

**The Enforcement of Electronic Arbitral Awards in
International Commercial Disputes under the New York Convention:
The Case of Dubai and DIFC Courts**

by

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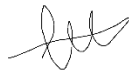
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Student Declaration

*I declare that while registered as a candidate for the research degree, I have not been a registered candidate or enrolled student for another award of the University or other academic or professional institution

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Abstract:

When arbitration is conducted online, some inherent, fundamental issues arise which could potentially undermine the enforceability of the final award under the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the “New York Convention” (NYC). The study identifies four key challenges which a winning party seeking the enforcement of an electronic award according to the NYC might face with relation to the enforcement of that award: the validity of electronic arbitration agreements, the enforceability of consumer arbitration agreements concluded online, obstacles arising out of the conduct of the arbitration procedures online and the issue of electronic authentication of the final award.

The study first critically analyses the NYC, to identify some key problems in relation to each of the said issues which might compromise or undermine the enforcement of awards rendered in online arbitration; it then makes suggestions as to some possible amendments to the NYC. The study then goes on to consider these issues in the context of the applicable law before the Dubai and DIFC Courts as the enforcement courts, to examine their ability to enforce such an award. The study concludes with several recommendations for both practice and law reform in the jurisdictions discussed, in relation to each issue.

The study is original in that it is the first comprehensive analysis of all the said issues, from formation of the arbitration agreement, through various stages of online procedures, to the final enforcement of the award, within the examined jurisdictions. Further, the recommended changes would help to improve the efficiency and reliability of the courts of Dubai and DIFC with regard to the enforceability of an award given via online arbitration. This is a particularly important issue in light of the current and anticipated growth in the prominence of the identified jurisdictions as financial and business centres, the centrality of international arbitration to international business and the fundamental need for confidence in the enforceability of the courts and arbitration awards.

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Dedication

I dedicate this thesis to my parents

The reason of what I become today, thanks for your great support and continues care.

To my brothers and sisters for their support, love and encouragement throughout my life
and especially during the period of this PhD.

Table of Abbreviations

This contains organized alphabetical list of abbreviations on international conventions, National legislations, and law journals referred in the text and footnote.

AAA	American Arbitration Association
ADCCAC	Abu Dhabi Commercial, Conciliation and Arbitration Centre
ADR	Alternative Dispute Resolution
AEADE	Asociacion Europea de Arbitaje de Derecho y Equidad
Afr. J. Int'l & Comp. L	African Journal of International and Comparative Law.
Am. Law	The American Lawyer's annual report
Arab LQ	Arab Law Quarterly
Buff L Rev	Buffalo Public Interest Law
Bus. L.R	Business Law Review.
DC	Dubai Courts
DIAC	Dubai International Arbitration Centre
DIFC	Dubai International Financial Centre
DIFCC	Dubai International Financial Centre Court
ECJ	European Court of Justice
EDI	Electronic Data Interchange
ESI	Electronic Stored Information
ESI	Electronic Stored Information
ETCL	UAE Federal Law 1/2006 on Electronic Transactions and Commerce
EWCA Civ	Court of Appeal Civil Division
FAA	US Federal Arbitration Act
FIDIC	International Federation of Consulting engineering
Fordham L.Rev	Fordham Law Review
GCC	Gulf Cooperation Council
GCC Protocol	The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications
Hamline J Pub L & Pol'y	Hamline journal of public law and policy
Harv Bus Rev	Harvard Business Review

IBA	International Bar Association
ICAC	International Commercial Arbitration Court
ICC	International Court of Arbitration
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
Ind L J	Indian Legal Journals
Int'l Arb. L. Rev.	International Arbitration Law Review
J. Int'l Arb	Journal of International Arbitration
LCIA	London Court of International Arbitration
LCIA	London Court of International Arbitration
NYC	The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. "New York Convention"
NYNF	New York No Fault
OCR	Optical Character Recognition
ODR	Online Dispute Resolution
Riyadh Convention	The Riyadh Convention on Judicial Cooperation between States of the Arab League
Sri Lanka J Int'l L	Sri Lanka Journal of International Law
U. Tol. L. Rev	The University of Toledo Law Review.
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
W.L.R.	Weekly Law Reports
WIPO-ECAF	World Intellectual Property Organization Electronic Case Facility

1 Chapter One: Introduction

1.1 Context of the problem

The main aim of the study is to examine whether the law in the Dubai Courts (DC) and the Dubai International Financial Centre (DIFC) Courts (hereinafter DIFCC) are ready to enforce and recognise awards conducted via online arbitration according to the rules of the New York Convention (NYC).

Arbitration is considered as the most important and successful method of dispute resolution, given its role in international disputes. It is able to overcome a number of shortcomings in traditional litigation, including lengthy procedures, and issues of applicable law and high costs, and can facilitate enforceability of the final award at the international level. However, as the Internet occupies much of our daily life and is extremely important for electronic commerce, some scholars have started to examine the potential of IT in arbitration.¹ IT is considered suitable for settling any type of dispute, as it increases the efficiency and effectiveness of settling disputes in both online and offline transactions.² Some researchers have already examined the issues and obstacles to adopting online dispute resolution.³ Despite the importance of online arbitration in

¹ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004). Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009). Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006).

² Slavomir Halla, 'Arbitration Going Online-New Challenges in 21st century' (2011) 5 Masaryk UJL & Tech. 215.

³ Tim Wallis, 'Online dispute resolution: will the talk turn to action?' (2015)(3) Journal of Personal Injury Law 210. Darin Thompson, 'Implementing online dispute resolution in a public justice system' (2014) Computers & Law 28. Juan Pablo Cortes, 'Online dispute resolution services: a selected number of case studies' (2014)(6) Computer and Telecommunications Law Review 172. Ibrahim Al Swelmiyeen, Ahmed Al-Nuemat and Andy Kok, 'Online arbitration in the social network world: mobile justice on iPhones' (2013) Information & Communications Technology Law 146. Ibrahim Al Swelmiyeen, Ahmed Al-Nuemat and Ibrahim Al-Nuemat, 'Disputes resolution in cyberspace: to "duello" or to arbitrate' (2013)(9) European Intellectual Property Review 533. Pablo Cortés and Fernando Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' (2013) 62(02) International and Comparative Law Quarterly 407. Julia Hornle, 'Encouraging online alternative dispute resolution (ADR) in the EU and beyond' (2013) 38 Eur Law Rev 187. Julio César Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the Way Forward?' (2013) 79(3) Arbitration 256. Aura Esther Vilalta, 'Online claims: new channels for small businesses' (2012) 14(5) E-Commerce Law & Policy 11.

commercial and high-value disputes, most existing studies have examined non-binding and binding online dispute resolution for low- and high-value disputes.⁴ This study examines online arbitration specifically for both low- and high-value consumer or commercial disputes.⁵

In 2004 more than 25 providers offered online arbitration services.⁶ The Virtual Magistrate, the first online dispute resolution (ODR) provider,⁷ was established in March 1996 as an Internet-based arbitration service that assisted in the initial resolution of computer network disputes. It offered a means of rapid, interim resolution for users of online systems, those who claimed to be harmed by wrongful messages, postings, and files and system operators. Nowadays, many of the pioneering ODR providers have ceased to operate for a numerous reasons, with new providers entering the market.⁸ The most recent is Modria, considered as one of the leading providers in both high- and low-value disputes.⁹

According to the principle of party autonomy, relying on IT to settle disputes through arbitration is not an issue as it gives the parties the ultimate power to choose the preferable

⁴ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004). Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009). UNCITRAL Working Group III (Online Dispute Resolution), Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules (March 24–28, 2014). http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html Last Accessed 01/06/2016.

⁵ In regard to consumer disputes it should be noted that there is a law that has been drafted in the EU which aims to regulate the matter of online arbitration in consumer disputes. Directive 2013/11 on alternative dispute resolution for consumer disputes [2013] OJ L165/63, Regulation 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

⁶ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004), P.34 (such as the AAA; the ADR Group; ARyME; BBBOnline; the BRC; the CIArb; the Cibertribunal Peruano; Consensus Mediation; Dispute Manager; eNeutral; JAMS; MARS; NovaForum; the Online Public Disputes Project; Online Resolution; the PrivateJudge.com; Resolution Canada; the Resolution Forum and SettleTheCase).

⁷ Virtual Magistrate, <http://www.vmag.org>

⁸ Such as eBay; Rechtwijzer 2.0; Canadian Civil Resolution Tribunal; Financial Ombudsman Service; Nominet, Resolver; Youstice; Online Schlichter; Cybersettle; Modria and Traffic Penalty Tribunal.

⁹ Juan Pablo Cortes, 'Online dispute resolution services: a selected number of case studies' (2014)(6) Computer and Telecommunications Law Review 172.

procedures;¹⁰ however, as online arbitration is still developing, there may be obstacles. The main difficulty is in enforcing the final judgment according to the provisions of the NYC. This research therefore examines in depth the legal issues of online arbitration under the NYC provisions, with special reference to enforcement before DC and DIFCC.

Dubai is one of the seven emirates that comprise the UAE. The growth of international trade in Dubai has produced a variety of types of dispute and nationalities of the parties to those disputes. International parties generally avoid the DC and prefer arbitration, given the barriers presented by the DC, such as lengthy procedures, conducting them in Arabic (requiring all copies of documents to be independently certified and translated into Arabic), and the perceived bias of judges in protecting the interests of the national establishment.¹¹ The DIFC was instituted as a global financial centre to connect East and West, including businesses and financial institutions from all over the world, including the Middle East, Africa and South Asia. To circumvent the barriers presented by the DC, the DIFCC is an option for parties seeking enforcement of arbitration in Dubai.¹²

A party is allowed to enforce an arbitral award before DIFCC irrespective of the seat or origin of such an award. Generally, once the original or certified award is submitted to the DIFC Enforcement Court, the award is recognised as binding within the DIFC. Once the award is enforced and recognised within the DIFC, then the DIFCC court order is

¹⁰ Richard Hill, "On-Line Dispute Arbitration: Issues and Solutions" (1999) 15(2) *Arbitration International* 199. See also Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" (2002) *ADR Online Monthly* 5; and Julia Hornle, *Online Dispute Resolution*, in John Tackaberry et al. (eds), *Bernstein's Handbook of Arbitration Law & Practice* (London: Sweet & Maxwell, 2003), pp.787–805. Legal scholars have raised several other concerns about: distrust of the operability and privacy of internet systems, fear about the "unseen" nature and neutrality of online arbitration providers, technological and presentation imbalances, elimination of face-to-face communications and the lack of voice; see Schmitz, Amy, "Drive-Thru' Arbitration in the Digital Age: Empowering Consumers through Regulated ODR" (2010) 62 *Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR* (June 16, 2010). *Baylor Law Review* 178. Julio César Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the Way Forward?' (2013) 79(3) *Arbitration* 256.

¹¹ Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) *Arbitration* 156.

¹² DIFC Court Law No.10 of 2004 art.24(1). Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) *Arbitration* 156. *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* unreported 27 May 2014 (CFI (DIFC)). Lucas Pitts and Dustin Appel, 'The DIFC as a conduit jurisdiction for enforcement of arbitral awards in Dubai' (2016)(3) *International Arbitration Law Review* N30.

binding and enforceable before the DC,¹³ which does not examine the merits of the award or the DIFCC judgment.¹⁴

The DIFCC enables parties who are looking to enforce awards in Dubai to benefit from their own courts and international judges who are experienced and supportive of international arbitration.¹⁵ It is arguable that relying on the DIFCC enables the application of high international standards in the enforcement of arbitral awards, which helps to minimise the risk of setting the award aside or the likelihood of the enforcement of the final award.¹⁶

Some studies that examined the issue of online arbitration under the NYC provisions¹⁷ have discussed a number of points, including the validity of online arbitration agreements, due process requirement, issues regarding the enforceability of awards and the arbitration community with regard to the online world and the current legal framework.¹⁸ However, these studies argue that the future of online arbitration is still vague and the issues mentioned above might prevent its development. An increasing number of consumer disputes are referring to both offline and online arbitration, which may raise the risk of enforcing consumers to unfair arbitration especially in e-commerce;¹⁹ hence, the courts

¹³ i.e. provided it is final and translated into Arabic. Law 12 of 2004 art.7.

¹⁴ *ibid.*

¹⁵ For example, Sir Anthony Evans (Chief Justice) and Mr Michael Hwang SC (Deputy Chief Justice).

¹⁶ Christopher Mainwaring-Taylor, 'Amended Arbitration Law for the Dubai International Financial Centre: DIFC as the seat of arbitration' (2008) 11(6) *International Arbitration Law Review* N90.

¹⁷ Slavomir Halla, 'Arbitration Going Online-New Challenges in 21st century' (2011) 5 *Masaryk UJL & Tech.* 215. Nasir Motassem and Hong-lin Yu, 'Can online arbitration exist within the traditional arbitration framework?' (2003) *Journal of International Arbitration* 455.

¹⁸ Alejandro Lopez Ortiz, 'Arbitration and IT' (2005) 21(3) *Arbitration International* 343. Nasir Motassem and Hong-lin Yu, 'Can online arbitration exist within the traditional arbitration framework?' (2003) *Journal of International Arbitration* 455. Julia Hornle, 'Online dispute resolution: the emperor's new clothes? Benefits and pitfalls of online dispute resolution and its application to commercial arbitration' (2003) *International Review of Law Computers & Technology* 27.

¹⁹ Arbitration clause usually part of the main contract and before any dispute arises. An arbitration agreement is a written contract in which two or more parties agree to settle a dispute outside of court. The arbitration agreement is ordinarily a clause in a larger contract.

should provide parties with sufficient protection to avoid referring them to unfair arbitration.

This research was conducted in the context of current efforts to develop online arbitration and benefit from IT to settle disputes online at the international level. It aims to discuss the arbitration law in the UAE and examine its ability to produce and enforce an electronic arbitral award that complies with the NYC before the DC and DIFCC. Moreover, it will contribute to and focus on two main issues: the ability to enforce an electronic arbitral award in the UAE, and whether the current legal system supports the provisions of the NYC.

The researcher chose DC and DIFCC as Dubai is considered as a hub for international commerce. Both bodies are developing systems in the field of e-commerce and ODR, although there is no current legislation to regulate this type of dispute. Each jurisdiction is different from the other as the Dubai Jurisdiction is a civil law jurisdiction while the DIFC is a common law jurisdiction. The study will examine whether the winning party will be able to benefit from either jurisdiction to enforce an electronic arbitral award. Moreover, the DC is much cheaper than the DIFCC, while its procedures are in Arabic, as against English in the DIFCC. Hence, the study will explore the benefit of the DC enforcing such an award.

1.2 Aims of the project

The researcher will examine the legal issues around enforcement of the electronic arbitral award before DC and DIFCC under the NYC, and the difficulties and obstacles facing such enforcement.

The originality of the work will be clearly focused on the ability to enforce an electronic arbitral award that is recognised before the DIFCC and DC according to the provisions

of the NYC. A number of issues are related to the application of the NYC, while others result from its limitations. In order to achieve the aim of the study, the following obstacles and matters are addressed:

1. Relying on the electronic arbitration agreement may raise issues regarding validity pursuant to Article II of the NYC; hence the study examines whether the current legal system in DC and DIFCC would be able to solve this matter and support the validity of arbitration agreements concluded via modern technology.
2. E-commerce may lead consumers to unfair arbitration; hence the study will critically analyse the issue of consumer protection under the DC and DIFCC systems.
3. Under the NYC there are minimum requirements that the arbitral tribunal should meet. This study critically examines the due process and equal treatment requirements under the NYC, DC and DIFCC legal systems. Further, the study examines the effect of these requirements on conducting the procedures online and how it may affect the enforceability of the final award before DC and DIFCC.
4. The NYC requires the final award to be authenticated and certified before submitting it before the enforcement court. The study examines the validity of relying on an electronic signature to authenticate the final award, and examines the validity and enforceability of electronic signatures before the DC and DIFCC.

Overall, the study examines whether the current legal system in Dubai and DIFC is sufficient and adequate to validate and enforce an award that is concluded via online arbitration. Based on the results, recommendations will be made.

1.3 Structure of the thesis

The thesis is divided into eight chapters. After the introduction, chapter two briefly explains some issues regarding other dispute mechanisms, including litigation, negotiation and mediation. Hence, it identifies the shortcomings of such mechanisms and then posits arbitration as the ideal method to settle international commercial arbitration. The second part of chapter two investigates the advantages of arbitration, and explains how IT can enhance it through efficiency, effectiveness and competence; it then suggests different arbitration tools that could be utilised in online arbitration. The last part of the chapter describes a number of current arbitration institutions.

