.¹⁵⁹

Further, the costs of the emergency arbitrator under the ICC rules are clearly acknowledged, whereas the ACICA rules are indefinite and require some clarification. In this regard, Article 7 Appendix V of the ICC rules specifies that the amount should be paid by the applicant.¹⁶⁰ It states that the applicant must pay an amount of USD \$40,000, consisting of USD \$10,000 for ICC administrative expenses and USD \$30,000 for the emergency arbitrator's fees and expenses. In comparison, the ACICA rules provide that the costs associated with the emergency interim measures of protection proceedings include the emergency arbitrator fee and the application fee, along with legal and other costs directly incurred by the parties.¹⁶¹

Although the provisions regarding emergency arbitrators under ACICA rules have many similarities with those found in the ICC rules, the provisions for emergency arbitrators under the ICC rules seem to be more detailed than the ACICA rules. This is because ACICA does not expressly provide rules regarding the conduct of emergency proceedings.

However, in comparing the ICC and ACICA emergency arbitrators' provisions with the provisions found in the DIFC arbitration law of 2008, it can be said that the DIFC

¹⁵⁸ See Voser, above n 42, pp. 783-820.

¹⁵⁹ Ibid, pp. 783-820. Notably, Voser states that 'such denomination does not have an impact on whether orders issued by the ICC emergency arbitroters can be recognised and eforced in any jurisdiction. Such decsion is for the recognising and enforcing jurisdiction to take. In particular jurisdiction which have adopted or will adopt the revised UNCITRAL Model Law, including the Articles 17 H and 17 , are likely to regonise and enforce orders issued by an ICC emergency arbitotor'.

¹⁶⁰ See *the ICC Arbitration Rules 2012*, Appendix V, art. 7.

¹⁶¹ See *the ACICA Arbitration Rules 2011*, Schedule 2, art. 6, 6(1) (a) (b).

arbitration law of 2008 does not contain provisions concerning emergency arbitration procedures. In other words, there are no certain forms of emergency measures, thus both forms of emergency measures, specifically the expedited constitution of the arbitral tribunal and the emergency arbitrator, are not applicable under the DIFC arbitration rules. Article 15 of the DIFC arbitration law 2008 states that ‘it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure’.¹⁶² The options provided under the DIFC rules for an application for such relief may typically be made to the judicial authority; alternatively, the party must wait for the constitution of the arbitral tribunal. This can be a time-consuming and uncertain process, especially in jurisdictions where the local courts are not known to be supportive of arbitration. Therefore, it is argued that the DIFC rules do not provide effective means for obtaining urgent measures for protection in the early stages of arbitral proceedings (i.e. before the constitution of the arbitral tribunal).

The emergency arbitrator procedures are gaining popularity in most arbitral institutions,¹⁶³ specifically those that have recently amended their rules. Due to the flexibility and autonomy of parties seeking to resolve disputes, it is important that the emergency arbitrator procedures to be incorporated into the legal framework of arbitration. This is because this requirement assists parties substantially during the early stages of arbitration. Therefore, it is recommended that the DIFC introduce similar provisions to those found in the ICC and ACICA. Inserting emergency arbitration provisions into the DIFC rules would afford more flexibility to parties seeking to resolve their disputes, especially in the early stages of arbitration. This will be useful for

¹⁶² See *the DIFC Arbitration Law 2008*, art. 15.

¹⁶³ Since the introduction of the emergency arbitration procedures in most of international arbitral institutions, the figure indicates a gradual increase in the number of parties seeking the use of emergency arbitrators. See David Bateson and Matthew Howlett, ‘Emergency Arbitration Procedures’ (Crossing Borders International Arbitration Insights, 2^{ed} ed, 2013).

the Dubai jurisdiction, even though the local courts in Dubai recently seem to be supportive of arbitration.

5.4 Conclusion

To summarise, the above analysis and comparison of the procedural rules of three arbitral institutions (i.e. the DIFC arbitration law of 2008, the ICC arbitration rules of 2012 and the ACICA arbitration rules of 2011) has discussed a number of essential procedural issues intended to make the arbitration process more effective and efficient. These include the commencement of arbitration, the arbitral tribunal, confidentiality, multiple parties, multiple contracts, joinders and consolidation, conduct of arbitration, terms of reference, case management and procurable timetable, and emergency measures. The findings support the argument of this chapter that the procedural rules of the DIFC Arbitration Law 2008 can be improved in line with the rules of other jurisdictions. The next chapter will develop detailed proposals about how specific rules can be modified or developed for more effective and efficient arbitral proceedings in settling international commercial disputes.

Chapter 6:

Conclusion and Specific Proposals for the Reform of the DIFC Arbitration Law 2008

6.1 Introduction

The research for this thesis was undertaken with the main objectives of assessing the appropriateness of arbitration as a dispute resolution method for international commercial disputes, and analysing the suitability of the DIFC Arbitration Law 2008 specifically. This chapter develops proposals for specific rules that might be incorporated into the DIFC Arbitration Law 2008 to enhance its suitability as a set of efficient rules in this regard. In addition, this chapter serves as the conclusion for the thesis. Therefore, the chapter is divided into three parts. In the first part (Section 6.2), a brief recapitulation of the main objectives of the thesis will set the background context for the presentation of the findings. The second part (Section 6.3) develops the recommendations and proposes a number of possible solutions to eliminate the drawbacks identified in the relevant laws in Dubai in the course of this research. The third part (Section 6.4) concludes the thesis and provides a brief discussion of possible avenues for future research in the broad area of international arbitration in the Gulf Arab Region.