The third chapter provides a summary of the current legal system of both DC and DIFCC. A brief explanation of the background of the legal system in the UAE helps in understanding the legal system in DC and DIFCC. Despite Dubai being one of the seven emirates of the UAE, it has its own legal system. Moreover, DIFCC, at the heart of the Emirate of Dubai, has its own laws and jurisdiction. The importance of this chapter is to explain the connections between the DIFCC, Dubai and other UAE states, and to illustrate the applicable law that is discussed and examined throughout the thesis. Indeed, it would be difficult to commence any work in this area of law without introducing these basic legal principles and characteristics.

Chapter four investigates the matter of electronic arbitration agreements. The first obstacle that will be discussed is whether the electronic arbitration agreement fulfils the writing requirement pursuant to Article II(2) of the NYC. This issue has recently been examined extensively, due to the lack of express provision in the NYC to validate such an agreement, making the enforceability of electronic agreements unreliable, and raising issues regard the enforceability of the final award based on arbitration agreements concluded via modern technology before DC and DIFCC. The study aims in this chapter

to explore whether the legal system is sufficient to enforce and recognise such an agreement by examining the provisions of the NYC, DC and DIFCC.

Chapter five examines the matter of consumer protection from unfair arbitration agreements. In the world of the Internet, consumers may be enforced to arbitration without having the intention or even knowledge of the existence of such an arbitration agreement. Therefore, the work considers whether consumers should be well protected from being forced into unfair arbitration by giving the enforcement court the ability to examine the arbitration agreement and whether the arbitration is fair for both parties. Countries aim to protect their consumers by invalidating unfair arbitration agreements and considering them contrary to public policy, which allows enforcement courts to set aside awards according to Article V(b)(2) of the NYC. Hence this approach should be examined if it is to be applied by DC and DIFCC, and procedures are suggested to provide consumers with the required protection.

Chapter six examines the extent and effect of monitoring arbitral procedures. The NYC provides grounds for the enforcement court to examine arbitral procedures. If the arbitral tribunal fails to comply with these procedures the final award might be set aside. The study examines the applicable law and the main elements that should be examined in order to avoid setting aside the final award on these grounds. The second part of the chapter examines the theory of delocalisation and how it may affect the enforcement of the final award before DC and DIFCC. The final part investigates the matter of Electronic Stored Information (ESI) production from two perspectives: whether the parties should agree on the rules to regulate the production of the ESI; and the matter of using the US style of ESI production in arbitration. The chapter aims to examine whether these perspectives would affect the enforceability of the final award before DC and DIFCC.

Chapter seven investigates the authentication requirement under the NYC, and examines the ability to authenticate an award and arbitration agreement electronically using an electronic signature. In order to achieve this goal, the study examines the validity of electronic signatures under the applicable law before DC and DIFCC.

In conclusion, the study makes recommendations to reform the law in both Dubai and DIFC in order to consider the DC and DIFCC as friendly jurisdictions, allowing the parties to guarantee the enforcement of the final award concluded via online arbitration.

1.4 Methodology

This study focuses on the Dubai and DIFC jurisdictions. However, other jurisdictions are referred to because of the lack of cases and books in Dubai and DIFC. Moreover, as the NYC is an international convention, relying on other jurisdictions will help to improve understanding of the rules and provisions of such a convention, and provide sufficient material for this thesis.

The study will utilise the black-letter methodology to examine the enforceability of awards concluded through online arbitration before DC and DIFCC according to the NYC. Both theoretical and legal aspects will be critically analysed through written material from law books, journal articles and various reports, in addition to legislations, case law and arbitral awards.

The significance of the NYC is that it is considered as the most important and successful convention in the field of commercial arbitration, to which 150 countries have acceded so far.

Given the lack of cases in DC and DIFC in regard to the NYC and in order to provide a better understanding of its provisions and explore its effectiveness in regard to using IT,

the study will examine the application of the NYC in courts other than DC and DIFCC, comparing cases from the US, UK and other countries.

Each chapter of this thesis will examine the effect of relying on the NYC to enforce awards concluded via electronic methods before DC and DIFCC. According to the findings, the study will suggest reforms to improve and develop the legal system in DC and DIFCC, to render them more germane to the enforcement of online arbitration awards.

The UAE is aiming to play a major role in the field of arbitration, especially at the international level. In order to reach this stage it has acceded to the NYC. Online arbitration is a promising method and parties may be forced to use IT in arbitration at any stage of their arbitration proceedings, which will affect the enforcement of the award. Therefore, the effect of merely using IT in the enforcement of the award under the terms of the NYC should be examined to add more certainty to such enforcement before DC and DIFCC.

As the main aim of the study is to improve and reform the law in Dubai and DIFC in order to guarantee the enforcement of the final award conducted via online arbitration, the black-letter method will be beneficial, enabling the researcher to compare and explain legal meanings and principles in some detail. Furthermore, the black-letter approach seeks to study primary sources of law, clarifies issues and focuses on legalistic questions about the doctrinal meaning of the law.

Although this study focuses on DIFC and DC Law, it is not a comparative study in the traditional sense of the term. The methodology is used here to critically analyse a description and exposition of legal rules as contained in legislative instruments and case law. Therefore, the main purpose of adopting the methodology for this study is to provide

a detailed account of NYC provisions as well as the courts' approaches in interpreting these provisions, by referring to different courts' decisions as well as academic commentaries on the scope of each question throughout the study, such as the matter of the online arbitration agreement, procedural requirements and enforcement issues. For instance, the black-letter methodology helps to answer several questions such as "what are the minimum required procedures?" and "what are the requirements to consider the online arbitral agreement valid?" Thus the methodology will enable the study to identify the requirements in relation to the issues that will be discussed such as the arbitration agreement, consumer protection, due process and enforcement, in order to apply them in the context of the DC and DIFCC legislation.

Despite the importance of online arbitration and the enforceability of the final award, few scholars have examined this matter. Existing literature includes some studies that examined each matter separately; some articles investigated consumer protection, others the validity of electronic arbitration agreement, and so on, but this is the first study to explore the enforcement of online arbitration awards in the important global trading context of Dubai.

2 Chapter Two: Online Commercial Arbitration: Prospects and Challenges

2.1 Introduction

Technology is absolutely integral to modern daily life in terms of work and leisure, and most daily communications now happens online, using PCs, tablets and smartphones. In the UK over 78% of the population aged 14 years and over are regularly online.¹ Another study stated that 35% of lawyers have been able to obtain clients through electronic social networks such as LinkedIn.² Moreover, IT has improved the way in which lawyers communicate with clients, relying on SMS text messaging, emails or instant messages via special applications instead of traditional letters.³

According to the *Innovation in Law Report 2014*,⁴ many lawyers are ready and enthusiastic to incorporate new technologies into litigation, with 90% believing that new technologies help to improve outcomes for clients, 57% supporting the compulsory retention of all communication in the court process and 50% backing the use of virtual courts in certain circumstances.

In international commercial disputes, parties have various options for settling their disputes, including litigation, arbitration, mediation, negotiation and other mechanisms. This chapter examines each mechanism separately and highlights the impact of technology on these methods of dispute resolution. The main advantages of online arbitration and the attractiveness of this mechanism are explained, especially as an instrument to settle international commercial disputes.

¹ William H. Dutton, Grant Blank and Darja Groselj, *Cultures of the Internet: The Internet in Britain. Oxford Internet Survey 2013* (Oxford: Oxford Internet Institute, 2013): "In 2013, 78% of the UK population said that they use the Internet."

² www.adweek.com Last Accessed 06/04/2016.

³ For example: inCase App: www.aequitaslegal.co.uk Last Accessed 06/04/2016.

⁴ Hodge Jones & Allen "Innovation in Law" (November 2014), <http://www.hja.net/wp-content/uploads/hja-innovation-in-law-report-2014.pdf> Last Accessed 06/04/2016.

In the first part, the chapter examines the advantages and disadvantages of non-arbitrative dispute resolution routes, including litigation, Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR).

The second part of the chapter is divided into four sections in order to consider the efficiency and importance of online arbitration. The first states the main advantages of offline arbitration in general and online arbitration in particular, in international commercial disputes. The second section explores how IT enhances arbitration, and the third discusses current online arbitration systems. The final section discusses the separate IT tools that parties may rely on if they conduct part of the procedure online.

2.2 Resolution Methods for International Commercial Disputes

There are different methods to settle international commercial disputes, either by referring to courts, such as litigation, or by settling disputes out of courts by different types of ADR and ODR, such as arbitration, mediation or negotiation. This section defines each type and examines their main advantages and disadvantages to explain why arbitration could be more appropriate in international commercial disputes.

2.2.1 Litigation

Litigation is the ordinary mechanism and traditional form of dispute resolution. However, in international disputes, litigation might be inappropriate as it may raise some issues such as the issue of courts' jurisdiction to settle the dispute,⁵ and the issue of enforcing the final judgment before the enforcement court.⁶ Further, the ability to appeal the court

⁵ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p 10. Halil Rahman Basaran, 'Identifying international commercial arbitration' (2016)(4) *International Trade Law & Regulation* 91. Halil Rahman Basaran, 'Is International Arbitration Universal' (2014) 21 *ILSA J.Int'l & Comp.L.* 497.

⁶ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p 11.

decision might bear extra costs on parties beside the delay of the procedure, therefore litigation might be time-consuming and impose extra costs on both parties.⁷

The issue of jurisdiction in litigation might arise, as there might be a conflict between the jurisdictions of different national courts in international disputes.⁸ Enforcing the final judgment might raise several issues. On the one hand, the winning party will be confronted by the issue of dealing with foreign court procedures with which he might be unfamiliar, which implies the need to engage a foreign lawyer to enforce the court judgment.⁹ On the other hand, the enforcement court may refuse to enforce the judgment on the basis of lack of international treaties that oblige the country to enforce it.¹⁰

It can be concluded that litigation is not an ideal mechanism to settle international disputes for several reasons, including practical considerations of high costs, lengthy court processes, jurisdictional disputes and barriers to enforcement of decisions at the international level. To overcome the limitations and shortcomings of litigation in international disputes, parties started to move toward settling their disputes by relying on ADR.¹¹

2.2.2 *Alternative Disputes Resolution (ADR)*

In the last few years, many countries started looking forward for new methods to settle international disputes instead of relying on the traditional judiciary system.¹² Attention

⁷ *ibid*, p 13. Rana Rashda, 'Is adjudication killing arbitration?' (2009) 75(2) *Arbitration* 223-230.

⁸ Enobun Ernest, 'Arbitration as an alternative to litigation: does it preserve party relationships post awards?' (2008)(8) *International Energy Law Review* 295.

⁹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), p.26.

¹⁰ *ibid*. Halil Rahman Basaran, 'Identifying international commercial arbitration' (2016)(4) *International Trade Law & Regulation* 91. Rana Rashda, 'Is adjudication killing arbitration?' (2009) 75(2) *Arbitration* 223-230.

¹¹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), p.42. Halil Rahman Basaran, 'Is International Arbitration Universal' (2014) 21 *ILSA J.Int'l & Comp.L.* 497. Richard Naimark and Stephanie Keer, "What Do Parties Really Want From International Commercial Arbitration?" (2003) *AAA Dispute Resolution Journal* 78-86.

¹² Halil Rahman Basaran, 'Identifying international commercial arbitration' (2016)(4) *International Trade Law & Regulation* 91

has increasingly focused on ADR processes as they are generally cheaper, faster and less cumbersome than litigation.¹³ There are various forms of ADR, the most prevalent of which are arbitration, mediation and negotiation.

ADR is defined as a collective expression for all dispute resolution mechanisms that interpose a neutral third party but which are out of the courts, and it is a synonym for extra-judicial or “out of court” dispute resolution.¹⁴ However, despite the numerous advantages of ADR over litigation, there are still several issues that it fails to solve in international disputes. For example, in ADR, face-to-face communication bears more costs and delay on parties, as one of the parties still have to travel from one country to another in order to meet with the other party to negotiate their dispute. Moreover, the same issue applies if parties want to refer to mediation or arbitration. As in mediation, the party needs to meet with mediator while in arbitration, parties are required to attend to present their arguments in person or for a hearing if applicable.

Therefore, in order to raise the efficiency and effectiveness of the ADR mechanisms in international disputes, some scholar suggested that ADR should take place online, which might help to save extra time and cost.¹⁵

2.2.3 *Online Disputes Resolution (ODR)*

ODR is a form of dispute resolution that has arisen as a consequence of the recent rapid development and the relationship between ADR and IT. It is defined as:

“dispute resolution outside the courts, based on information and communications technology and in particular, based on the power of computers to efficiently process

¹³ *ibid.* Halil Rahman Basaran, 'Is International Arbitration Universal' (2014) 21 ILSA J.Int'l & Comp.L. 497.

¹⁴ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004).

¹⁵ Ethan Katsh and Leah Wing, 'Ten years of online dispute resolution (ODR): Looking at the past and constructing the future' (2006) 38 U.Tol.L.Rev. 19.

enormous amounts of data, store and organise such data and communicate it across the internet on a global basis and with speed.”¹⁶

ODR was established in 1996 and it quickly spread in various directions with the rise of e-commerce and its reputation for fostering efficiency and cost-savings for courts and disputing parties.¹⁷ ODR is expected to be ideal for settling international disputes compared to litigation and ADR, as it provides solutions for the issues that have been found in ADR and litigation, such as the enforceability of the final decision, saving extra costs and time.¹⁸ The main scheme of classification ODR and according to the most commonly practiced methods can be divided into three main types: online negotiation, online mediation and online arbitration. Each type is discussed in further detail below.

2.2.4 Online Negotiation

Negotiation is defined as the way in which people contact each other to reach an agreement.¹⁹ For this, negotiation is considered as the most commonly practised form of dispute resolution; negotiation implies reaching amicable solutions, making it a highly desirable way of resolving disputes when possible.²⁰

Before the advent of the internet parties used to negotiate in courthouse corridors or in offices, but nowadays they can negotiate through the web.²¹ The advancement of

¹⁶ Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009), p.75; Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004), p.7.

¹⁷ Ethan Katsh and Leah Wing, 'Ten years of online dispute resolution (ODR): Looking at the past and constructing the future' (2006) 38 *U.Tol.L.Rev.* 19.

¹⁸ Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International, 2004). Catherine Kessedjian and Sandrine Cahn, 'Dispute resolution on-line' (1998) *The International Lawyer* 977. Lan Q. Hang, "Online Dispute Resolution System: The Future of Cyberspace Law" (2001) 41 *Santa Clara Law Review* 854. Laura Klaming et al., "I Want the Opposite of What You Want: Reducing Fixed-pie Perceptions in Online Negotiations" (2009) 1 *Journal of Dispute Resolution* 139.

¹⁹ Julio César Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the Way Forward?' (2013) 79(3) *Arbitration* 256.

²⁰ *ibid.*

²¹ Regina Fazio Moruca, 'The electronic negotiator (conversation with Kathleen Valley)' (2000) 78(1) *Harv Bus Rev* 16.

electronically based negotiations (online negotiation) means that it is not required to meet in a particular place. The main advantage of online negotiation is that it helps to save costs for parties, especially in international disputes, where it is more likely that parties will be living in different countries, in which case traveling from one place to another merely to negotiate is inefficient.

The main feature of negotiation is that it is informal and there is no third party to serve as a mediator. It is left to the disputing parties to decide how, where and when they will negotiate. In addition, negotiation procedures are usually held without reference to specific law or legal proceedings. In other words, parties have full control over the negotiation procedures and they have the freedom to choose the most appropriate procedures without the presence of any external regime.

Some commentators have suggested that online negotiations should be conducted via video conference rather than by the exchange of emails,²² claiming that the latter could result in misunderstandings between parties that can scupper negotiations. Noam Ebner described the disadvantages of negotiations via email as “increased contentiousness, diminished information sharing, diminished process cooperation, diminished trust and increased effects of negative attribution.”²³

This type of resolution is important, because many disputes could be settled and parties could reach an agreement before they refer their disputes to litigation or arbitration, which will help to save extra costs and time on the disputants. Therefore, it is recommended that parties negotiate any dispute that arise before submitting it to arbitration or litigation or any other dispute resolution mechanism.

²² Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009), p.75; Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004), p.7.

²³ Noam Ebner and others, 'You've Got Agreement: Negotiating via Email Rethinking Negotiation Teaching Project' (2009-2010) 31 *Hamline J Pub L & Pol'y* 427.

However, negotiation can be efficient when parties are willing to reach a settlement, and they both have a close point of view toward the settlement. Otherwise, if parties failed to reach an agreement they will need to rely on a binding mechanism to settle their dispute, such as arbitration and litigation. Nevertheless, before referring to any binding dispute mechanism, parties may submit their dispute to mediation if they are willing to settle the dispute in an amicable way.

2.2.5 *Online Mediation*

Online mediation can be defined as “online negotiation carried out with the assistance of a third party.”²⁴ The definition is derived from the fact that online mediation is the process of negotiation and communication between two parties with the interaction of a third party named the mediator. The procedures may take place wholly or partly online.

As mentioned previously, there is generally no mediator in negotiation, however the procedures are different in mediation, as it implies the intervention of a third party (i.e. a mediator). The procedures start when both parties turn to a third party or mediator, who listens to their presentations and then both of their cases separately. The mediator then works to find common areas and to help parties bring their respective positions together to reach final agreement.²⁵

The main advantage of conducting mediation online is that none of the parties will have to travel and pay extra costs in order to meet with the mediator/third party.²⁶ As mediation is not a compulsory procedure,²⁷ referring cases to online mediation might prevent them

²⁴ Stephen B Goldberg, *Dispute resolution: Negotiation, mediation, and other processes* (Aspen law & business, 2003), p.107.

²⁵ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009), p 46.

²⁶ Susan Summers Raines, “Can Online Mediation be Transformative?: Tales from the Front” (2005) 22(4) *Conflict Resolution Quarterly* 437. Richard S. Granat, “*Creating an Environment for Mediating Disputes on the Internet*” (1996) *A Working Paper for the NCAIR Conference on On-line Dispute Resolution*.

²⁷ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), P.43.

from bearing extra costs, especially as parties may ultimately fail to reach a solution in any case. On the other hand, conducting the procedures online is not always efficient, and one of the key disadvantages of using online mediation is the lack of verbal communication compared to the traditional mediation, which might affect the mediation procedure and its potential to settle the dispute.²⁸

Both offline and online mediation rely the core aspect of “good faith”,²⁹ whereby both parties should in good faith seek to genuinely settle the dispute. Otherwise, mediation might be just a waste of time and could be used to delay the settlement, for the reason that any of the parties are allowed to leave the mediation procedures without any consequences, and neither the mediator nor the opposite party can oblige him to continue or to stay in the procedures.

Another important observation here is that the mediator cannot solely make the final decision/agreement. In other words, the mediator needs the consent of both parties before rendering a final binding solution.³⁰ Therefore, in mediation, in order to reach a final decision, both parties should agree on a solution that is mutually beneficial.

Mediation might be effective and efficient in settling disputes, but as the mediator does not have the authority to render a binding decision on parties without their agreement, the role of the mediator is limited to helping parties understand the risks associated with continuing a dispute. In other words, the mediator should explain to the disputants the potential decision according to the facts referred to in a binding resolution, hence inducing both parties to try and solve the dispute to save extra costs and time.

²⁸ Joseph B. Stulberg, “Mediation, Democracy, and Cyberspace” (2000) 15(3) *Ohio State Journal on Dispute Resolution* 641. Richard Victorio, “Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century” (2001) 1 *Pepperdine Dispute Resolution Law Journal* 293.

²⁹ Andrew Maguire and Robert Rhodes and Andrew Maguire, ‘Have the risks of ADR escalation clauses reduced?’ (2016) 82(1) *Arbitration* 16.

³⁰ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 7.

As discussed above, a large number of cases have been solved by mediation, but parties cannot rely on mediation all the time, and relying on the “good faith” of parties might fail. However, mediation and negotiation share the same issue in regard to being nonbinding disputes, and if the parties failed to reach a final agreement or if the losing party refused to comply with the mediator settlement, then the winning party does not have any choice other than settling the dispute by a binding dispute mechanism, such as arbitration and litigation.

In conclusion, negotiation and mediation should be used as supporting tools to settle international commercial disputes, and conducting the procedures online might help to reduce extra expenses and delays. However, as these mechanisms are not binding on parties unless they both agreed on a settlement, then parties may need to refer for a binding dispute resolution (litigation or arbitration) to secure their rights, in case mediation and negotiation failed. Nonetheless, as explained earlier, litigation might not be the ideal solution for settling international commercial disputes due to shortcomings at the international level, especially regarding the enforceability of the final judgment and the court’s jurisdiction. Therefore, arbitration might be an ideal solution to settle international disputes due to the different conventions and treaties used to enforce the award internationally, especially the widespread ratification of the NYC, which is discussed in the next chapter. The next part explains the meaning of online arbitration and states its main advantages, how IT enhanced arbitration, the current online arbitration systems, and IT arbitration tools.

2.2.6 *Online Arbitration*

In contrast to mediation and negotiation, arbitration is a binding and mandatory dispute resolution that leads to a directly enforceable award with *res judicata* effect, and it is the

only dispute resolution that can be a true alternative to litigation as a binding and enforceable resolution.³¹

Online arbitration is defined as “an electronic version of offline arbitration.”³² In other words, online arbitration is where the arbitration procedures are conducted wholly or partly on the internet, starting from the online agreement of the parties and the online arbitral procedures, and ending with the online arbitral award.³³ Using IT in arbitration might help to raise the efficiency and effectiveness of such a mechanism.³⁴ Nevertheless, due to several advantages of online arbitration, some scholars argued that it would transform offline arbitration, due to its potential to solve high-value disputes through technological channels, thus online processes will come to be considered the norm.³⁵ Therefore, online arbitration is not expected to settle low value disputes only, as it might be able to work with high value claims.³⁶

Generally, there are three possible ways to conduct arbitration procedures. The first method is to conduct the whole arbitration using traditional arbitration procedures.³⁷ The second method is to follow the hybrid way, using IT and traditional arbitration procedures, for example using the internet to submit the dispute or sending documents via email, while still using traditional arbitration procedures for sending original documents and written arbitration agreement. Finally, all procedures can be comprehensively conducted by electronic means from the beginning to the end, as when

³¹ *ibid.* p. 11.

³² Chinthaka Liyanage, 'Online Arbitration Compared to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature' (2010) 22 Sri Lanka J Int'l L 173.

³³ <http://www.wipo.int/amc/en/arbitration/online/index.html>; <https://www.equibbly.com/>; www.modria.com Last Accessed 06/04/2016.

³⁴ http://unctad.org/en/docs/edmmisc232add20_en.pdf

³⁵ Beth Trent and Colin Rule, “Moving Arbitration Online: The Next Frontier”, New York Law Journal (April 1, 2013).

³⁶ *ibid.*

³⁷ e.g., the procedures available through the International Chamber of Commerce, see <www.iccwbo.org>, and the American Arbitration Association, see <www.adr.org>.

parties commit to online agreements and the issuance of e-awards.³⁸ However, this study is more focused on the last two methods, either conducting the whole procedures online or the hybrid method, as it examines each part of the arbitration procedure separately, hence parties may agree to arbitrate online and conduct the rest of the arbitration offline, or parties may agree on arbitration agreement offline and render an e-award. This study examines the effect of conducting any part of the procedures online on the enforceability of the final award.

2.3 Arbitration Advantages

This part discusses the advantages of arbitration in general, and why arbitration could be the ideal resolution mechanism for international commercial disputes.

There are several reasons to rely on arbitration in international commercial disputes, such as reduced cost and speed, being considered a neutral method, the enforceability of the final award, confidentiality and flexibility of the procedures. These advantages are explained below.

2.3.1 Cost and Speed

Some scholars argue that arbitration might be expensive and slower than litigation, and describe it as the slower costlier mechanism between the alternative disputes settlement.³⁹

Other scholars equalize between arbitration and litigation, as they can both be subject to expense and delay, varying according to the case situation and circumstances.⁴⁰

³⁸ See <http://www.modria.com/>. <http://www.wipo.int/amc/en/arbitration/online/index.html> Last Accessed 06/04/2016.

³⁹ James Lyons, "Arbitration: The Slower, More Expensive Alternative?" *Am. Law.*, Jan.-Feb. 1985, at 107; *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633 (2^d Cir.1993). *International Resource Management (Canada) Ltd v Kappa Energy (Yemen) Inc* 16 *Business Law Reports* (3rd) 163 at 164 Alberta Court of Appeal. Jason Fry and Simon Greenberg, 'The new ICC rules on arbitration: how have they fared after the first 18 months?' (2013)(6) *International Arbitration Law Review* 171.

⁴⁰ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), P. 14. Richard Naimark and Stephanie Keer, "What Do Parties Really Want From International Commercial Arbitration?" (2003) *AAA Dispute Resolution Journal* 78-86.

In arbitration, parties can control the time limits as when the dispute will end by agreeing on the length of the arbitration procedures.⁴¹ In other words, parties can agree on simple procedures, with simple submission of the documents and the use of the internet (the key of the quickness and efficiency of the approach), enabling parties to set deadlines for proceedings and submissions of evidence and pleading.⁴² A study found that the employment claims submitted before the American Arbitration Association took less time than the claims submitted before the courts at reduced cost.⁴³

2.3.2 *Neutrality*

Arbitration provides a neutral forum of dispute resolution.⁴⁴ There is a high possibility that parties in international dispute may be living in different countries, which may lead to a conflict on deciding the local court where the dispute should be settled. Therefore, arbitration provides a neutral forum considered to be the same for both parties. It is a dispute resolution mechanism that does not favour one party above another, rather it offers both parties the same advantages and opportunities to present their cases before a fair and impartial tribunal.

It is important for both parties to guarantee that the utilised mechanism is impartial and independent. The importance of neutrality in arbitration as a dispute resolution is that it helps to raise the parties' confidence in the mechanism itself.

⁴¹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), P.28. Enobun Ernest, 'Arbitration as an alternative to litigation: does it preserve party relationships post awards?' (2008)(8) *International Energy Law Review* 295.

⁴² Frank Cona, 'Application of Online Systems in Alternative Dispute Resolution Focus on Cyberlaw' (1997) 45 *Buff L Rev* 975.

⁴³ <http://www.law.gwu.edu/News/2010-2011Events/Documents/Drahozal%20Submission.pdf> Last Accessed 21/5/2015.

⁴⁴ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009), p 32. Halil Rahman Basaran, 'Identifying international commercial arbitration' (2016)(4) *International Trade Law & Regulation* 91. Halil Rahman Basaran, 'Is International Arbitration Universal' (2014) 21 *ILSA J.Int'l & Comp.L.* 497.

In arbitration, parties might have the opportunity to choose their arbitrators and decide on their number.⁴⁵ However, if both parties chose to appoint a sole arbitrator, they have to agree between themselves who will be the arbitrator, or they will have to leave it for an outside institution to choose. Further, the tribunal might consist of three arbitrators, in which case each party will choose an arbitrator who must be independent and impartial, and the two arbitrators will agree on the third arbitrator.⁴⁶ Indeed, by giving the parties the ability to determine their tribunal, it will be a strictly neutral tribunal.

It is important to make sure that the institution and arbitrator are impartial, separate and independent. Regardless of whether the parties or the institution selected the arbitrator, parties should be careful regard having a financial or direct interest from the business or a personal relationship with any of the disputants, in which case they should recuse themselves or be dismissed to guarantee the neutrality of the arbitration procedures.

2.3.3 *Finality of Arbitral Award*

Arbitration procedures are binding, and the arbitrator is empowered by the parties' agreement to settle their dispute and issue a final award.⁴⁷ Moreover, unlike mediation and negotiation, once the parties have submitted their dispute to arbitration they are not allowed to withdraw the arbitration procedures, as the arbitral tribunal may issue an enforceable and binding default award.⁴⁸

⁴⁵ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009), p 32. Halil Rahman Basaran, 'Identifying international commercial arbitration' (2016)(4) *International Trade Law & Regulation* 91. Halil Rahman Basaran, 'Is International Arbitration Universal' (2014) 21 *ILSA J.Int'l & Comp.L.* 497. Derek Roebuck, 'Odds or evens: how many arbitrators?' (2014) 80(1) *Arbitration* 8.

⁴⁶ Derek Roebuck, 'Odds or evens: how many arbitrators?' (2014) 80(1) *Arbitration* 8.

⁴⁷ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 6. Enobun Ernest, 'Arbitration as an alternative to litigation: does it preserve party relationships post awards?' (2008)(8) *International Energy Law Review* 295.

⁴⁸ Luca Beffa, 'Enforcement of "Default Awards"' (2013) 31(4) *ASA Bulletin* 756-773.

The final decision of the arbitral tribunal is binding on all parties, while in other types of ADR the decisions and agreements are merely recommendations that parties may or may not accept. For example, if the losing party in mediation did not agree with the decision that was made by the mediator, he may just refuse it, and no one can oblige him with the agreement or the mediator decision.

2.3.4 *Enforceability of Awards*

When it comes to litigation, both parties prefer to bring their case into their own local courts. However, the winning party will eventually seek the enforcement of the court decision before the court where the defendant holds his assets. However, the winning party may have difficulties in enforcing the court judgment.⁴⁹

Conversely, at the international level it is easier to enforce the arbitral award in the foreign country where the losing party has his assets compared to the courts judgment. International convention such as the NYC and other conventions helped to ease the enforcement of arbitration awards in the international level,⁵⁰ which has been ratified by more than 150 countries.⁵¹ Therefore, once the decision was made by the arbitrator, the award should be recognised and enforceable by most of the countries under the NYC, with limited grounds for refusal of enforcement and recognition of the arbitral award; these grounds are discussed in more detail later. However, arbitration awards in general are not subject to appeal unless the parties agreed otherwise. Consequently, this feature might help parties to reduce extra time and cost.

⁴⁹ *Ibid*, p. 11.

⁵⁰ *Ibid*.

⁵¹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html Last Accessed 25/04/2016.

2.3.5 Confidentiality

Unlike litigation, which is in the public domain, the main feature of arbitration is confidentiality.⁵² In arbitration the procedurals, hearings and awards should remain confidential and private, unless the parties agree otherwise. This approach might be preferable for financial institutions that seek to protect their reputations, the terms and structures of their products and their clients' identities.

In some jurisdictions the clause of confidentiality is implied with the arbitration agreement and is considered as a matter of law whether the parties agreed on it or not, while other jurisdictions require parties to express their intention to imply the confidentiality of the procedures with their agreement in order to be applied.⁵³ However, there might be exceptions with regard to confidentiality, such as to protect or enforce legal rights,⁵⁴ and the public interest and the interests of justice form the basis of a legal exception to confidentiality.⁵⁵

Confidentiality is a well-recognised feature in international arbitration, and leading arbitral institutions provide for confidentiality in their rules. For example, art.30.1 of the London Court of International Arbitration (LCIA) Rules provides that:

“unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other

⁵² Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 15.

⁵³ *Ibid*, p. 15.

⁵⁴ *Ali Shipping Corp* [1999] 1 W.L.R. 314 at 326–327.

⁵⁵ Andrew Tweeddale, “Confidentiality in Arbitration and the Public Interest Exception” (2005) 21(1) *Arbitration International* 59, 69. Elina Zlatanska, “To publish, or not to publish arbitral awards: that is the question..” (2015) 81(1) *Arbitration* 25.

documents produced by another party in the proceedings not otherwise in the public domain....”⁵⁶

Nevertheless, a study found that confidentiality is not one of the most desirable features of international commercial arbitration, and that less than 10 per cent of the participants that had been surveyed had indicated confidentiality as an important aspect.⁵⁷

2.3.6 *Party Autonomy and Procedural Flexibility*

The most favourable feature of arbitration is the flexibility of the procedures. Parties are free to choose the procedures, applicable law to the dispute, place of arbitration, the institution, arbitrators, number of arbitrators and the language they will use in the arbitral proceedings, and they are free to conduct the procedures online.⁵⁸ The autonomy of the parties to determine the rules of procedure is of special importance in international cases, since it allows parties to select the rules according to their specific needs and requirements, unimpeded by traditional domestic concepts of procedure.

This factor allows parties to refer to online arbitration, as they are free to choose the preferable procedures so they may dispense with the technical formalities of traditional arbitration, as they may exclude unneeded procedures such as hearings, which results in faster procedures with fewer expenses.

The supplementary discretion of the arbitral tribunal is equally important, because it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being subject to the restraints of the traditional local law, including any

⁵⁶ See also art.34, AAA Rules.

⁵⁷ Richard Naimark and Stephanie Keer, “What Do Parties Really Want From International Commercial Arbitration?” (2003) *AAA Dispute Resolution Journal* 78.

⁵⁸ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009), p 33.

domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or in the provisions of the law.

2.4 How IT Enhances Arbitration

Offline arbitration in general has several advantages to which online arbitration adds more efficiency and effectiveness. IT is usually applied to increase the efficiency of work, to save extra costs and to accomplish work more easily. The same argument can be applied to arbitration, as explained in the next part, which outlines how using IT in arbitration may raise the efficiency of arbitration, increasing its effectiveness and convenience.