6.2 Main Objective of the Research

As mentioned in Chapter 1, the aim of the research in this thesis has been to explore how international commercial arbitration in Dubai may be conducted and regulated more effectively. Thus, as an initial step, a review of the relevant literature was carried

out to examine how a dispute may be best solved through alternative dispute resolution. To answer this question, it was necessary to analyse and compare a number of dispute resolution techniques and assess their effectiveness in international commercial settings.¹

The more specific aim of this thesis, to determine appropriate methods of dispute settlement in the international context, necessitated the development of the argument that arbitration as a dispute resolution technique may, in fact, be the only technique that is effective in international transactions. This argument was supported by criteria for determining the effectiveness of dispute resolution methods in settling international commercial disputes.²

In light of this elaboration on what constitutes effective methods, a comparative study of various dispute resolution mechanisms, including litigation, arbitration and mediation, led to the conclusion that arbitration meets the criteria of effective dispute resolution. As a result, arbitration is preferred over litigation and mediation as an effective method of solving international commercial disputes. Several reasons for this were established. To briefly recapitulate these reasons, first, arbitration provides its users with a rapid process for solving disputes. Moreover, arbitration is considered an option for reducing the heavy caseload of the courts. Second, the cost of arbitration processes is largely less expensive than litigation, as litigation process may involve

¹ See Chapter 2, 'An analysis of various dispute resolution mechanisms in law'. This chapter provides literature on various dispute resolution mechanisms in law and analyse the arguments for and against various mechanisms at pp. 18-44.

² See Andrew I Okekeifere, 'Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a myth?' (1998)15 *Journal of International Arbitration Kluwer Law International*, 81-106; Margaret Wang, 'Are Alternative Dispute Resolution Methods Superior to Litigation In Resolving Dispute in International Commerce?' (2000) 16 *Arbitration International Kluwer Law International* 2, 198-212. For more detailed information, see Chapters 1 and 2 of this thesis.

additional expenses and time, especially when involving a foreign party.³ Third, arbitration provides its users with a high level of flexibility, including the flexibility to choose the substantive and/or procedural laws to be applied, the place or seat of arbitration, the language of the proceedings and the expert adjudication or arbitral tribunal. Fourth, the most important feature of the effectiveness of arbitration is its confidentiality, allowing for the protection of trade secrets and preservation of relationships between businesses. Fifth, arbitration is capable of dealing with the growing complexity and diversity of disputes, such as claims between multiple parties, multiple contracts, joinders and consolidation. Finally, arbitration has effective mechanisms for enforcing judgments, awards or other outcomes.

This evaluation of the effectiveness of dispute resolution techniques is linked to the central research question of this thesis, which is to assess the extent to which the new rules of the DIFC of 2008 are effective in governing the conduct of international commercial arbitration in Dubai.⁴ Very briefly, the selection of the DIFC arbitration rules (as justified in greater detail in Chapter 1)⁵ is logical because they have conceptual similarities with the Western concept of arbitration. These similarities include the nature of arbitration, scope of arbitration, certainty in the rules regarding arbitration, the substantive law applicable and scope of judicial review and enforcement. Moreover, unlike all other arbitration centres in the Gulf region, the DIFC has an independent judicial system. Its courts system is separate and distinct from the UAE courts, and promotes the provisions of the DIFC laws and regulations. This makes the DIFC arbitration rules of 2008 ideal arbitration rules compared to others in the region. It is also the case that the DIFC arbitration law of 2008 is considered the best international

³ It should be noted that a number of arbitral institutions such as the ICC have amended their arbitration rules with the reason to make the arbitration process conducted in expeditious and cost-effective manner.

⁴ See Chapter 1, Section 1.5, 'Thesis Question'.

⁵ See Chapter 1, Section 1.12.3, 'Reasons to Choose International Commercial Arbitration in the UAE, Particularly the DIFC Arbitration Law'.

practice in arbitration in the Middle East. This is due to the fact that these rules are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which forms the source of arbitration laws in most countries. The other sources of these rules are the English Arbitration Act (1996) as well as the Arbitration Rules of the LCIA.

In order to answer the central research question and measure the effectiveness of the existing arbitration law of the DIFC, it was first important to undertake an analysis of the laws applicable to arbitration in the UAE, focusing on the current arbitration law of the DIFC (i.e. institutional arbitration). It was found that in the UAE, arbitration is continuing to develop as a preferred and key method of solving international commercial disputes between parties from different legal jurisdictions. This endorses the argument that arbitration is the most effective method of solving international commercial disputes within the UAE.

The analysis also found that the UAE Federal Government and the Government of the Emirate of Dubai have as a priority to provide economic sustainability and access to justice. In this regard, facilitating resolution mechanisms such as arbitration was one measure adopted by the governments, and major developments in arbitration laws, both at the Federal level (the UAE) and at the Emirate level (Dubai), subsequently took place. The development of international arbitration can be observed in the UAE's proposed Federal arbitration law and the development of institutional arbitration measures such as those of the DIFC.⁶ All these changes have been undertaken in response to the

⁶ For detailed information on the topic of the developments occurred in the UAE and the Emirate of Dubai, see Chapters 1 and 3. Chapter 3 contains a comparison study of the previous and current legal frameworks of arbitration in the UAE, focusing on the legal frameworks of arbitration in the Emirate of Dubai.

substantive and procedurally ineffective rules in the legal systems of many Middle Eastern countries.