2.4.1 Increased Efficiency

Born⁵⁹ stated that international arbitration might cost the parties more than litigation, as they will have to pay the rent for the hearing room, the cost of the arbitrators, arbitral institution, and they might need to pay the traveling expenses. This argument might not fully apply to online arbitration, as parties will not have to pay the costs for the hearing room or the travel costs, as none of them have to attend a particular place to attend the meeting or for the hearing. Hence, online arbitration helps to reduce ancillary costs such as travel and accommodation costs, as all procedures are taking place online.

Conducting procedures through the internet should be faster and cheaper. As Rothchild puts it, “the cost of making a communication over the internet and the delivery time of a communication are independent of the geographic separation of the parties to the communication.”⁶⁰

⁵⁹Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 14.

⁶⁰ John Rothchild, 'Protecting the Digital Consumer: The Limits of Cyberspace Utopianism' (1998-1999) 74 *Ind L J* 893.

Using IT in arbitration may help to reduce the costs and time, especially travelling and document handling. Parties can rely on online meetings instead of face-to-face meetings to reduce traveling costs, which includes parties, arbitrators, witnesses and experts. Holding the meetings online will help to save lost working time. In regard to document handling, using IT is efficient, as parties will save the costs of document reproduction by avoiding photocopies. This might be suitable for larger claims with numerous lengthy documents. Moreover, parties may benefit from IT in saving documents online instead of storage space. In addition, parties can save the costs of shipment of documents by using email rather than sending the files by mail or special courier. Moreover, conducting the procedures online gives both parties wider options to choose a specialised arbitrator from anywhere in the world who is expert in the field of their dispute, without the need for external expert.⁶¹

IT may help to save extra time, as some tasks could be done faster using IT, such as hearings and other forms of meetings, and also exchanging documents online might help to save time. However, parties should agree on the most appropriate technology suited to the task. For instance email might be useful for transferring a small number of files, however in the case of a large number of documents, case management could be more appropriate.⁶² It can be argued that relying on IT helps to save time between specific tasks, as IT could be used to reduce travelling and shipping times, while on the other hand parties can do other tasks in a shorter time, such as agreeing on a time to meet, as they will find more common available time if they undertake to proceed online, without the need to travel or have time off work etc., which makes the procedure faster. The same holds true for the waiting periods due to shipping documents, hence using the internet to

⁶¹ Lesley Caplin, 'Resolving consumer disputes online: a review of consumer ODR' (2004) Commercial Law Practitioner 207.

⁶² Case management can assist parties, counsel and arbitrators in achieving a timely, less expensive resolution which is fair both in process and outcome.

exchange documents will help increasing productivity and potentially shortening procedures.

Moreover, online arbitration might help the parties to reduce the costs of translation, as they may choose arbitrator who is able to speak the parties' language(s) instead of spending extra costs on a translator. However, if the parties could not find arbitrator who speaks both languages parties can refer to translation software, which is still cheaper than appointing a translator.⁶³

Another benefit of conducting the arbitral proceedings online is that there will be no need to use paper documentation, which will save extra costs for parties, as the whole of the arbitral proceedings take place online, and can be kept on a records in different forms, such as electronic documents, video records and audio records. Katsh and Rifkin stated that the benefit of keeping records is for building feedback and intelligence into the ODR process, which has another benefit in recreating who said that, where and under what circumstances.⁶⁴

Finally, it can be summarized that online arbitration can help to save extra costs and time compared to other dispute mechanisms, including offline arbitration.

2.4.2 IT Raises Effectiveness of Arbitration

In addition to saving time and costs, IT can also help in conducting arbitral procedures in a way that would not be practicable without it, such as enabling parties to hear witnesses or experts who would not otherwise be available, especially in fast-track procedures.⁶⁵

⁶³ Instant translation is already offered by several sites free of cost, eg <<http://translate.google.com/#>>. Pablo Cortés and Fernando Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' (2013) 62(02) International and Comparative Law Quarterly 407.

⁶⁴ Ethan Katsh and Janet Rifkin, *Online dispute resolution: Resolving conflicts in cyberspace* (John Wiley & Sons, Inc., 2001), p.81.

⁶⁵ Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006). P.14.

For instance, in disputes concerning the Olympics (the global athletic competition), IT has enabled witnesses from throughout the world to participate in resolution (who could not otherwise feasibly be present for arbitration), mainly by using videoconferencing.⁶⁶

In some circumstances, IT might help to raise the quality of the procedures; for example, instead of using teleconferencing parties may rely on videoconferencing, which is able to provide richer information transfer, which is associated with greater potential to render satisfactory results.⁶⁷ Some scholars have observed that operating meetings on high definition video and audio conferencing can replace face-to-face meetings even when significant geographical and logistical barriers are not relevant.⁶⁸

2.4.3 *IT More Convenient*

In several circumstances, using IT might not be for raising the efficiency or effectiveness of arbitral procedures; instead, it makes the process more convenient. For example, IT might make it easier to search through a particular document using the «find» function instead of going through the whole document. However, this solution does not always work, as some documents are scanned as images, hence parties may not be able to use the «find» function; however, increasingly adept optical character recognition (OCR) software will likely obviate this problem in the near future. Moreover, IT is more convenient to archive and transport vast volumes of documents easily without any consideration of physical weight or material damage.

Conducting procedures online might not always be convenient, as it is vulnerable to some breaches and malicious attacks that can compromise confidentiality.⁶⁹ These breaches

⁶⁶ Gabrielle Kaufmann-Kohler, *Arbitration at the Olympics* (The Hague, 2001).

⁶⁷ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004), p. 61.

⁶⁸ Beth Trent and Colin Rule, "Moving Arbitration Online: The Next Frontier", *New York Law Journal* (April 1, 2013).

⁶⁹ Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006) p. 122.

might be with respect to exchanging the documents online or the backup copies of documents that might leave traces and could be uncovered or sent to others by mistake or maliciously.

2.5 Current Online Arbitration Systems

Various institutions conduct their procedures partly or wholly online, as in the cases of Modria, AAA-Webfile, WIPO-ECAF and the Czech Arbitration Court, while some systems have been terminated despite being successful, such as NetCase.

2.5.1 Modria

Modria is an online arbitration system.⁷⁰ It is a leading software provider for online dispute resolution for both high- and low-value disputes.⁷¹ Moreover, it provides the customers with the ability to link between negotiation, mediation and arbitration, which supports the customers with the ideal process to settle their disputes. This platform includes support for caucusing, document management, discussion, scheduling and case management, which helps neutrals and parties to focus on finding solutions.

The American Arbitration Association started working with Modria.com in order to improve its dispute resolution mechanisms and to build a new ODR platform to manage AAA's New York No Fault (NYNF) caseload, consisting of negotiation, mediation and arbitration.⁷² The system was designed with the aim of supporting more than 100,000 cases annually, providing new tools such as case management aids to AAA staff and neutrals. In 2014 over 180,000 cases were submitted to the NYNF, mainly automobile

⁷⁰ See <http://www.modria.com/> Last Accessed 06/04/2016. See also Benjamin H Barton, 'Lawyer's Monopoly-What Goes and What Stays, The' (2013) 82 Fordham L.Rev. 3067, 3075–3076.

⁷¹ Juan Pablo Cortes, 'Online dispute resolution services: a selected number of case studies' (2014)(6) Computer and Telecommunications Law Review 172.

⁷² Tim Wallis, 'Online dispute resolution: will the talk turn to action?' (2015)(3) Journal of Personal Injury Law 210.

insurance cases.⁷³ Moreover, the new platform includes new secure online communication that allows parties to communicate easily with AAA staff and with each other.⁷⁴ The new AAA New York Auto Insurance case management platform will be the first cloud-based technology system used for case management.⁷⁵ The new platform provides AAA staff with new hearing scheduling tools, supporting process optimization and continuous process improvement, adding additional efficiency to the overall resolution process.

The transition to this new application requires migrating millions of pieces of information and documents from the existing AAA case system to the new system. The end result is virtually paperless case management; even the award is dispatched online after the arbitrator enters it into the system and authorizes it.⁷⁶

2.5.2 *American Arbitration Association, AAA-WebFile*

The AAA-WebFile provides parties with several tools, such as the ability to track cases online even if submitted offline. This tool contributed to a 49% increase in the number of cases submitted to AAA-WebFile in 2004.⁷⁷ Between 2001 and 2005 AAA received a total of 3834 cases involving more than \$1.4 billion in claims online.⁷⁸ Most of the cases

⁷³ AAA 2014 Annual Report, <https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2030291&revision=latestreleased> Last Accessed 26/04/2016.

⁷⁴ C. Rule, ODR News (April 2014), "AAA Chooses ODR for Its Largest Volume Case Load" (2014) 1(1) International Journal of Online Dispute Resolution 97. Available at <http://www.prnewswire.com/news-releases/american-arbitration-association-selects-modria-to-power-new-york-no-fault-caseload-248543191.html> Last Accessed 22/06/2016.

⁷⁵ Tim Wallis, 'Online dispute resolution: will the talk turn to action?' (2015)(3) Journal of Personal Injury Law 210.

⁷⁶ AAA 2014 Annual Report, <https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2021420&revision=latestreleased> Last Accessed 26/04/2016.

⁷⁷ Am. Arbitration Ass'n, President's Letter & Financial Statements 4 (2005), <file:///Iha-024/pers-I/0006A361/Downloads/2004%20Annual%20Report.pdf> Last Accessed 26/04/2016.

⁷⁸ *ibid.*

submitted to WebFile were in the fields of commercial, labour and hurricane insurance claims.⁷⁹

AAA-WebFile has been used mostly for commercial disputes, including employment, construction, international and general commercial claims. General commercial cases increased from 32 in 2001 to 1,264 cases in 2005. Figures show that construction filings has been raised from 10 cases in 2001 to 390 cases in 2005, and the amount of the filled cases increased from \$2,704,761 in 2001 to \$194,966,707 in 2005.⁸⁰ In relation to employment cases, the number of cases filed using AAA-WebFile increased from two to 311 cases between 2001 and 2005. Filing of international cases increased from 11 to 47 during the years 2002-2005, with a cumulative dollar amount of \$158,124,409.⁸¹

AAA-WebFile provides parties with other tools that could be utilized online, such as filing a new claim, select neutral, track financial transactions, communicate with parties and case managers through a message board, review cases commenced by traditional methods offline and review case progress.⁸² It should be noticed that AAA-WebFile has successfully been utilised in a multi-million dollar case, wherein parties filed more than 280 documents, and the hearings and communication were conducted via the message board, demonstrating the system's significant capabilities,⁸³ and showing the efficacy of online arbitration for both low- and high-value cases.

⁷⁹ Debi Miller-Moore, 'ODR at the AAA: Online Dispute Resolution in Practice Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution: Proceedings' (2006-2007) 38 *U Tol L Rev* 395.

⁸⁰ Construction filings on AAA Webfile showed a steady increase in each year. There were 151 construction cases filed in 2002, 219 in 2003, and 289 in 2004, for a cumulative total of 1059 cases filed from 2001 through 2005-265 for mediation and 794 for arbitration. Am. Arbitration Ass'n Webfile Statistical Report, May 2006 (on file with author) [hereinafter AAA Webfile Statistical Report].

⁸¹ Debi Miller-Moore, 'ODR at the AAA: Online Dispute Resolution in Practice Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution: Proceedings' (2006-2007) 38 *U Tol L Rev* 395.

⁸² *ibid.*

⁸³ *ibid.*

2.5.3 World Intellectual Property Organization Electronic Case Facility (WIPO-ECAF)

The WIPO-ECAF is usually used for administrative disputes related to intellectual property.⁸⁴ The World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre created a new facility named the WIPO Electronic Case Facility (ECAF), which provides parties, arbitral tribunals and the Centre with different tools such as the ability to file, store and retrieve submissions online, accessible from anywhere in the world using an ordinary Web browser. The WIPO-ECAF seeks to facilitate the conduct of cases under the WIPO Mediation, Arbitration, and Expedited Rules.⁸⁵

The case management system should be able to facilitate communications, document exchange, and case administration.⁸⁶ The function of the WIPO-ECAF is that it is considered as a central database that is accessible via the internet, which allows parties to upload and submit their documents, and to communicate through exchanging messages on a message board. There are other tools that the system provides participants with, such as finance overview, time tracking, contact information and general case overview.⁸⁷

The system is securely well protected, as the data stored in ECAF's electronic repository is ensured by three measures. First, in order to access the system, parties need to confirm their username, password and a changing passcode.⁸⁸ The passcode is delivered by RSA SecurID card, a hand-held device that furnishes changing passcodes. Second, ECAF's servers, and all information stored on them, are firewall protected. Third, all

⁸⁴ World Intellectual Property Organization "the WIPO Arbitration and Mediation Centre", <http://www.wipo.int/amc/en/index.html> Last Accessed 29/04/2016.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

communications to and from ECAF are encrypted by using state-of-the-art Secure Sockets Layer (SSL) technology.⁸⁹

2.5.4 *Czech Arbitration Court*

The Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic (Czech Arbitration Court) have separate rules for online arbitration procedures,⁹⁰ according to which parties are able to submit all documents and to conduct all procedures online, and the award can be rendered online.⁹¹ The tribunal is formed by a sole arbitrator appointed by the Chairman of the Czech Arbitration Court.⁹² The Czech Arbitration Court settles different types of disputes, such as international commercial disputes, domestic commercial disputes, consumer disputes and domain disputes.⁹³

2.5.5 *NetCase*

The International Commercial Court (ICC) created NetCase⁹⁴ in order to provide arbitrators and parties with the ability to conduct the arbitration procedures online through a closed, secure system.⁹⁵ Every user has a username and password to access the system, to be able to communicate and share information.⁹⁶ NetCase supports parties and

⁸⁹Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006) p.92.

⁹⁰ <http://en.soud.cz/rules/additional-procedures-for-on-line-arbitration-1st-june-2004> Last Accessed 02/05/2016.

⁹¹ Section 1(2) <http://en.soud.cz/rules/additional-procedures-for-on-line-arbitration-1st-june-2004> Last Accessed 02/05/2016.

⁹² Section 2(c) <http://en.soud.cz/rules/additional-procedures-for-on-line-arbitration-1st-june-2004> Last Accessed 02/05/2016.

⁹³ Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards, as amended which took effect on 1 January 1995.

⁹⁴ The researcher could not access the website of the NetCase and no information was available regarding the current situation of the system.

⁹⁵ Philippe "New upgrades to ICC NetCase" (2008) 19(2) *Bulletin of the ICC International Court of Arbitration* 23.

⁹⁶ Mirèze Philippe, 'Are Specific Fast-Track Arbitration Rules Necessary?' (2002) Permanent Court of Arbitration/Peace Palace Papers, The (Hrsg.), *Arbitration in Air, Space and Telecommunications Law*, Den Haag 253.

arbitrators with an address book, which will help them understand the role of each item in the case. NetCase allows parties to post, read and respond to messages through a dedicated space for their case. Parties have the possibility to access all documents filed online or posted in the system by the Secretariat of the Court, once the documents are edited, then the parties receive an email to notify them that they can access and check the posted documents through the system. The system supports the keywords in order to ease finding a particular document. The arbitrators and parties only need their username and password to be able to access the documents that have been exchanged through the NetCase and stored in the system; this will help the parties and arbitrators to hold the hearings without having to carry any document.

NetCase allows documents to be sent via email in case one of the parties is unable to access the documents through the system, or he does not have the appropriate equipment to benefit from it. In such a situation, the deadlines granted will keep running as of receipt of the mail or the fax. This may not affect the ability of other parties to use the system. In case all parties are able to access the system, the time-limits will run as of the time of accessing the document online.

So far, NetCase arbitration procedures are hybrid and the system has not provided totally online procedures. For example, notifying parties with important documents such as the terms, references and awards is concluded in the traditional format, not online.⁹⁷ Moreover, if all parties request an online transmission of such documents, copies will be posted in the NetCase and a hard copy must be transmitted by mail, for the reasons of enforcement stated above.⁹⁸

⁹⁷Philippe, Mireze, 'Where is everyone going with online dispute resolution (ODR)?' (2008) *International Business Law Journal* 167.

⁹⁸ *ibid.*

2.5.6 *Canadian Civil Resolution Tribunal – www.civilresolutionbc.ca*

The Civil Resolution Tribunal should have been launched in the summer of 2015 in British Columbia, Canada; however, so far it has not been launched yet.⁹⁹ It is a public scheme, regulated under the Civil Resolution Tribunal Act 2012. The Canadian Civil Resolution Tribunal is instituted to deal with cases valued at under \$25,000 Canadian, related to debts, damages, recovery of personal property, and certain types of condominium disputes. The online tribunal provides parties with an option to settle their disputes out of courts in a more convenient and less costly way. In order to reach a final settlement, the online tribunal provides parties with the required tools and facilities to help explore possible solutions. If they fail, the parties can resort to negotiation through an online negotiation platform, supported by templates and arguments tools. The second stage is through mediation, in which the online tribunal provides parties with a mediator who will assist the parties to reach a settlement. The process might take place online or over the phone. Finally, if the parties fail to reach a settlement, the online tribunal will appoint an arbitrator who will contact the parties, and via an online platform, over the phone or through videoconferencing, and then render final and binding decisions. Parties should agree to refer to the third stage, and they will not be enforced to arbitration directly.

2.5.7 *Financial Ombudsman Service - www.financial-ombudsman.org.uk*

The UK Financial Ombudsman Service was established in 2000 to settle disputes between consumers and UK-based financial firms more quickly and cheaply. The platform is designed to settle disputes during their early stages in order to avoid any formal determination. Businesses covered by the ombudsman are allowed to settle disputes within eight weeks before referral to the latter.

⁹⁹ <https://www.civilresolutionbc.ca/what-is-the-crt/how-will-the-crt-work/> Last accessed 05/06/2016.

After receiving the initial complaint, the ombudsman endeavours to facilitate an amicable solution and send it to the parties; if they agree to the suggested solution then the dispute is resolved, which occurs in 90% of cases. If the parties failed to reach a settlement then they may refer the dispute to the ombudsman for a final and binding solution. The final decision can be accepted or rejected by the consumer, but once the consumer accepts the decision it is binding. These decisions are not appealable, but are subject to judicial review. In 2013/14, the Financial Ombudsman Service resolved 518,778 disputes, of which 487,749 were resolved by adjudicators and 31,029 by ombudsmen. The service is a ‘distance’ service, so that each year there are usually less than 20 face-to-face meetings with adjudicators or ombudsmen. The average cost per case for 2014/2015 was an estimated £567.

2.5.8 *Rechtwijzer 2.0* – www.hiil.org/project/rechtwijzer

The Netherlands Ministry of Justice and Security established Rechtwijzer 2.0. for the Dutch Legal Aid Board by the Hague Institute for the Internationalisation of the Law (Hiil). The service aims to settle disputes through a various process that begin with diagnosis of the problem, to facilitate a Q&A-based framing of their case, to problem-solving and assisted negotiation, and finally other forms of online dispute resolution. The service provides parties with automated legal guidance, based on answers given by the parties during the Q&A session.

If the parties failed to reach a settlement then they are taken to the next stage, which is online mediation or online arbitration. Both online arbitration and mediation take place through a secure and confidential platform designed for asynchronous dialogue. The platform allows the mediator to engage with each party in a private and confidential discussion. Finally, as a ‘fail safe’ against a resolution being reached that does not satisfy the criteria of ‘fairness’, agreements go before an independent lawyer for confirmation.

2.5.9 *Summary*

According to the sections above, it can be seen that various systems have been established by arbitration institutions aiming for the whole or a large part of procedures to be conducted online. Most of these systems demonstrate continuing success, although others have been closed down despite general success. In general, online arbitration has been improved in recent years and many institutions have referred to online arbitration, which has become an essential dispute resolution mechanism.

2.6 **Separate IT Tools**

So far, conducting procedures exclusively online has mainly been possible in consumer and domain names disputes.¹⁰⁰ However, the internet might be a useful tool to improve the speed and reduce the cost of traditional arbitral procedures, even if procedures are not exclusively conducted online. There are several IT tools that parties may use if they agree to conduct some arbitration procedures online, including email exchange, the initial filing system and oral hearings.

2.6.1 *Exchange of Emails*

As parties in international disputes are generally based in different countries, communication between them might be costly and time-consuming. Hence, using the internet is much more efficient in this regard, as parties may rely on the exchange of emails to produce messages and electronic documents and exchange them between

¹⁰⁰ Mirèze Philippe, “ODR Redress System for Consumer Disputes Clarifications, UNCITRAL Works & EU Regulation on ODR”, (2014) (1) International Journal of Online Dispute Resolution,

themselves, and with the tribunal and the case administrator. However, several issues might arise in regard to using emails for such purposes, particularly security issues pertaining to the possibility of being hacked by unauthorised persons.¹⁰¹ Nevertheless, Article 3(2) of the ICC Rules states explicitly that even if the parties failed to agree on the use of electronic communications, the arbitral tribunal may decide to use the electronic communication as long as it is accessible by all parties.¹⁰²

2.6.2 *Online Claim Filing System*

Besides using the exchange of emails, parties may use an online filing system to enable them to submit arbitration claims using the online system and file all documentation on a web-based platform that is accessible from anywhere by the parties, the arbitral tribunal and the administrator.¹⁰³ The online arbitration claim filing system is a fast, convenient and efficient way to file an arbitration claim. Parties may view, browse and search documents without having the ability to amend these documents. The benefits of such software include that it prevents duplication and avoids the logistical burdens of hard copy documents, facilitating completion of online claims and information forms. In addition, it provides parties with the ability to submit a statement of claim, signed submission agreement and other supporting documentation electronically, beside the ability to pay the fees online.

2.6.3 *Online Hearing*

Online hearings are essentially traditional hearings conducted by videoconferencing, whereby the physical presence of parties at a specific time but not in a specific place is

¹⁰¹ *How To Solve The Five Biggest Email Security Problems* Posted by *Mike Spykerman* / August 5, 2015 <https://www.opswat.com/blog/how-solve-five-biggest-email-security-problems> Last Accessed 03/05/2016.

¹⁰² http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_3 Last Accessed 03/05/2016.

¹⁰³ Financial Industry Regulatory Authority <https://www.finra.org/arbitration-and-mediation/faq-online-claim-filing-faq#1-3> Last Accessed 7/5/2016.

required. Parties are allowed to agree whether to conduct the hearing orally or in writing. There are several new technologies that could be utilised in this field to support both oral (video conferencing or telephone conferencing) and written hearings. Parties should agree on the technology that will be used. An agreement could usually be done in the terms of reference, informally in writing or during the procedures. However, the ability to use any type of technology to conduct the hearing usually depends on the party's agreement and the discretion of the tribunal.

Distance hearing may raise some issues, especially in relation to the identification of the witness giving oral and concerns that filmed testimony could be manipulated. However, in proposals to solve this issue, Hörnle¹⁰⁴ suggested that a member of the arbitral tribunal shall be physically present at the time of testimony, or parties may refer to an official facility of a trusted third party, such as a law firm, a notary, an arbitration institution or a court.

2.6.4 *Electronic Signature*

The NYC requires parties to sign the final award and arbitration agreement before enforcement. Therefore, parties may rely on electronic signatures to sign the arbitration agreement or the final award.¹⁰⁵ In *Kerr v Dillard Store Services Inc*,¹⁰⁶ Oak Park developed a new system to execute arbitration agreements. The system contains more than the arbitration agreement itself, such as an employee's email address, work schedule and paycheck information. Once the employee accesses the system with his unique username and password, he will execute the arbitration agreement, and then receive an email confirming the execution and inviting him to object if the execution was mistaken.

¹⁰⁴ Julia Hornle, 'Online dispute resolution: the emperor's new clothes? Benefits and pitfalls of online dispute resolution and its application to commercial arbitration' (2003) *International Review of Law Computers & Technology* 27.

¹⁰⁵ *Kerr v. Dillard Store Servs., Inc.*, No. 07-2604-KHV, 2009 WL 385863 (D. Kan. Feb. 17, 2009).

¹⁰⁶ *ibid.*

A secured electronic signature can be used to sign the award instead of a manual signature and it shall be valid, on the basis of a functional form.¹⁰⁷

Thus the whole procedure might be conducted online the parties might never meet physically. The electronic signature might be an appropriate solution, saving parties extra costs and time. This study will examine the ability and validity of relying on electronic signatures according to the NYC before the enforcement court.

2.6.5 Electronically Stored Information

In international commercial arbitration, whether parties conduct the whole procedure online or offline, they might deal with the discovery of ESI, as businesses store the majority of their data online.¹⁰⁸ In 2012, the amount of global data reached approximately 2.8 zettabytes (ZB), and by 2020 the digital universe is expected to reach 40 ZB; enough information to fill over a half trillion 32GB tablet computers.¹⁰⁹

2.6.6 Summary

Parties may prefer to benefit from the use of IT in arbitration to make the procedures more efficient and effective, such as the case of exchanging documents by email or online hearing. In some circumstances parties might be obliged to deal with IT, such as the case of ESI and electronic signature. Consequently, IT is taking a great part in arbitration whether the parties are willing to conduct the whole procedures online or to benefit from some IT tools.

¹⁰⁷ This issue will be discussed in more detail in the next chapters. See, Norbert Horn, 'Arbitration and electronic communications: public policy' (2009) 12(5) International Arbitration Law Review 107 .

¹⁰⁸ Mian ud-Din, 'International commercial arbitration: developments in the practice of taking evidence' (2013) 79(1) Arbitration 17.

¹⁰⁹ <http://www.thediscoveryblog.com/2013/04/01/cost-shifting-in-the-era-of-big-data/> Last Accessed 8/5/2016.

2.7 Conclusion

The first part of this chapter explained possible methods of settling international commercial disputes, including litigation and different types of ADR and ODR. However, arbitration might not be the ideal mechanism to settle international commercial disputes for several reasons: 1) the obstacles to enforcing the final judgment in litigation; 2) the courts' jurisdiction in litigation in international disputes; and 3) alternative dispute resolutions other than litigation are not binding processes. Therefore, given the shortcomings in each type of method of dispute resolution at the international level, arbitration might be an ideal mechanism in international commercial disputes due to the widespread application of treaties and conventions (i.e. the NYC). Indeed, parties should refer to negotiation and mediation to settle their disputes, as they may be efficient and effective and hence help parties to save on extra costs and time.

The chapter then stated the main advantages of arbitration, including the enforceability of the final award internationally, neutral procedures, the binding nature of procedures once initiated, the flexibility of arbitration procedures and confidentiality procedures. This was followed by consideration of how IT has improved arbitration, increasing its efficiency and effectiveness as well as offering greater convenience to all stakeholders and removing the burden of dispute resolution which would otherwise fall on traditional courts.

The chapter then considered several applications of online arbitration, including Modria, AAA-WebFile, WIPO-ECAF and the Czech Arbitration Court. However, for unknown reasons NetCase was shut down, although it demonstrated overall success. The final section examined the available IT tools that parties may use even if they do not rely on any of the comprehensive online arbitration systems: exchanging emails, online filing systems, online hearings, electronic signature and electronic stored documents.

3 Chapter Three: An Overview of the Dubai and DIFC Legal Systems

3.1 Introduction

As explained in the previous chapter, online arbitration is a promising method and there are a number of centres that provide parties with the ability to rely on IT in arbitration. However, due to the lack of uniformity in online arbitration at the international level, efficiency in relying on such a mechanism might be uncertain. As this study is examining the enforceability of an arbitral award concluded via online arbitration before DIFCC and DC, this chapter presents an overview of the legal system in Dubai and DIFC, to help in understanding the connection between the two legal systems and how they interact, and when the parties are allowed to rely on one of the jurisdictions. It will also help in understanding the applicable laws before the Dubai and DIFC enforcement courts. This information also provides the basis for later discussion.

Dubai is one of the seven Emirates that comprise the United Arab Emirates (UAE), the others being Abu Dhabi, Ajman, Fujairah, Ras al-Khaimah, Sharjah and Umm al Qaiwain. The UAE was declared an independent country by the passing of the Union Declaration in December 1971,¹ having formerly been known as the Trucial States, due to their position as protectorates and allies of Britain under the Perpetual Maritime Truce (1853).² As part of its strategy to promote Dubai as a global capital destination, the Government of Dubai established the DIFC in December 2004, a 110-acre free zone.³ The DIFC is located in the heart of Dubai near the Central Business District, offering investors and businesses a liberal regulatory environment for all qualifying civil and

¹ The state of the United Arab Emirates: Historical Study and Documents-publication of the Centre of Documents and Studies with the Ministry of Presidential Affairs- Abu Dhabi- State of the United Arab Emirate- Dec. 2, 1927, 26.

² Essam Al Tamimi, *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer Law International, 2003), p.1.

³ Established by Dubai Law 3 of 2002.

commercial transactions. Its main advantages are that it offers 100% ownership, tax-free income, zero exchange controls and an independent common law jurisdiction,⁴ which makes it attractive to foreign businesses and investors.

The DIFCC jurisdiction is based on an English-speaking and common law system. Despite its being geographically located within the UAE, the DIFC has its own court system and retains judicial independence. Accordingly, there are two parallel legal systems in Dubai: the DC and the DIFCC. Hence, Dubai, the DIFC and the UAE each has its own independent judicial system. This chapter explains the differences between these parallel legal systems and reviews the main developments of arbitration in the UAE and Dubai. As the DIFC was only recently established, there is no need to discuss the development of arbitration. The chapter continues by illustrating the leading arbitration centres in Dubai and their current legal framework. The final part explains the major conventions that the UAE has ratified, with special reference to the NYC.

3.2 Legal System in the UAE, Dubai and DIFC

There are some differences between the UAE, Dubai and DIFC in regard to the judicial system. While the UAE Constitution regulates the judicial system in the component emirates, Dubai and DIFC each has its own judicial system.

3.2.1 UAE Legal System

Like many systems throughout the Arab world, the UAE legal system is a civil law system influenced by the Egyptian Civil Code, which was ostensibly rooted in Islamic law.⁵ The civil law system applies both to the codification of laws and the practice and procedure

⁴ No personal or corporate taxes being levied for at least the next 50 years, as guaranteed by federal decree.

⁵Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) Arbitration 156.

of the judicial system.⁶ Contrary to common law requirements, judges are not obliged to consider previous decisions as precedents, and they do not normally hear oral arguments.

The provisional Constitution, with some minor amendments, was made final in terms of Constitutional Amendment Law No. 1 of 1996 and signed by the President of the UAE on the 2nd of September 1996.⁷ The Constitution provides for five different State authorities under Article 45, which are the Supreme Council of the Union, the President of the Union and his Deputy, the Council of Ministers of the Union, the National Assembly of the Union and the Judiciary of the Union, the latter of which regulates court jurisdictions within the UAE emirates.

Article 95 of the Federal Judicial Authority states that the federal court system is divided into the Federal Supreme Court and the Federal Courts of the First Instance. The Supreme Court serves as the court of cassation for the UAE. It has five members appointed by the Supreme Council of the Union. However, the Union Supreme Court has jurisdiction over several matters stated in Article 99 of the UAE Constitution:

1. Any dispute that is related to one of the Emirates or more and the Union Government, or a dispute between the Emirates in the Union, or dispute that has been submitted to the Court on the request of any of the interested parties.
2. Examination of the constitutionality of Union laws and Emirates legislation.
3. Crimes directly affecting the interests of the Union.
4. Conflict of jurisdiction between the Union judicial authorities and the local judicial authorities in the Emirates.
5. Examination of the constitutionality of laws.

⁶ *ibid.*

⁷ <http://www.refworld.org/pdfid/48eca8132.pdf> Last Accessed 31/8/2015 Last Accessed 13/05/2016. The state of the United Arab Emirates: Historical Study and Documents-publication of the Centre of Documents and Studies with the Ministry of Presidential Affairs- Abu Dhabi- State of the United Arab Emirate- Dec. 2, 1927, 26.

6. Interpretation of international treaties and agreements.

The Federal Courts of the First Instance have jurisdiction over civil, commercial and administrative disputes between emirates and individuals, over capital crimes committed in the Union capital, over civil and commercial cases, and personal status cases between individuals residing in the capital of the Union.⁸ Hence, local courts in each Emirate have jurisdiction over all cases which are not within the jurisdiction of the federal courts.⁹

3.2.2 Dubai Legal System

The UAE Constitution permits each Emirate to have its own laws and courts beside the Federal law, at the request of these emirates,¹⁰ although the federal ('Union') law supersedes that of the emirate in cases wherein they conflict.¹¹ In regard to court jurisdiction, the Constitution allows each state to administer its own internal affairs and its own court system, which is practiced in Dubai, Abu Dhabi and Ras Al-Khaimah.¹² Dubai has retained its own judicial system which is not part of the UAE Federal Government, consequently there are no federal Courts in Dubai and all matters are generally determined by local courts,¹³ and final judgments delivered by Dubai's Court of Appeal can be subject to appeal before the Dubai Court of Cassation, not the Federal Supreme Court.