Focusing on the DIFC, the comparative study of the DIFC's old and new arbitration laws established that on the one hand, the previous version of the DIFC's arbitration law of 2004 gave its users a high level of party autonomy, as it contained a number of mandatory provisions, and it also granted the arbitral tribunal the capacity to order interim measures. On the other hand, the law contained several issues limiting the application of definite dispute resolution process.⁷ The main issue regarding the *DIFC Law No 8 of 2004*, for example, was that it limited the capacity of arbitration to cases in which one of the parties, or the dispute itself, was related to the DIFC. In other words, the DIFC's previous arbitration law, enacted in 2004, effectively limited the scope of arbitration to disputes arising out of or in connection with the DIFC. Another issue regarding the *DIFC Law No 8 of 2004* is the definition of the 'seat'. It is also indicated that the law does not cover the privacy or confidentiality of arbitral proceedings, does not express the right to order or apportion costs and, finally, does not deal satisfactorily with the status of DIFC-rendered arbitral awards in the wider UAE. These and other related matters of procedure were reasons for the 2008 amendment of the 2004 DIFC arbitration rules. The comparison of the old and new versions of the DIFC arbitration law helped to answer the central research question and measure the effectiveness of the existing arbitration law of the DIFC.

The next necessary step was to compare the DIFC arbitration law with the arbitration rules of other leading institutions such as the ICC and ACICA, who have recently amended their arbitral rules in accordance with best practice in international commercial

⁷ See Chapter 3, 'Arbitration at Dubai International Financial Centre (DIFC)', pp. 25-28.

arbitration. The aim of this comparative analysis was to design a few possible options for reform and refinement of the DIFC arbitration law of 2008. In part, these changes are meant to meet the criteria of effective dispute resolution and to be able to cope with the increased complexity of international commercial disputes.

The doctrinal and comparative analysis of the arbitration laws of three institutions—the ICC, ACICA and the DIFC—led to the finding that even though the DIFC arbitration law was amended in 2008 (with the aim of eliminating a number of deficiencies existing in the previous DIFC arbitration rules of 2004), yet more changes were needed for it to compete in the field of international commercial arbitration. Using the ICC arbitration rules as a model for the comparative study in Chapter 5 of this thesis, it was shown that the DIFC arbitration rules of 2008 are not as advanced as the ICC arbitration rules of 2012.

In particular, the DIFC arbitration rules of 2008 do not contain a number of essential procedural issues intended to make the arbitration process more effective and efficient. These include the provisions regarding the commencement of arbitration, the arbitral tribunal, confidentiality, multiple parties, multiple contracts, joinders and consolidation, conduct of the arbitration, terms of reference, case management and procurable timetable, and emergency measures. The DIFC arbitration law of 2008 does not have a comprehensive coverage of the contemporary issues of arbitration, as this is revealed by comparison with the ICC arbitration rules of 2012.⁸ As a result, it is argued that the DIFC rules require further reform and refinement to become more effective and efficient in settling complex international commercial disputes.

⁸ See Chapter 5, ‘Comparison of the procedural rules of International Commercial Arbitration in Australia (ACICA), the UAE (the DIFC) and the International Chamber of Commerce: The court of Arbitration (the ICC)’.

As argued previously,⁹ effective dispute resolution has distinct characteristics of speed of proceedings, affordability, possibility of expert adjudication, flexibility and certainty, confidentiality, aiding of international business, accommodation of third-party interests, aiding the growth of the law, public policy restrictions and ease of enforcement. The comparative study of the three sets of rules (i.e. the ICC, ACICA and DIFC) has shown that the ICC is currently more effective in meeting these criteria, as elaborated below. Therefore, it is recommended that the DIFC modify its rules in appropriate ways based on this example.

The ICC arbitration rules meet the criteria for effective dispute resolution for two main reasons. First, the rules have provisions for enhancing the speed of the ICC arbitration process.¹⁰ Examples of such provisions include the following:

- Article 4 (the request for arbitration) and Article 5(the answer for arbitration) require parties to obtain more information regarding the claim at the beginning of the arbitration. The claimant is also required to specify on what basis claims are made. Moreover, the claimant is given the possibility under a number of circumstances to decide, in one arbitration process, claims arising out of more than one contract; it is important that the claimant specifies the arbitration agreement under which each of its claims is made when claims are made under more than one arbitration agreement. The factors mentioned in Article 4 mentioned above are also reflected in Article 5. Articles 4 and 5 are made precise and clear with the purpose of assisting parties to make more informed decisions at the outset of arbitration. Accordingly, the likelihood of a rapid and inexpensive settlement increases.

⁹ See Chapter 2, 'Criteria for Determining the Effectiveness of Dispute Resolution Processes', at pp. 18-44.

¹⁰ In this regard, Articles 4, 5, 12, 13, 22, 24, 27, 29 and 37 of the ICC arbitration rules are meeting a number of features of the criteria of effective dispute resolution and law, namely the speed of proceedings, the affordability and flexibility. See also Chapter 2.

- Articles 7–10 of the ICC arbitration rules deal with a number of issues, such as procedural frameworks for multiple parties, multiple contracts, joinders and consolidation in arbitration. In terms of costs and time, these provisions benefit parties who conduct their arbitration within reasonable limits of time and costs; for example, it permits the ICC Court to decide on the fairest and most appropriate manner of fixing and allocating advances on costs in complex multi-party arbitrations.
- Article 12(5) gives the ICC Court the power to nominate the third arbitrator directly and immediately. Moreover, Articles 13(3) and 13(4) provide extended powers to the ICC Court, in certain circumstances, to appoint arbitrators directly without going through the National Committee. These provisions regarding the appointment of arbitrators address the issue of delay in the nomination process.
- Article 22(1) expresses a general obligation that both the parties and the arbitral tribunal are obliged to make every effort to conduct the arbitration proceedings in an expeditious and cost-effective manner. This general obligation must be read with other provisions that maintain the general aim:
 - Article 24, which organises the case management of arbitration. The provisions state that the arbitral tribunal shall convene at the beginning of arbitration a case management conference to consult with the parties on procedural measures that may be adopted. This procedure may take place again at any time during the arbitration to ensure continued effective case management.
 - The provisions of Appendix IV include a list of suggested case management techniques that may be used by the tribunal with the aim of making the arbitration process rapid and less expensive.

- Under Article 27, the arbitral tribunal shall declare the proceedings closed as soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorised submission concerning such matters, and shall inform the Secretariat and the parties of the date by which it expects to submit its draft award to the ICC Court. By declaring the end of the proceedings and informing the Secretariat, it is anticipated that the Secretariat will administer this situation to make sure that the tribunal is in compliance with submitted deadline. The arbitrator's compliance with the submitted deadline is very important for the arbitrators themselves, as the ICC Court has the power when fixing the arbitrators' fees to consider, among other things, how diligent and efficient the arbitrators have been in conducting the proceedings. Therefore, this motivates the arbitrators to render an award in an expeditious manner.
- More to the point, the parties are also motivated by the ICC rules, in that they can reduce their costs if they make efforts to conduct the arbitration in an efficient way. For instance, Article 37(3) provides that when awarding costs, the tribunal may take into account the extent to which each party has complied with the general obligation mentioned above.
- Article 29 and Appendix V (Emergency Arbitrator Provisions) give the parties the option to apply interim measures in the period before the constitution of the tribunal. The Emergency Arbitrator Provisions benefit parties to arbitration, so parties to ICC arbitration can avoid the additional expense, time and risks of applying to the national court for interim measures in the period before the constitution of the arbitral tribunal.

The second reason is that the ICC arbitration rules provide mechanisms for dealing with the growing complexity and diversity of disputes. Examples of such provisions include Articles 7–10 of the ICC arbitration rules, which deal with contemporary procedural issues related to disputes involving multiple parties, multiple contracts, joinders and consolidation in arbitration. Despite the fact that the ICC Court and arbitrators have dealt with issues arising out of complex arbitration disputes, the amended ICC arbitration rules address these issues and define practices in this complex area. Therefore, the practices of the ICC Court and the arbitrators concerning the questions of multiple parties, multiple contracts, joinders and consolidation are now more transparent.

All provisions of the ICC mentioned above are considered key procedural issues contributing to making the arbitral process more effective and efficient. They have positive aspects, as they accelerate the arbitration procedure. Therefore, taking into account the current version of the ICC arbitration rules would assist lawmakers in eliminating procedural difficulties found in the arbitration rules of the DIFC 2008. The final result of this comparative study was to provide suggestions for modifying specific provisions of the DIFC arbitration law of 2008. It is argued that, if implemented, these suggestions will bring the DIFC arbitration law into accord with the current version of the ICC arbitration rules, and make it more comprehensive, effective and competitive in the field of international commercial arbitration.

It is this author's view that it is reasonable to expect that the implementation of the proposed changes in the DIFC arbitration law will facilitate greater investment and

international trade in the UAE and in the wider Gulf Arab Region.¹¹ It will also promote Dubai as a prominent venue for conducting international commercial arbitration. This is because the proposed changes address contemporary issues concerning the effectiveness and efficiency of the arbitration procedure and the growing complexity and diversity of disputes. Therefore, in the following section, specific recommendations for modifying the DIFC rules are developed.

6.3 Recommendations for Modifying Specific DIFC Rules

The aim of this section is to propose possible modifications to specific rules of the arbitration law of the DIFC 2008 in order to enhance their effectiveness and efficiency. The recommendations below are designed to modify rules at all stages of arbitration, including at its commencement, at the stage of the arbitral tribunal, at the stage of the arbitral proceedings and at the stage of the award. At each stage, a number of changes are required, either as re-organisation, clarification or addition to the existing rules.

6.3.1 At the Stage of the Commencement of the Arbitration

At the stage of the commencement of the arbitration, the provisions of the DIFC arbitration law of 2008 contain two possible issues, including the length of the process of initiating the arbitration and limitations of the requirements regarding the information

¹¹ It is a fact that the UAE, particularly Dubai is a leading investment destination in the Middle East in relation to investor confidence. Keeping in mind that arbitration is the preferred dispute resolution method in the Middle East; the investor's confidence may be sustained and may be increased with the implementation of the required changes to the DIFC arbitration law. As a result, the development of the international commercial arbitration law in UAE, particularly in Dubai will give significant indicators of an improvement to the global economy as the local and foreign investors in Dubai or even in the Gulf Arab Region will have the benefit of this development in a way that both parties would be able to settle their disputes effectively and successfully. Government of Dubai Department of Economic Development the Foreign Investment Office, Dubai the FDI Destination of Choice, <http://vae.ahk.de/fileadmin/ahk_vae/FAQ/Business_Support/Foreign_Direct_Investment_-_Dubai.pdf> at 12 December 2014.

should be included in the request for arbitration at the beginning of arbitration procedure. These two issues will be discussed in the following section, and some proposed articles will be suggested.

The DIFC arbitration law of 2008 has only two provisions, in Articles 28 and 30 respectively. Article 28 stipulates that ‘unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to Arbitration is received by the respondent.’¹² Article 30, in brief, requires a statement describing the nature and circumstances of the dispute. In the comparative study undertaken in Chapter 5, it was submitted that the provisions of the commencement of the arbitration under the DIFC arbitration law, particularly Articles 28 and 30, required some clarification and addition. This is because they do not provide a clear procedure for the initial stages of arbitration, which may increase the length of the arbitral proceedings.¹³ Thus, Articles 28 and 30 of the DIFC arbitration law require re-organisation, clarification and addition to enable parties to make precise decisions from the beginning of arbitration.