⁸ United Arab Emirates Constitution art.102 at www.worldstatesmen.org/uae_const.doc Last Accessed 23/06/2016.

⁹ *Ibid.*

¹⁰ Essam Al Tamimi, *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer Law International, 2003), p.4. United Arab Emirates Constitution art.105 at www.worldstatesmen.org/uae_const.doc Last Accessed 23/06/2016.

¹¹ United Arab Emirates Constitution art.151 at www.worldstatesmen.org/uae_const.doc Last Accessed 23/06/2016.

¹² Abu Dhabi used to participate in the federal courts system, but established its own system in 2006. *See* Abu Dhabi Law No. 23 of 2006 on the Courts Department of Abu Dhabi, as amended. Dubai and Ras Al Khaimah have always maintained independent courts.

¹³ Essam Al Tamimi, *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer Law International, 2003), p.4. United Arab Emirates Constitution art.105 at www.worldstatesmen.org/uae_const.doc Last Accessed 23/06/2016.

In general, Dubai local courts consist of civil courts, criminal courts and Sharia courts. The jurisdiction of Civil Courts includes all claims ranging from commercial matters to maritime disputes. The court's decision is subject to appeal within 30 days of the date of judgment; such appeals can be made to the Civil Court of Appeal on factual and/or legal grounds. However, parties are allowed to appeal on points of law alone to the Court of Cassation within 30 days of the date that parties notified of the Court of Appeal judgement, and the Court of Cassation decision is final and not subject to appeal.¹⁴ The criminal division deals with most criminal cases arising in UAE,¹⁵ while the Sharia Division hears civil matters for Muslims, most of which relate to family matters such as divorce and inheritance.¹⁶

The DC adjudicates civil matters in accordance to the Federal Civil Procedures Code (No. 11 of 1992) and the Federal Law of Evidence in Civil and Commercial Transactions (No. 10 of 1992) in civil courts.¹⁷ The Dubai civil courts have jurisdiction over commercial and financial matters, including the banking sector. The sources of law in Dubai that judges should consider in their decisions are stated under Article 4 of the Dubai Courts Law (1992) as follow:

1. The laws in force in the Emirate of Dubai.
2. Provisions of the Islamic Shari'a.
3. Provisions of custom, unless these contradict the Law or public order or decency.
4. The principles of natural justice, right and equity.

¹⁴ Butti Al-Muhairi, 'The Development of the UAE Legal System and Unification with the Judicial System' (1996) 11(2) Arab Law Quarterly 116.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Essam Al Tamimi, *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer Law International, 2003), p.9.

In regard to the enforcement of foreign arbitral awards before DC, the courts shall examine whether the award fulfils the conditions stated under Article 235 and 236 of the Civil Procedure Code. The required conditions are:

- a) The UAE courts did not have jurisdiction and the foreign courts did.
- b) The court that made the order had jurisdiction under the laws of that country.
- c) The parties to the dispute were properly notified and represented.
- d) The order has become final and binding according to the law where it was made.
- e) The award does not conflict with a previous ruling of a UAE court and it does not contravene propriety or public order.

Article 238 of the Civil Procedure Code states that “The principles stipulated in the preceding articles shall be not-withstanding any rulings or pacts between the State and any other state in this regard.”

Therefore, when any international convention or treaty is applied on the award, the court shall not examine the award in accordance to Article 235 and 236.

3.2.3 DIFC

In 2004, Article 121 of the UAE Constitution was amended in order to empower emirates with the ability to establish financial free zones.¹⁸ After the amendments in the UAE Constitution were effected, Federal Law No. 8 of 2004 concerning financial free zones was enacted to allow the federal emirates to establish such zones within the UAE. The creation of Special Economic Zones helped to raise the status of Dubai in the international commercial community.

¹⁸ <http://www.dfsa.ae/Documents/Constitutional%20Amendment%20No%201%20of%202003.pdf> Last Accessed 13/05/2016.

3.2.3.1 Overview

Similar to the China/Hong Kong principle of “one country, two systems”,¹⁹ as part of the Dubai legal jurisdiction system, the DIFC has its own independent judicial system, with its own courts and an independent judicial authority.²⁰ In addition, English is the official language for the DIFC, contrary to the UAE court proceedings, which are conducted in Arabic. Interestingly, the DIFCC are based on the Common Law principles, following the English legal system, which governs any commercial or civil disputes that have a connection with the DIFC.²¹

A series of laws have been adopted in order to help facilitate the implementation of DIFC,²² and where DIFC law is silent, English law should fill the gap.²³ The reason that the DIFCC are applying the English law was explained by the DIFCC chief justice Michael Hwang, who stated that the English Commercial Court has been chosen as it led the way in developing the rules of common law into internationally accepted principles of commercial law.²⁴

DIFC has legislative powers with its own body of law, and it has enacted several laws in the areas of corporate law, contracts law, the DIFC Arbitration Law (2008) and employment law.²⁵ The DIFC Arbitration Law of 2008, which replaced the previous DIFC Arbitration Law of 2004, is based on the UNCITRAL Model Law on International Commercial Arbitration, which opens up the DIFC as possible seat of arbitration to all

¹⁹ Szymon Zareba, 'China and Hong Kong: The One Country, Two Systems Principle and Its Practical Implications for Polish Civil Courts' (2013) 33 *polish yearbook of international law* 363.

²⁰ Dubai Law No. 12 of 2004 available online <http://www.dfsa.ae/Documents/Dubai%20Law%20No%2012%20of%202004.pdf> Last Accessed 14/6/2015.

²¹ DIFC Law 10 of 2004 and Law 12 of 2004 in respect of the Judicial Authority of the Dubai International Financial Centre.

²² e.g. DIFC No.6 of 2004 on Contract Law, DIFC No.6 of 2005 on Implied Terms in Contracts and Unfair Terms and DIFC Law 7 of 2005 on Damages and Remedies.

²³ Art. 8(2) (e) DIFC Law No.3 of 2004.

²⁴ <http://www.lawgazette.com.sg/2007-11/feature1.htm> Last Accessed 14/05/2016.

²⁵ <https://www.difc.ae/laws-regulations/legal-database> Last Accessed 13/05/2016.

interested parties. DIFC law applies to civil and commercial arbitrations (whether international or domestic).²⁶

3.2.3.2 Jurisdiction of DIFCC

The DIFC Court of First Instance has exclusive jurisdiction, which has been stated under Article 5(A)(1) of Dubai Law No 12 of 2004 as follows:

“Where the scope of dispute will fall within the scope of DIFC Courts of First Instance jurisdiction; the dispute must be related the Centre or any of the Centre’s Bodies or any of the Centre’s Establishments, the transaction concluded in the centre and the contract executed in the centre, whether with to the subject matter.”

However, this situation was changed in the 31st of October 2011, as the new enactment of Dubai Law No. 16 of 2011 extended the Court’s jurisdiction authority over claims related to commercial or civil transactions that were supposed to take place in the DIFC, and disputes wherein the parties agree that DIFCC have jurisdiction, even if there is no connection to the DIFC.²⁷

The Court of Appeal has jurisdiction over the judgments that have been rendered by the DIFC Court of First Instance and it has jurisdiction in relation to any:

“request of interpretation by the Chief Justice of the Courts of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment; such interpretation shall have the same authority as the interpreted legislation.”²⁸

²⁶ Gordon Blanke, 'The DIFC: a brave new world of arbitration' (2009) 75(3) Arbitration 422.

²⁷ Dubai Law No.16 of 2011 art.5A.

²⁸ *ibid* art.5B.

However, the judgment of the Court of Appeal is final and not subject to any appeal, even with regard to the right to appeal to the Dubai Court of Cassation.

3.2.3.3 DIFCC Jurisdiction to Examine Arbitration Agreements

This part examines the validity of the arbitration agreement; the issue of the enforcement of the award will be discussed later in the chapter. If a party brings proceedings before the DIFCC, and the seat of the arbitration is the DIFC, despite the existence of an arbitration agreement, the DIFCC shall have jurisdiction to examine the arbitration agreement and decide whether to stay proceedings and refer parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.²⁹

It is clear that the DIFCC has jurisdiction under article (7) to determine the validity of a DIFC-based arbitration clause, but its jurisdiction in foreign-seated arbitration (but within the UAE) is unclear. Therefore, conflicting decisions have been made regarding the jurisdiction of the DIFCC in regard to a non-DIFC arbitration seated in Dubai. The main reason for the conflict is that the DIFC Arbitration Law does not state clearly whether Article 13 should be applied in an arbitration seated outside the DIFC. Article 13 in turn provides that:

“If an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed.”

²⁹ DIFC Arbitration Law 2008 art.13 read in conjunction with the DIFC Arbitration Law 2008 art.7.

In the case between *Injazat Capital Limited and Injazat Technology Fund B.S.C. (Claimant) v Denton Wilde Sapte (Respondent)*,³⁰ Justice Sir David Steel of the Court of First Instance of DIFC stated that the Court does not have jurisdiction to determine the validity of a non-DIFC arbitration clause, despite the fact that there is an option if the parties agree to refer to LCIA arbitration instead of the Court's jurisdiction.

In summary of the case facts, the Claimant (Injazat Capital) brought a claim against the Respondent (Denton Wilde Sapte) before the DIFC Court of First Instance alleging negligence on the grounds that the latter failed to advise the Claimant in regard to the existence of an option to sell shares that it had acquired under a Share Subscription Agreement. The Respondent claimed that the court should stay proceedings on the grounds that there was a valid arbitration agreement instituted in the existing terms of business that were attached to an engagement letter, which gave the parties the right to refer to LCIA arbitration as follows:

“If any claim, dispute or difference of any kind whatsoever (...) arises out of or in connection with those agreements (...), you and we each agree to submit to the exclusive jurisdiction of the Dubai Courts. However, we may at our sole option, refer the claim, dispute or difference to LCIA Arbitration in London (...).”

However, the Claimant (Injazat Capital) argued against the Respondent by claiming that they received neither the terms of business nor the arbitration agreement, as the Respondent sent them by fax and email, and the Claimant did not respond to any of them. The Respondent argued that on the basis that the subject matter is governed by an existence of a valid arbitration agreement, the Respondent requested the court to stay proceedings pursuant to Article 13 of the DIFC Arbitration Law. However, the Court

³⁰ *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co* (CF1 019/2010 – Judgment of 6 March 2012).

refused to grant stay to proceedings on the basis that Article 7(2) states that if the arbitration agreement is seated outside the DIFC then Article 13 does not apply, and the court is not obliged to stay proceedings. Furthermore, regardless of the fact that the UAE has been a member state of the NYC since 2006, the Court refused to grant a stay proceedings pursuant to Article II(3) of the NYC that compels the Courts to recognise the arbitration agreement regardless of where they are seated, deciding that Article 13 is clear, and there is no ambiguity in the application of this Article as there is no room for interpretation.³¹ The Respondent argued that the Dubai national court has jurisdiction, not the DIFC, but the Court dismissed this argument and concluded that the onus is on the Respondent to establish that it constituted an agreement to contract out of the DIFCC. Consequently, according to the court decision, the DIFCC have jurisdiction to examine the validity of arbitration agreement over the disputes that determine the seat within the UAE.

In contrary to the first case, in *International Electromechanical Services Co LLC v Al Fattan Engineering LLC & Al Fattan Properties LLC*, Justice Williams QC held that DIFC Courts have jurisdiction over the validity of non-DIFC based arbitration agreement, and the court may stay proceedings on the basis of a surviving "inherent jurisdiction to stay".³² Justice Williams QC explained that there was no express rule that inherent jurisdiction either under Article 7 or Article 10 of the DIFC Arbitration Law. Further, the DIFC courts should have jurisdiction over foreign arbitration agreements in order to comply with international treaties especially the New York Convention. Justice Williams QC stressed that "an interpretation of the DIFC Arbitration Law which prohibited the DIFC Court from staying court proceedings brought in breach of non-DIFC arbitration

³¹ *International Electromechanical Services Co LLC v Al Fattan Engineering LLC* Claim No: CF 004/2012 Judgment 14 October 2012.

³² *ibid*, *Al Fattan Properties LLC (CFI 004/2012)*. Available at <http://difccourts.ae/cfi-0042012-international-electromechanical-services-co-llc-v-1-al-fattan-engineering-llc-and-2-al-fattan-properties-llc/> Last Accessed 5/9/2015

agreements would thwart the promotion of the DIFC as a jurisdiction supportive of arbitration as an expeditious and cost-effective dispute resolution process".³³

However, in order to clarify the conflict between the two judgements. Recent amendments to DIFC Arbitration Law has been done in order to bring the DIFC in line with the New York Convention, more specifically Article II(3) of the Convention. The amendments focus on the DIFC jurisdiction to examine the validity of an arbitration agreement despite the seat of arbitration whether it is DIFC or not. The DIFC Authority announced:

"the amendments to the Arbitration Law 2008 have been made to ensure alignment of DIFC to the New York Convention, which require[s] a court of a member state to have the obligation to dismiss or stay an action, upon request of a party, in a matter which is the subject of a valid arbitration agreement".³⁴

According to Article 7(2) under the new amendments, it is stated clearly that Article 13 shall apply to arbitrations even if the parties agreed on other than the DIFC seat. Article 7(2) states as follow:

"Articles 13 14, 15, Part 4 and the Schedule of this Law shall all apply where the Seat of Arbitration is one other than the DIFC."

Therefore, the new amendments state clearly that the DIFC courts shall have jurisdiction over the validity of arbitration agreements when it is seated in DIFC or if the parties agree that the seat of the arbitration is within the UAE.

³³ *International Electromechanical Services Co LLC v Al Fattan Engineering LLC & Al Fattan Properties LLC (CFI 004/2012)* at [116]. Available at <http://difccourts.ae/cfi-0042012-international-electromechanical-services-co-llc-v-1-al-fattan-engineering-llc-and-2-al-fattan-properties-llc/> Last Accessed 5/9/2015

³⁴ DIFC Law No.1 of 2013. Available at: http://www.difc.ae/sites/default/files/Annex%20A_DIFC%20Laws%20Amendment%20Law%20No%201%20of%202013.pdf Last Accessed 16/9/2015.

3.2.3.4 *Enforcing Judgments before DIFCC*

In relation to the enforcement of foreign judgments, the DIFC has the ability to enforce court judgments against a party who holds his assets in the DIFC, especially those emanating from England, as the DIFCC and the English Commercial Court signed a non-legally binding memorandum of guidance to facilitate the mutual enforcement of money judgments issued in the two jurisdictions.³⁵ It is noteworthy that the DIFC recently established a separate DIFC Enforcement Department in order to raise the efficiency and speed of the DIFC judgments enforcement and other jurisdictions.³⁶ The aim of this department is to enforce DIFC judgments both locally and internationally, and to enforce the orders of other courts with regard to assets held within the DIFC.

In conclusion, there are many benefits of relying on the DIFC. The first advantage is that once the enforcement of a DIFC award has been secured before the DIFCC, the court's order will be recognised and enforced by the DC under the same conditions without examining the merits.³⁷ The second advantage is that DIFC awards will benefit from the provisions of the NYC and other conventions ratified by the UAE,³⁸ hence, DIFC awards should be enforced immediately in other Gulf countries that have signed the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications.³⁹

3.3 **Arbitration Development in Dubai**

The UAE has approximately eight percent of the world's proven oil reserves, and the Emirate of Abu Dhabi commands one of the wealthiest sovereign investment funds in the world. The UAE as a whole has one of the highest incomes per capita in the world.

³⁵ <http://difccourts.ae/memorandum-of-guidance-as-to-enforcement-between-the-difc-courts-and-the-commercial-court-queens-bench-division-england-and-wales/> Last Accessed 13/05/2016.

³⁶ <http://difccourts.ae/difc-courts-and-ministry-of-justice-sharpen-international-enforcement-process/> Last Accessed 13/05/2016.

³⁷ Law 12 of 2004 art.7.

³⁸ DIFC Arbitration Law art.4.

³⁹ Gordon Blanke, 'The DIFC: a brave new world of arbitration' (2009) 75(3) Arbitration 422.

Concerns about regional security have made the UAE a major purchaser of defence technology. By one estimate, the UAE is the fourth largest importer of arms in the world.⁴⁰ Because of the UAE's very strong financial standing regionally and internationally, it has attracted businesses from around the world to do commerce there.⁴¹

The main reasons behind referring disputes to arbitration rather than local courts in Dubai pertain to the variety of disputes that arise in international trade, conducting the proceedings in Arabic, the risk of bias (as national judges might tend to protect the interests of the establishment) and the lack of speed of resolving disputes.⁴² Dubai applies the UAE Civil Procedural Code, which institutes arbitration rules within its provisions. DC may refer to Sharia if the Civil Procedures Code is silent on particular areas,⁴³ however the provisions of Sharia do not have major differences from the Civil Procedures Code. This section examines arbitration under Sharia and the current rules of arbitration in the Dubai, and states the main arbitration centres in Dubai and the most significant conventions acceded to by the UAE.

3.3.1 Arbitration under Sharia

Sharia is one of the sources of legislation in Dubai, and Article 7 of the UAE Constitution states that "Islam is the official religion of the Union. The Islamic Sharia shall be a main source of legislation in the Union." Sharia comprises "a body of principles pertaining to moral, economic, social and political issues which Muslims regard as being prescribed by God to govern human life."⁴⁴ The two main resources of Sharia are the Quran (the holy text of Islam) and the Sunnah, which comprises a corpus of narrations concerning

⁴⁰ Emirates builds its own defense industry. United Press International, March 18, 2013. <http://www.upi.com/Emirates-builds-its-own-defense-industry/77731363633569/> Last accessed 23/06/2016.

⁴¹ Gregory Mayew and Mark Morris, 'Enforcement of Foreign Arbitration Awards in the United Arab Emirates' (2014) 81 Def.Counsel J. 279.

⁴² Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) Arbitration 156.

⁴³ Article 4 of the DC Law No. 3 of 1992.

⁴⁴ Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) Arbitration 156.

the wont of the Prophet Mohammed (ﷺ), including his sayings (*hadith*) and acts. The interpretation of the Companions of the Prophet and the early generations of Muslims and the verdicts of classical and contemporary jurists derived from jurisprudence are secondary resources (generally in that order). The process of reasoning in Islamic jurisprudence is known as (*fiqh*), which is also considered an important source of law in its own right, and which is ranked as second to Sharia proper in some countries such as Jordan and Syria, both of whose constitution state that *fiqh* is second and custom (*urf*) is third.⁴⁵

Fiqh aims to interpret the Quran and the Sunnah in order to help create a code of rules that will help people for contemporary usage as society develops, living in accordance with God's law. However, the adopted procedures to help understanding the first principles of Sharia are *ijtihad*, which is analogical and deductive process, and *qiyaas*, which means reasoning by analogy to deduct legal principles, which might be applied if there is no acceptable interpretation available. The consensus of the community and the requirements of public interest (*ijma*) are other ancillary sources of Islamic law in Sharia courts. All of the secondary sources of Sharia derive their legitimacy from the Quran and Sunnah, the latter of which is itself legitimized by the Quran.

The official *madhab* (school of jurisprudence) of the UAE is the Maliki *madhab*,⁴⁶ formerly prevalent in many parts of the Arabian Peninsula and North Africa, but the Hanbali *madhab* is also widely practiced (largely due to Saudi hegemony in the GCC). Courts are required to refer to one of these schools to judge in accordance with Sharia if there is no appropriate provision to be applied on a particular matter.⁴⁷ Article 1 of the

⁴⁵ Butti A-Muhairi, 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Shari'a' (1990) 3 ALQ219 at 6.

⁴⁶ <http://www.awqaf.ae/Affair.aspx?Lang=EN&SectionID=14&RefID=868> Last accessed 14/06/2016.

⁴⁷ Samir Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Lebanon, Syria and Egypt* (Hart Publishing, 2006), at 15.

Civil Code⁴⁸ requires the judges to refer to Sharia if no appropriate provisions were found in UAE law, with preference for the Maliki and Hanbali schools (as mentioned previously), and if no solutions are found there, then from the Shafi'i and Hanafi schools (the latter was the official *madhab* of the Ottoman Empire as well as Mughal India). By Article 27 of the Civil Code, statutory law may not be applied if contrary to Sharia, as Article 27 states: "It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Sharia, public order, or morals in the State of the United Arab Emirates." In addition, Article 4 of the Dubai Courts Law No. 3 of 1992 states that the Court shall exercise its power according to the laws in force in the Emirates and the provisions of Sharia.

In general, judges in Dubai apply the Sharia law in relation to commercial disputes in two different situations, which are when the statutory laws of the Emirate are found to be incomplete in regard to a particular matter, and when relating to matters of public policy.⁴⁹

In regard to the first situation, the Dubai civil courts may refer to Sharia in banking matters if the banking law and regulations of Dubai are found to be silent.⁵⁰ However, Sharia is fundamentally different from other legal systems in several areas, including the concepts of compensation, causation and proximity, but most importantly in its absolute prohibition of usury (interest). In regard the second situation, an example where the public policy issue might arise is in the enforcement of an award that has been rendered in a non-Islamic state.

⁴⁸ Law of Civil Transactions, Federal Law No.5 of 1985.

⁴⁹ 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 L Int'l 254, 274–275.

⁵⁰ Since 2004 a wide range of private and public laws have been enacted by the Emirate of Dubai to allow for the operation of the DIFC and its judicial system.

History shows that arbitration is not an alien process or incompatible with the Sharia.⁵¹ On the contrary, there is consensus among Islamic jurists that disputes between parties should be referred to arbitration based on their agreement. While the Holy Quran is silent in relation to the validity of the arbitration clause (pre-dispute arbitration) and does not prevent this type of agreement, it was agreed that such agreements are invalid on the basis that the Quran was silent about it.⁵²

However, many differences might be found between Islamic schools with regard to particulars about arbitration, such as the number of arbitrators and their appointment, or the nature of the arbitration itself.⁵³ The Hanafi and Shafi schools interpreted arbitration as mere conciliation, and not a binding covenant, citing that the Quran (al-Nisaa, 'The Women', verse 35) requires each party to be presented by one arbitrator when marital disputes arise, which appears to be very similar to the modern conciliation found in the Western world.⁵⁴ The verse reads:

“And if you fear a breach between the two, appoint an arbiter from his people and an arbiter from her people. If they desire reconciliation, God will bring about agreement between them. Truly God is Knowing, Aware.” (Quran, al-Nisaa, 4: 35)

The classical commentator al-Zamakhshari (d. 1144 CE), famous for his linguistic analysis of the Quran, explained the verse thus:

“If the problems between a husband and wife cannot be resolved between them... two arbiters should be appointed... trusted relatives of each spouse, since they are more familiar with the situation, and have the interests of their

⁵¹ Arbitration is referred to and promoted in the Quran, most explicitly at verse 4:35.

⁵² Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) *Arbitration* 156.

⁵³ *ibid.*

⁵⁴ Jalal El-Ahdab, *Arbitration with the Arab countries* (Kluwer Law International 2011), p.8.

respective family members at heart. The arbiters are charged with determining, if possible, which spouse is at fault and recommending either terms of reconciliation or a mutually agreed-upon divorce. The extent of the arbiter's power to reconcile or separate the married couple is unclear. Some have suggested they bring their recommendations to the local authority for implementation; others have felt they have the power to reconcile or dissolve the marriage upon their own agreement; still others felt that any action taken has to be with the consent of the two spouses.”⁵⁵

The Maliki and Hanbali schools affirm that the final decision of the arbiters is binding, therefore parties should agree on an odd number of arbitrators, citing 4:58.⁵⁶

“God commands you to return trusts to their rightful owners and, if you judge between men, to do so with justice. Excellent indeed is the instruction God gives you. Truly God is Hearing, Seeing.” (Quran, al-Nisaa, 4: 58)

This verse pertains to a particular historical context, in which God ordered the Prophet to return the keys to the Ka'bah from his uncle Abbas to the original pre-Islamic trustee, Uthman ibn Talhah. However, its meaning is generally construed in terms of the apparent: a general exhortation of judges and rulers to judge justly.

Despite the differing interpretations within normative Islamic jurisprudence, verdicts are not static and are to be applied appropriately to the time and place. Arbitration is considered valid under the Sharia and there are no articles or provision that prohibit parties from referring to arbitration to settle their dispute. Arbitration as adopted

⁵⁵ Sayyed Hossein Nasr (ed.) *The Study Quran*. (New York: Harper One, 2015).

⁵⁶ Jalal El-Ahdab, *Arbitration with the Arab countries* (Kluwer Law International 2011), p.8.

nowadays across the Middle East is compatible with the principles of arbitration in the Sharia, including those provisions that consider it as binding dispute resolution.⁵⁷

3.3.2 Arbitration Institutions in Dubai

Referring disputes to arbitration is increasingly common in the UAE, as it is considered as an ideal and preferable method to settle disputes, especially for foreign businesses. In Dubai, as in other emirates in the UAE, there is no independent and distinct corpus of legislation for arbitration, as its rules are found within the UAE Civil Procedural Code (1992). Articles 203-218 deal with arbitration, Articles 235-238 deal with the execution of foreign judgments, and Articles 239-243 deal with execution procedures. These articles organise the relations between courts and arbitrators, as courts are given the power to dismiss any arbitrator, examine procedural issues and apply anti-arbitration injunctions. However, the UAE has enacted a new Federal Arbitration Draft Law (the Draft Law) that is based on the Egyptian Law, which in turn is based on the UNCITRAL law, which is expected to repeal Articles 203-218 of Federal Law (11) of 1992, the Civil Procedural Code.⁵⁸

In the UAE there are several of successful arbitration institutions that are considered to be leading centres in the field of arbitration in the country and beyond. For example, Dubai International Arbitration Centre (DIAC) has its own set of Arbitration Rules 2007 (the DIAC Rules), Dubai International Financial Centre established its own Arbitration Centre with its own DIFC-LCIA Arbitral Rules (the DIFC-LCIA Rules), administered with the London Court of International Arbitration (LCIA) and the Abu Dhabi

⁵⁷ Rodney Quinn Smith and Omar Ibrahim, 'Arbitrating at the Crossroads of East and West: An Overview of Prominent Arab National Arbitration Laws' (2008).

⁵⁸ Article 59 of the Federal Arbitration Draft Law.

Commercial, Conciliation and Arbitration Centre (ADCCAC). However, as the study is concerned about Dubai, it will only focus on the DIAC and DIFC-LCIA at this stage.

There are two different arbitration centres in Dubai, each of which has its own rules and courts. Hence, parties should determine clearly the seat of arbitration when choosing Dubai, whether it is Dubai or DIFC, as the seat of arbitration will decide which legal framework will be applied. The next sections provides a general overview in regard to these two institutions.

3.3.2.1 Dubai International Arbitration Centre (DIAC)

DIAC is one of the busiest arbitration centres in the Gulf region; it was established in May 2003, and it is located in Dubai. Over the last decade, arbitration has become widespread in the UAE in general and Dubai in particular, as reflected in the high demand on arbitration institutions in the UAE. For example, the cases in the DIAC increased from 15 in 2003 into 413 by 2010.⁵⁹ In 2013, the number of cases registered was reduced to 310.⁶⁰

DIAC is part of the Dubai Chamber of Commerce, although it is financially and administratively autonomous.⁶¹ However, it has its own rules under which it administers arbitration, the DIAC Arbitration Rules (2007), which are modelled on international best practice. However, choosing Dubai as a seat of arbitration means that the arbitration would be governed by the Civil Procedural Code. DIAC provides parties with lists of both national and international arbitrators from across the region, in the Middle East and

⁵⁹ Reza Mohtashami, Antonia Birt and Lee Rovinescu, *Arbitration Guide United Arab Emirates* (International Bar Association, 2013), available at [file:///Iha-024/pers-I/0006A361/Downloads/IntlArbGuide - United Arab Emirates%20\(2\).pdf](file:///Iha-024/pers-I/0006A361/Downloads/IntlArbGuide%20(2).pdf) Last Accessed 27/02/2017.

⁶⁰ <http://www.diac.ae/idias/archiveevents/CASESTATIC/> Last Accessed 27/02/2017.

⁶¹ Hassan Arab, Rita Jaballah and Robert Maxwell Marsh, 'Taking on the world' (2015) *Legal Business* 36.

beyond. DIAC gives parties the choice to decide the number of arbitrators, as they are free to choose a sole arbitrator or three-member tribunal.

Several issues might arise with regard referring to DIAC, such as the procedures being conducted in Arabic, which might be an obstacle in relation to the international disputes and could bear parties extra costs for translation, and due to the lack of an official translation body in the Civil Procedures Code this could lead to misunderstanding of the rules.

3.3.2.2 *DIFC-LCIA*

The DIFC established the DIFC-LCIA arbitration centre in February 2008, established by Dubai Law No. (9) of 2004, amended by Dubai Law No. (7) of 2014. Under the jurisdiction of DIFC-LCIA, parties may agree to consider the DIFC-LCIA as the seat of arbitration even if the dispute does not have any connection with the DIFC.⁶² When parties agree on DIFC-LCIA as the seat of arbitration, this means that the courts of DIFC will have the curial jurisdiction over arbitration. DIFCC, as mentioned earlier, are English-language common law courts modelled on the English Commercial Court, and the DIFC relies on the English Common Law where there are gaps in the legislation.

However, parties are not obliged to apply the DIFC law when referring their dispute to DIFC-LCIA, as the DIFC is merely home to DIFC-LCIA.⁶³ For example, parties may submit their dispute to DIFC-LCIA in order to administrate their dispute and still apply the French law if the seat is Paris. In other words, the seat of arbitration will determine the applicable law, thus it is not necessary that the DIFC law will be applied if the DIFC-LCIA administers an arbitration.

⁶² Article 1 of the DIFC-LCIA Arbitration Rules.

⁶³ *ibid*, Article 16.

The list of arbitrators in DIFC-LCIA is based on that found in LCIA. Moreover, under the DIFC-LCIA Rules, parties are free to choose between a sole arbitrator and a three-member arbitral tribunal. The language should be English unless the parties have agreed otherwise.

3.3.3 Ratified Conventions in the UAE

In regard to the international level, the UAE has ratified several of treaties and conventions in the field of arbitration to enhance its place in international commercial arbitration. UAE is aiming to state itself as a hub for the settlement of domestic and international disputes in the Middle East. However, in order to achieve this goal, the UAE has ratified a several arbitration conventions such as the Riyadh Convention on Judicial Cooperation between States of the Arab League, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications, the ICSID Convention and finally the most widespread convention, the NYC.

3.3.3.1 The Riyadh Convention on Judicial Cooperation between States of the Arab League (Riyadh Convention)

The Riyadh Convention was concluded in 1983 in Riyadh, and it was ratified by the UAE in 1999 by the Federal Decree No.53 of 1999. The other parties to the Convention are Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia and Yemen.

The Riyadh Convention deals with the enforcement of the foreign arbitral awards. Under the Riyadh Convention, the enforcement court is compelled to recognise and enforce the arbitral award without discussing its merits, with limited grounds to refuse the

enforcement.⁶⁴ However, in practice, in the UAE they have not been directly enforceable, but rather require ratification by a UAE First Instance Court prior to execution.⁶⁵

The Riyadh Convention established the grounds for refusal of an award, as stated in Article 37 and summarised as: 1) if the subject matter of the dispute is not arbitrable; 2) if the arbitration clause or arbitration agreement is invalid or void; 3) if the final award is not final yet; 4) if the parties were not treated summoning in a proper manner; 5) if the award does not comply with the Sharia, constitution and public policy; and 6) if the arbitrators are non-competent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made.

The Riyadh Convention requires the party who is seeking the enforcement and recognition of the award to produce an authenticated award accompanied by with proof that it is enforceable under the law of the country of origin.⁶⁶ Moreover, the winning party is required to submit an authenticated copy of the arbitration agreement.⁶⁷

3.3.3.2 The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (GCC Protocol)

The GCC Protocol was ratified in the UAE in 1996 by the UAE Federal Decree No. 41 of 1996. The other countries that have ratified the GCC Protocol are Saudi Arabia, Oman, Qatar, Kuwait and Bahrain. The main aim of the Protocol is to ensure the enforcement of the judgments and arbitration awards in GCC States. Under Article 1 of the GCC Protocol, it governs civil, commercial and administrative cases. Both arbitral awards and judgments are enforced in the same way under the provisions of this Protocol.⁶⁸ The GCC Protocol

⁶⁴ Article 37 of the Riyadh Convention on Judicial Cooperation between States of the Arab League.

⁶⁵ <http://www.tamimi.com/en/magazine/law-update/section-6/september-2/execution-of-foreign-judgments-in-cases-of-concurrent-jurisdiction-in-the-uae-pursuant-to-internatio.html> Last Accessed 15/05/2016.

⁶⁶ Article 34 of the Riyadh Convention on Judicial Cooperation between States of the Arab League.

⁶⁷ *ibid.*

⁶⁸ Article 12 of the GCC Protocol.

took the same approach applied by the Riyadh Convention and stated under Article 7 that the award merits should not be examined, stating that:

“The task of the judicial authority of the state where the judgment is required to be executed shall be limited to confirming whether the judgment fulfils the requirements as provided by this agreement, without discussing the subject matter.”