For the purposes of re-organisation, the provisions for the commencement of arbitration in the DIFC arbitration law should be placed at the beginning of the arbitration law of the DIFC, specifically in the general provisions immediately after Article 8 (i.e. Receipt of written communications). Further, with the aim of clarification and addition, the provisions for the commencement of the arbitration in the DIFC arbitration law should begin with the request and answer for arbitration. The provisions of the request and

¹² See *the DIFC Arbitration rules 2008*, art.28 .

¹³ For example, the provisions regarding the information in the request and answer for arbitration under the ICC arbitration rules may enable parties to avoid delays caused by further submissions of documents as well as the parties will be able, whenever possible, to determine the extent and limits of the dispute and of the claim at the early stages of arbitration proceedings. See Chapter 5, ‘Commencement of Arbitration’, at pp. 11-16.

answer for arbitration should aim to describe the procedure for the submission of the request and answer, and specify the required information that should be included therein. The provisions of the commencement of arbitration under the ICC arbitration rules are comprehensive, and could be used as a model.¹⁴

With the aim of changing the existing provisions of the DIFC arbitration law of 2008 at the stage of the commencement of the arbitration, the provisions of the request and answer for arbitration should be reformed as follows:

(Request for Arbitration)

- 1) A party wishing to have recourse to arbitration under the DIFC Rules shall submit its Request for Arbitration (the 'Request') to the Registry at any of the offices specified in the Internal Rules. The Registry shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.
- 2) The date on which the Request is received by the Registry shall, for all purposes, be deemed to be the date of the commencement of the arbitration.
- 3) The Request shall contain the following information:
 - a) the name in full, description, address and other contact details of each of the parties;
 - b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;
 - c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
 - d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
 - e) any relevant agreements and, in particular, the arbitration agreement(s);
 - f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;
 - g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice, and any nomination of an arbitrator required thereby; and

¹⁴ See *the ICC Arbitration rules 2012*, art.4 and 5. These articles require that the request for arbitration and the answer include the basis on which claims and counterclaims are made. It also requires detailed information concerning what the request and answer should include.

h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

4) Together with the Request, the claimant shall:

a) submit the number of copies thereof required; and

b) make payment of the filing fee required on the date the Request is submitted.

In the event that the claimant fails to comply with either of these requirements, the Registry may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

5) The Registry shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Registry has sufficient copies of the Request and the required filing fee.

(Answer to the Request; Counterclaims)

1) Within 30 days from the receipt of the Request from the Registry, the respondent shall submit an Answer (the 'Answer') which shall contain the following information:

a) its name in full, description, address and other contact details;

b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;

c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;

d) its response to the relief sought;

e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals, and any nomination of an arbitrator required thereby; and

f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.

2) The Registry may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules.

3) The Answer shall be submitted to the Registry in the number of copies required.

4) The Registry shall communicate the Answer and the documents annexed thereto to all other parties.

5) Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:

a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;

b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;

c) any relevant agreements and, in particular, the arbitration agreement(s); and

d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.

6) The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Registry. Prior to the transmission of the file to the arbitral tribunal, the Registry may grant the claimant an extension of time for submitting the reply.

The above suggested re-organisation, changes and additions to the DIFC arbitration law will improve the structure and comprehensiveness of the provisions of the DIFC arbitration law concerning the commencement of arbitration. They will also clarify the process of initiating the arbitration for parties. This may lead to another advantage for parties, which is that the arbitration will start when the notice of arbitration is received by the DIFC (the registry), not by the respondent, as in Article 28 of the current DIFC

arbitration law.¹⁵ Moreover, the proposed model contains several requirements regarding the information that should be included in the request for arbitration at the beginning of the arbitration procedure. The initial information to be provided by parties in the request and answer for arbitration may reduce the time consumed in the early stages of arbitral proceedings. The following section suggests possible refinements to the provisions of the DIFC arbitration law at the stage of the arbitral tribunal.

6.3.2 At the Stage of the Arbitral Tribunal

The second issue identified in Chapter 5 relates to the rules at the stage of the arbitral tribunal. At this stage, the provisions of the arbitral tribunal of the DIFC arbitration law contain four issues, including the limited duties of arbitrators, the lengthy process of the appointment of the third arbitrator in a panel of three arbitrators, the limited grounds for challenging the arbitrator, and issues related to the resignation and the replacement of arbitrator.

6.3.2.1 The Limited Duties of Arbitrators

First, it was found that the provisions of the arbitral tribunal of the DIFC arbitration law do not expressly outline the duties of arbitrators in the manner that Article 11 (and related provisions) of the ICC arbitration rules do. The DIFC rules also do not cover significant duties that could contribute to fast tracking the arbitration.¹⁶ For example, the ICC arbitration rules incorporate significant new duties for arbitrators, including the obligation to conduct the arbitration proceeding in an expeditious and cost-effective manner, the obligation to immediately establish the facts of the case by all appropriate

¹⁵ Under Article 28 of the DIFC arbitration law, the claimant is the one in charge to send the notice of arbitration to the respondent. However, with the required change, the claimant will no longer be the one in charge to send the notice of arbitration to the respondent. It will be the registry's responsibility.

¹⁶ See Chapter 5, 'Duties of Arbitrators', at pp. 18-21.

means and the obligation when delivering an award to make every effort to ensure that the award is enforceable at the law. Moreover, the duties of arbitrators under the current DIFC arbitration law are not well organised, as they are found in different articles.¹⁷

In re-organising the section of the arbitral tribunal in the DIFC arbitration law, it is appropriate that the DIFC arbitration law should first insert a general section. This general section should define the duties of arbitrators: to make the parties aware of their rights at the outset of the proceedings and to clarify the obligations of arbitrators. The main advantage of the general section is that it articulates and places in one section all required obligations for arbitrators at the outset of the arbitration.

The proposed rules regarding the duties of arbitrators could be drafted as follows:¹⁸

(General Provisions)

- 1) Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
- 2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Registry any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Registry shall provide such information to the parties in writing and fix a time limit for receiving any comments from them.
- 3) An arbitrator shall immediately disclose in writing to the Registry and to the parties any facts or circumstances of a similar nature to those referred to the

¹⁷ For example, the duty of arbitrators to remain independent and impartial is found under Article 19 (Grounds for Challenge). See *the DIFC Arbitration Law 2008*, art.19.

¹⁸ There are also other related provisions found in the ICC arbitration rules provide for such duties for arbitrators, including: conduct the proceeding fairly, impartially, and in an expeditious and cost- effective manner and ensure that each party has a reasonable opportunity to present its case (Article 22(1) and (4)); establish the facts of the case (Article 25(1)); determine and apply the applicable provisions of the contract relevant, trade usages the applicable rules of law (Article 21 (1) and (2)); deliver an award and make every effort to ensure that the award is enforceable at the law (Article 41); keep the arbitration confidential (Article 22 (3)). It should be noted that there are two duties which are considered new in the practice of international arbitration and arbitral rules; these are the duties to make every effort to conduct arbitration in expeditious and cost-effective manner and ensure the enforceability of the award at the law. Another one is the duty to disclose the availability of arbitrators. These new duties for arbitrators are found in the ICC arbitration rules of 2012.

above concerning the arbitrator's impartiality or independence which may arise during the arbitration.

4) The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.

5) By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

6) Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of the constitution of arbitrators in the rules.

Enacting and implementing these requirements will prove useful, as both parties and arbitrators will have an early understanding of what they can do to avoid issues related to the obligations of the arbitrators.

6.3.2.2 The Lengthy Process of Appointment of a Third Arbitrator in a Panel of Three Arbitrators

The second issue found at the stage of the arbitral tribunal was that of the lengthy process of appointing a third arbitrator to create a panel of three arbitrators. Article 17(3)(a) of the DIFC arbitration rules provides that

in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint an arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the DIFC Court of First Instance.¹⁹

In contrast, the ICC arbitration rules provide that

Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.²⁰

¹⁹ See the *DIFC Arbitration Law 2008*, art. 17 (3) (a).

²⁰ See the *ICC Arbitration rules 2012*, art.12(5).

In light of this, it was found that the procedure of the appointment of the third arbitrator under the DIFC rules is lengthier than that under the ICC arbitration rules. To shorten the process of appointment of a third arbitrator (i.e. the chairperson or president), it is suggested that Article 17(3)(a) should be changed. The proposed article for an arbitration with three arbitrators is as follows:

(Appointment of Three Arbitrators)

Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

In accordance with this required change, the third arbitrator (i.e. the chairperson or the president) will be nominated directly by the DIFC Court, significantly shortening the process. The suggested provision will give the DIFC Court an extended power to nominate the third arbitrator directly and immediately, whereas the current provision of the DIFC law gives the DIFC Court the power to do so under limited circumstances, particularly if a party fails to appoint an arbitrator within 30 days of receipt of a request, or if the two arbitrators fail to agree on the third arbitrator within 30 days of the initial appointment.

6.3.2.3 Limited Grounds for Challenging an Arbitrator

The comparative study in Chapter 5 related to the stage of arbitral tribunal also identified a number of additional provisions that need to be improved. These are the provisions regarding the grounds for challenge to an arbitrator. Under the DIFC

arbitration law, the grounds for challenge to an arbitrator are limited to an arbitrator's lack of independence or impartiality. In light of that, it would be useful if these grounds were extended to other possibilities. The issue of the limited grounds for challenging an arbitrator under the DIFC arbitration law can arise where a challenging party brings new grounds or arguments for a challenge. In this situation, the challenging party may have difficulty in filing the challenge if it is not covered by the DIFC arbitration law.

To avoid such difficulties and widen the grounds for challenging arbitrators, it is suggested that Article 18(2) of the DIFC arbitration law should include the word 'otherwise'. This word opens up other possible grounds of challenge. Article 18(2) of the existing DIFC states:

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

The proposed article for the challenge of the arbitrator is as follows:

An arbitrator may be challenged, whether for an alleged lack of impartiality or independence, or if he does not possess qualifications agreed to by the parties, **or otherwise**. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made, A party shall make submission of a written statement specifying the facts and circumstances on which the challenge is based.

This change will eliminate the issue of the limited grounds for challenging an arbitrator under the DIFC arbitration law. Also, the DIFC arbitration law will be read differently, as it will provide the parties with a wide range of reasons for challenge and a broad right to challenge arbitrators.

Related to the grounds for challenge of arbitrators is the issue of the procedure for making the challenge. Such a procedure is also important, and requires changes to the DIFC arbitration rules. The main issue concerns the time limit given to parties to submit their challenge applications. The DIFC arbitration law gives the challenging party 15 days to submit his or her application. Comparing the time limit provided by the DIFC arbitration law with other rules such as the ICC arbitration rules, it was argued in Chapter 5 that it would be difficult for the challenging party to file an adequate challenge within 15 days where the challenging party is required to specify the facts and circumstances on which the challenge is based. Therefore, it was submitted that the time limit for the concerned party to submit his or her application for challenge under Article 19 of the DIFC arbitration rules should be extended to 30 days. Accordingly, the challenging party will have legal certainty and an opportunity to consider his or her decision carefully before filing an inadequate challenge.²¹

6.3.2.4 Issues Related to the Resignation and the Replacement of Arbitrator

In the situation of a successful challenge in which an arbitrator may have to be replaced,²² it was observed in Chapter 5 that Article 21 of the DIFC arbitration law does not expressly restrict the right of the arbitrators to resign. The resignation of the arbitrator can cause disruption to the arbitration, especially if it happens at later stage of the proceedings. For this reason and with the aim of preventing unreasonable

²¹ As stated by Schütze, ‘this rule is clear and fosters legal certainty as compared to the rules of other arbitral institutions or national legal systems which merely require the challenge to be filed ‘immediately’ or ‘without delay’. In addition, the time limit of 30 days allows the concerned party to carefully consider and re-think its options, instead of filing a hasty, insufficiently considered challenge in the midst of the proceedings, merely to avoid the objection that the challenge might be time barred. A party might legitimately fear that a situation which is already critical due to a suspicious bias might become worse if a challenge submitted and subsequently denied’. See According to Schütze, disclosure is the only means by which the parties can become aware of potential conflicts of interest. The parties are under no obligation to investigate whether conflicts of interest might exist. See Rolf A Schütze, *Institutional Arbitration: A Commentary*, (Verlag C. H. Beck, 2013) 90–91.

²² These include the arbitrator’s death or resignation, his or her revocation by all parties and inability of the arbitrator to perform his or her function along with the rules.

resignation, it is submitted that Article 21 of the DIFC arbitration law should clearly restrict the rights of arbitrators to resign. This can be done by imposing a requirement that the resignation of an arbitrator must be accepted by the DIFC Court.

The proposed model found in the ICC arbitration rules should be considered with the aim of restricting the rights of arbitrators to resign. The proposed rule could be drafted as follows:

(Replacement of Arbitrators)

An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

Following this change, unreasonable resignations will be rejected, and the arbitration proceedings will be prevented from being interrupted.

Another issue regarding the replacement of arbitrators is that the DIFC arbitration law does not permit truncated tribunals as the ICC arbitration rules do. For the purpose of expediting the proceedings, it is recommended that the DIFC arbitration law permit the continuance of the arbitration proceeding and of the arbitral tribunal's activities at the time the tribunal is truncated. With this aim of facilitating the arbitration process, the DIFC arbitration law should make it possible for the remaining arbitrators to continue. A suggested provision in this regard is available in Article 15(5) of the ICC arbitration rules, which stipulates:

Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.²³

²³ See the ICC Arbitration Rules 2012, art. 15 (5).

The final provision of the DIFC arbitration law related to the replacement of arbitrators is Article 21(b), which states:

A substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, unless otherwise agreed by the parties.²⁴

This means that the same appointment procedure found in Article 17 of the DIFC arbitration law can be applied to the replacement process. This negatively affects the arbitral process, as the appointment process must start from the beginning and will undoubtedly result in delays. To avoid this situation, it is suggested that the DIFC arbitration law should provide the DIFC Court with the discretion to decide whether or not to follow the original nominating process under Article 17.

Provisions avoiding the issue of repeating the same process for appointing substitute arbitrators can be found in a number of arbitral institutional rules, such as those of the ICC. For example, Article 15(4) of the ICC stipulates:

[W]hen an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.²⁵

It is proposed that this provision be incorporated into the DIFC rules to resolve this issue.

²⁴ See *the DIFC Arbitration Law 2008*, art. 21 (b).

²⁵ See *the ICC Arbitration Rules 2012*, art.15 (4); also, the Article 11(1) of the LCIA arbitration rules provides similar approach as the ICC regarding the replacement of arbitrators. For example, it provides that in the event that the LCIA Court determines that any nominee is not suitable, or independent, or impartial or if any appointed arbitrator is to be replaced for any reason, the LCIA Court shall have complete discretion to decide whether to follow the original nominating process under Articles 5,7,8 and 9 of the LCIA Rules.

6.3.3 At the Stage of the Arbitral Proceedings

After the constitution of the arbitral tribunal and before becoming involved in the third stage of the arbitral proceedings, a number of issues of the DIFC arbitration law should be discussed. The issues are the absence of provisions for the transmission of the file to the arbitral tribunal and proof of authority of any party representatives.

First, the DIFC arbitration law does not make any express provisions regarding the transmission of the file to the arbitral tribunal after the arbitral tribunal constitution. To reorganise the DIFC arbitration law at this point, it is recommended that the DIFC arbitration law should insert, at the beginning of its provisions on arbitral proceedings, an article explaining the procedure for the transmission of the file to the arbitral tribunal. For example, an equivalent provision appears under Article 16 of the ICC arbitration rules:

[T]he Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.²⁶

Another concern is that, between the constitution of the arbitral tribunal and its involvement at this stage, the DIFC arbitration law does not have an express provision on the proof of authority of any party representatives. The inclusion of this provision in the DIFC arbitration law will empower arbitral tribunals to verify power of authority at the early stages of arbitration. A recommended provision in this regard comes from the ICC arbitration rules, particularly Article 17, which provides:

At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.²⁷

²⁶ See the *ICC Arbitration Rules 2012*, art.16.

²⁷ See the *ICC Arbitration Rules 2012*, art. 17.

At the arbitral proceedings stage, it is important that the DIFC arbitration law provide its users with a set of rules ensuring that the arbitration procedure is conducted efficiently. This is because the modern practice of international arbitration requires an increase in the efficiency and speed of the resolution of arbitral disputes. The comparative study in Chapter 5 found that the provisions of the DIFC arbitration law regarding the conduct of arbitral proceedings do not address issues of arbitration procedure in an efficient and cost-effective manner compared to those of other arbitral institutions such as the ICC.²⁸ Moreover, the DIFC arbitration law does not offer any formal provisions concerning the terms of reference that can benefit parties by defining their dispute and avoiding any disruptions in the later stages of the proceedings.²⁹ The DIFC arbitration law also does not offer any provisions or techniques concerning case management. The importance of these provisions or techniques is that they allow the arbitral tribunals and parties to discuss and initiate the most appropriate procedure for the arbitration, particularly with the goals of time and costs efficiency. Further, the DIFC arbitration law of 2008 does not contain provisions concerning emergency arbitration procedures, which means that the DIFC rules do not provide effective means for obtaining urgent measures of protection in the early stages of the dispute (i.e. before the constitution of the arbitral tribunal).

With the aim of ensuring that arbitral proceedings under the DIFC arbitration law are conducted in an efficient and cost-effective manner, several innovative provisions found in the ICC arbitration rules should be incorporated into the DIFC arbitration law of 2008. The first set of provisions is found in Article 22 (i.e. the conduct of arbitration),

²⁸ The comparative study in Chapter 5 found some observations. The first observation is that the provisions of DIFC do not introduce the obligation on parties to make every effort to conduct the arbitration proceedings in an expeditious and cost-effective manner. The second observation is that the DIFC arbitration law does not provide the arbitral tribunal with such general power to make procedural orders. For more detailed information refer to Chapter 5.

²⁹ For more detailed information about the advantages of term of reference refer to Chapter 5.

specifically Articles 22(1), 22(2), 22(4) and 22(5). The second set of provisions concerns the terms of reference (i.e. Article 23). The third set of provisions is found in Article 24 (i.e. case management conference and procedural timetable) as well as Appendix IV (i.e. case management techniques) and finally the provisions of Article 29 and Appendix V (emergency arbitrator procedures).

6.3.4 At the Stage of the Award

At this stage, the DIFC arbitration rules do not make express provisions regarding the scrutiny of the award as it appears in the ICC arbitration rules under Article 33. The inclusion of the provision in the DIFC arbitration law will maximise the legal effectiveness of the DIFC arbitral award. This is because it identifies any possible defects of the award, and it ensures the award's general accuracy and quality. Therefore, it is submitted that the provisions of the award under the DIFC arbitration law should provide for the scrutiny of the award. This can be done by requiring that no arbitral award be issued until it has been approved by the DIFC Court.

A suggested provision regarding the scrutiny of the award is found in Article 33 of the ICC arbitration rules, which states:

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.³⁰

³⁰ See the *ICC Arbitration Rules 2012*, art. 33.

6.4 Conclusion and Prospects for Future Research

This thesis has critically examined the procedural issues of the DIFC arbitration law of 2008. It has measured the effectiveness and efficiency of the DIFC arbitration law with other institutional arbitration rules, such as those of the ICC and ACICA. The thesis has provided some insights into how the DIFC arbitration law can be made more effective and efficient in conducting international commercial arbitration in Dubai. This research contributes to its field of knowledge by providing an assessment of the diverse challenges of conducting international arbitration effectively in Dubai, comparing the DIFC arbitration rules and procedures with those of other leading international arbitral institutions such as the ICC and ACICA. These challenges in conducting international arbitration effectively in Dubai directly affect practitioners in the field of arbitration, and potential clients expecting to gain maximum advantage from arbitration.

With regard to the reforms in specific provisions of the DIFC arbitration rules, this thesis has shown how the procedural rules of the ICC and ACICA may be integrated into the DIFC arbitration law to make it more flexible and arbitration-friendly. The legal reforms proposed in this thesis would help the institutional practices related to the DIFC law on arbitration in Dubai and make them more effective and efficient. Further, the findings in this thesis contribute to the existing literature by suggesting possible points of reform, with emphasis on recent trends in the conduct of arbitration in solving large and complex international commercial disputes. Thus, there are at least two main contributions of this research. First, it generates awareness and understanding of current issues relating to effective arbitration laws in Dubai. Second, it provides proposals for significant reforms to enhance the effective and efficient conduct of arbitration in Dubai.

In addition to the legal analysis and reform, it is hoped that the thesis will be useful for practitioners and potential clients, government and law reformers, researchers and students. For practitioners and arbitration users in the UAE and other jurisdictions, the findings of this research are useful in that they identify differences in the practices of arbitration in various jurisdictions. In this way, the thesis provides guidance on how, in international commercial undertakings, arbitrators and commercial parties can work collectively in conducting the arbitration process in an expeditious and cost-effective manner. Therefore, it is hoped that this thesis offers practitioners and arbitration users ways to overcome known obstacles and develop their knowledge of efficient conduct in international arbitration.

The findings of this thesis may also be beneficial for the government and law reformers in Dubai. The thesis covers recent comprehensive reforms of arbitration rules in a number of other jurisdictions, and this work may encourage the Dubai Government and law reformers to adopt similar new provisions in international arbitration. Adopting the most recent and best practices in international arbitration will demonstrate the proactive role and the pro-investment policy of the Dubai leadership, and it will promote the UAE to the forefront of arbitration development in the Gulf region and the Middle East.

The thesis may also be a useful guide for researchers and students, as it provides advanced research in the law and practice affecting international arbitration. It examines international commercial arbitration from the perspectives of three jurisdictions, namely the UAE, Australia and France. Therefore, researchers and students can use it to improve their understanding of both foreign and domestic statutes on the subject. Further research projects may be developed based on the issues discussed here.

In general, the complexity of disputes is increasing rapidly in Dubai and all over the world. The rise of the complexity of disputes requires the continual and effective revision of arbitration laws and their implementation. As a result, additional research on how to improve the effectiveness and efficiency of arbitration laws in Dubai will need to be carried out in order to meet the evolving challenges of this field.

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