However, Article 2 of the Protocol stated several grounds for rejection of enforcement of the award:

1. Article 2(a) states that the award/judgment may set aside if it was found contrary to the Sharia provisions, Constitution or public policy according to the law of the enforcement court.
2. If the winning party failed to notify the other party of the suit or the judgment properly.
3. The court may refuse the enforcement if it found that there were a former award or decision that has already been issued and it includes the same subject matter, same parties and it is related to the same right.
4. If the court found that the award/judgment required to be enforced the same subject matter and parties. Moreover, it is related to the same right to dispute that is heard by one of the courts of the state where the party is seeking the enforcement. However, the suit should be filed prior to the date of referring the dispute to the court of the state in which the judgment is issued.
5. The court may refuse the enforcement if the award/judgments are in conflict with the international conventions and protocols applied in the country of the enforcement court.

6. The court may set aside the award/judgment if it is issued against the enforcement court Government or “against one of the officials for acts done by such officials during or only due to the performance of the duties of their job.”⁶⁹

However, courts of GCC member states are required to enforce judgments rendered by the DIFCC on the basis that the DIFCC are located within the UAE; in practice, it is better to obtain recognition of the DIFCC judgments in the DC first, before seeking enforcement in foreign states (i.e. GCC member states other than the UAE).⁷⁰

An example where the DIFCC applied the GCC protocol to enforce a judgment is in *Farooq Al Alawi v. Lloyds TSB Bank PLC and Credit Suisse AG*,⁷¹ in which the court held that the respondents should enforce a judgment issued by the Bahraini Family Courts and a resolution emanating from the Bahraini Board of Minors’ Funds Custody. The court made its decision on the basis of the Rules of the DIFCC, the GCC Protocol and the 1983 Convention on Judicial Cooperation between States of the Arab League.⁷²

3.3.3.3 *The ICSID Convention*

The UAE is a contracting party to the ICSID Convention, which is concerned with investment disputes. It established the International Center for Settlement of Investment Disputes in Washington, DC, which aims to provide parties with facilities for arbitration and conciliation in relation to investment disputes. Article 54 of the ICSID Convention states that countries that are party to the Convention are required to enforce arbitral awards within their territories if it is a final judgment of a court in that state.

⁶⁹ *ibid*, Article 2(e).

⁷⁰ www.lexology.com/library/detail.aspx?g=7b1c9bcd-4768-4196-b56a-e37b5e83adad Last Accessed 14/05/2016.

⁷¹ Enforcement No: 02/2012, The Dubai International Financial Centre Courts.

⁷² <http://difccourts.ae/enf-022012-farooq-al-alawi-v-1-lloyds-tsb-bank-plc-2-credit-suisse-ag/> Last Accessed 09/07/2015.

The winning party who is seeking the enforcement of the award under the ICSID Convention must provide the court charged with enforcement a copy of the award certified by the Secretary-General of the ICSID.⁷³ Moreover, the ICSID provides that the award shall be governed by the same execution laws of judgments that are in force in the state where the enforcement is sought.⁷⁴

3.3.3.4 *The NYC*

The UAE ratified the NYC in 2006 by Federal Decree No.43/2006. The NYC applies to awards that have been rendered in a foreign country and awards that are not considered domestic in the state where the enforcement is sought.⁷⁵ Under Article II(3) of the NYC, the courts must refer the dispute to arbitration if the arbitration agreement is valid and binding, if any of the parties raised an objection regarding the arbitration agreement.

According to the NYC provisions, in order to obtain recognition and enforcement the winning party is required to produce at the time of application a duly authenticated or duly certified award in the language of the country of enforcement, hence if the award language is different from the official language the award should be translated before it is submitted.⁷⁶

Due to the importance and widespread application of the NYC, the study chose to examine its reliability in enforcing the final award conducted via online arbitration in international commercial disputes.⁷⁷ The NYC helped to ease the enforcement of the final award at the international level. Indeed, the NYC made the recognition and enforcement

⁷³ Article 54(2) of the ICSID.

⁷⁴ *ibid*, Article 54(3).

⁷⁵ Article I of the NYC of 1958.

⁷⁶ *ibid*, Article IV(2).

⁷⁷ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), P.81. Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 11. Lord Justice Tomlinson, 'The enforcement of foreign arbitral awards: the CIArb London branch annual general meeting: keynote address, April 27, 2015' (2015) 81(4) *Arbitration* 398-403.

of arbitral awards and agreements easier and more effective, superseding the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards in states that are parties to both Conventions. However, the NYC played a major role in raising the importance of arbitration, for the reason that the award that is made in a country that has ratified the NYC could be enforced and recognised by any country that is party to the Convention. The NYC provides a much simpler and easier method to enforce foreign arbitral awards. The enforcement of the arbitral award is guaranteed within limited grounds stated under Article V of the Convention.

Since the NYC has been enforced, the courts in Dubai have dispensed with any procedural matters of form and/or the requirements set out in the UAE Civil Procedures Code Article 235 as valid grounds for non-recognition and/or nullification, only applying the provisions of the NYC.⁷⁸ The NYC is determined to focus on the recognition and enforcement of the arbitration agreement and arbitral awards, without specifically regulating the conduct of the arbitral proceedings or other aspects of the arbitral process.

3.4 Issues of Applying the NYC

Several issues might arise in regard to the parties who are wishing to rely on the NYC to enforce the final award. The first matter that might face the winning party is whether the award is commercial or not and whether the country of the enforcement court declared the commercial reservation. On the other hand, the winning party relying on an award concluded via online arbitration might face several obstacles when relying on the NYC provisions, some of these issues might arise due to the lack of rules that regulate the online matters and other issues might arise due to the outdated provisions stated in the NYC.

⁷⁸ Gordon Blanke and Soraya Corm-Bakhos, 'Enforcement of New York Convention awards: are the UAE courts coming of age?' (2012) 78(4) *Arbitration* 359.

3.4.1 Reciprocity and Commercial Reservations under the NYC

Under Article I(3) of the NYC, there are two specified reservations that the Contracting States may declare, which are the reciprocity reservation and the commercial reservation. Countries have the choice to declare any, both or none of the reservations. NYC 1958, Article I(3) stipulates:

“When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”

These reservations may affect the enforcement of the arbitral award; if the country is applying the reciprocity reservation, it means that in order to apply the Convention, the arbitral award should be made within the territory of another Contracting State. Indeed, the reciprocity reservation has little or no effect on arbitral awards, as 153 countries are already signatories to the Convention.⁷⁹ In other words, even if the contracting state applied the reciprocity reservation, this does not raise any pertinent issue in online arbitration due to the ubiquity of the NYC.

On the other hand, several issues might arise if the commercial reservation is applied in the country where the enforcement is sought. The commercial reservation means that the Convention applies only to disputes arising out of commercial transactions. This reservation is more related to consumer arbitration and raises some issues in this field, as

⁷⁹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last accessed 24/11/2014).

the consumer transaction might be considered a commercial transaction in some countries that declare the reservation, and might not be considered as such in other states.⁸⁰

Article I(3) of the NYC limits its application to disputes that arise from commercial transactions, which means that the courts in contracting states that declare this reservation will have to examine the transaction in terms of whether it is considered commercial under its legal system or not. The commercial reservation has been declared by 48 out of 153 countries.⁸¹ However, in practice the commercial reservation may not cause any problem as the courts in different countries intend to interpret the coverage of the term “commercial” broadly.⁸²

For example, in the US itself the “commercial reservation” has been adopted, which might mean that arbitral awards will be examined before the enforcement court, whether they concern commercial transactions or not. Under Article 1 of the FAA, commerce includes maritime and shipping transactions, but the courts expanded the definition to include construction,⁸³ insurance policies,⁸⁴ and depository shares.⁸⁵ According to the FAA and

⁸⁰ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), p.21. Julia Hornle, ‘Legal controls on the use of arbitration clauses in B2C e-commerce contracts’ (2006) *Electronic Business Law* 8(8) 9. Lesley Caplin, ‘Resolving consumer disputes online: a review of consumer ODR’ (2004) *Commercial Law Practitioner* 207.

⁸¹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last accessed 23/06/2016).

(Afghanistan, Algeria, Antigua and Barbuda, Argentina, Armenia, Bahrain, Barbados, Bhutan, Bosnia and Herzegovina, Burundi, China, Central African Republic, Croatia, Cuba, Cyprus, Denmark, Djibouti, Ecuador, Greece, Guatemala, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Jamaica, Madagascar, Malaysia, Monaco, Mongolia, Montenegro, Nepal, Nigeria, Philippines, Poland, Republic of Korea, Romania, Saint Vincent and the Grenadines, Serbia, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam)

⁸² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), P.22. Karakas, Edin, ‘International character of disputes as a requirement to the validity of arbitral agreements and awards’ (2006) 9(2) *International Arbitration Law Review* 42.

⁸³ *Trans Chemical Limited v China National Machinery Import and Export Corporation*, 978 F.Supp. 266(C.A 5th Cir. 1998).

⁸⁴ *Best Concrete Mix Corp. v Lloyd's of London Underwriter*, 413 F. Supp. 2d 182 (E.D.N.Y. 2006).

⁸⁵ *President and Fellows of Harvard College v JSC Surgutneftegaz* [Case No.11 168 T 01654 04], 770 PLI/Lit 127.

the courts' definitions, consumer arbitration is not considered to pertain to commercial transactions, but US courts interpret the term "commercial" widely.⁸⁶

It can be seen from the discussion above that the commercial reservation is not widely adopted, and even countries that adopted it they use the term "commercial" broadly and do not seriously impede the efficacy of the NYC.

In the UAE, the country has not declared any of the reservations,⁸⁷ hence the award might be enforced before the courts of Dubai and DIFC despite the country where the award was rendered in the territory of another contracting State or not, and despite the award is commercial or not.

3.4.2 *Obstacles Facing Online Arbitration in Relation to the NYC*

Despite the numerous advantages of online arbitration, and the vital importance of enforcing the final award according to the NYC rules in international commercial disputes, there might be several obstacles that may prevent parties from referring to online arbitration, and benefiting from the NYC to enforce the final award. The main obstacles that are related to the enforceability of electronic award pursuant to the NYC are the validity of electronic arbitration agreement,⁸⁸ safeguards regarding consumer disputes,⁸⁹ due process and online arbitration procedures⁹⁰ and the issue of authenticating the

⁸⁶ Philip Johnson, 'Enforcing Online Arbitration Agreements for Cross-Border Consumer Small Claims in China and the United States Commentary' (2013) 36 *Hastings Int'l & Comp L Rev* 577.

⁸⁷ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last accessed 23/06/2016).

⁸⁸ M.H.M. Schellekens, "Online Arbitration and E-Commerce" (2002) 9 *Electronic Communication Law Review* 113. Alejandro López Ortiz, "Arbitration and IT" (2005) 21(3) *Arbitration International* 353.

⁸⁹ http://unctad.org/en/docs/edmmisc232add20_en.pdf Last Accessed 05/04/2016. *Mostaza Claro v Centro Movil Milenium SL*(C-168/05) [2007] Bus. L.R. 60; [2006] E.C.R. I-10421; (2007) *SchiedsVZ* 46; critical comment by Wagner (2007)*SchiedsVZ* 49.

⁹⁰ Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009). Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004). p.197.

electronic award.⁹¹ Nevertheless, due to the lack of international treaties to regulate these matters, the answer might vary based on the applicable law. The study will examine these matters under Dubai and DIFC legislation. In brief, the main issues are as follows:

3.4.2.1 The Enforceability of Electronic Arbitration Agreement

The NYC requires the arbitral award to be “in writing” in order to be enforceable.⁹² This might be an obstacle and could raise several issues regarding the enforceability of an electronic arbitration agreement before the competent court.

3.4.2.2 The Enforceability of Arbitration Agreement in Consumer Disputes

Consumers by agreeing on the terms and conditions of an ecommerce contract there is a high possibility that there is an arbitration agreement among the terms and rules of such a contract, which would bind and enforce them to arbitrate any future dispute. However, consumers are protected in some countries from referring into arbitration, whether offline or online arbitration. The NYC provides grounds to set the award aside, thus the court may rely on any of these grounds to set consumer arbitral awards aside. Therefore, it is important to examine the approach of the Dubai and DIFCC in this context, and whether consumers are well protected from referring to unfair arbitration.

3.4.2.3 Due Process and Online Arbitration

While conducting procedures either online or offline, arbitrators should consider the due process requirements, otherwise the award might be challenged on the grounds of being contrary to public policy.⁹³ Consequently, if the arbitrators failed to conduct procedures

⁹¹ Norbert Horn, 'Arbitration and electronic communications: public policy' (2009) 12(5) *International Arbitration Law Review* 107. Haitham A Haloush, 'The Authenticity of Online Alternative Dispute Resolution Proceedings' (2008) 25(3) *Journal of International Arbitration* 355.

⁹² Article II of the NYC.

⁹³ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004). p.197.

according to due process, the award might be set aside pursuant to Article V(2)(a) of the NYC. However, this study examines the effect of conducting the procedures online on the enforceability of the final award before DC and DIFCC. Moreover, it considers other issues regarding enforcement of the final award when conducting the procedures online, such as the issue of delocalization and the issue of ESI.

3.4.2.4 Authentication of Electronic Award

NYC under Article IV requires the award and arbitration agreement to be authenticated. However, there might be challenges regarding authentication of the award and arbitration agreement electronically.⁹⁴ Nevertheless, the validity and enforceability of the e-award depends on the legislation of the enforcement court. Therefore, the study will examine the legislation of Dubai and DIFC in terms of whether they validate electronic authentication.

3.5 Conclusion

The chapter explained the legal systems in the UAE, Dubai and the DIFC, clarifying that each is different from the others. In the UAE the court's jurisdiction is regulated by the Judiciary of the Union pursuant to Article 45 of the Constitution. Article 95 states that the courts in the UAE are divided into First Instance Courts and Supreme Union Courts. In Dubai there are only local courts regulated under the Dubai Courts Law No. 3 of 1992. The DIFC's legal system includes its own commercial, corporate and arbitration laws, and is regulated under DIFC Law 10 of 2004 and Law 12 of 2004 in respect of the Judicial Authority of the DIFC.

⁹⁴ UNCTAD, Dispute Settlement. International Commercial Arbitration 5.9 Electronic Arbitration (UNCTAD/EDM/Misc.232/Add.2o) (2003). Norbert Horn, 'Arbitration and electronic communications: public policy' (2009) 12(5) *International Arbitration Law Review* 107. Dahiyat EAR, 'The legal recognition of electronic signatures in Jordan: some remarks on the Electronic Transactions Law' (2011) *Arab Law Quarterly* 297.

The chapter examined the development of arbitration in Dubai and how Sharia may affect it, especially as Sharia is the second source of law, and DC are required to apply it when there are no provisions within the UAE Civil Procedural Code to cover a particular matter.

The rules relating to arbitration are included within the Civil Procedures Code, which means that judges in the DC will have to apply arbitration rules found within these provisions; these rules regulate the enforcement of foreign arbitral awards. The UAE has ratified a number of arbitration conventions and agreements, and the NYC was ratified in 2006, considered as a vital step in the world of international commercial arbitration.

On the one hand, the enforcement of the award before DC means that the court in Dubai shall examine the validity of the foreign award according to the provisions of the NYC. On the other hand, enforcing the foreign award before the DIFCC means that the court will examine the award according to the provisions of the DIFC Arbitration Law and the provisions of the NYC.

Finally, relying on online arbitration might raise some issues regarding the enforceability of the final award before DC and DIFCC. Therefore, the study will examine the issues and solutions in enforcing arbitration awards under the NYC before DC and DIFC when parties conduct part or the whole procedure online or rely on IT tools. Each major matter will be discussed in a separate chapter.

4 Chapter Four: The Enforceability of Electronic Arbitration Agreements before DIFCC and DC

4.1 Introduction

The first issue that might face parties attempting to use IT is the validity of the electronic arbitration agreement. The winning party who is seeking the enforcement of an arbitral award relying on the provisions of the NYC should consider the formal requirements of the arbitration agreement stated in Article II of the Convention; failing to do so might lead to the nullity of the final award pursuant to Article V(1)(a). Article V of the NYC sets forth the only grounds that can be used to refuse enforcement of a foreign arbitral award. It states that: “The ... agreement referred to in article II ... is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. Article II refers to the arbitration agreement, thus the validity of arbitration agreements is of great importance due to its role as the basis and core of the arbitration procedure. In other words, invalidity of the arbitration agreement will consequently invalidate the whole arbitral procedure, hence rendering the award null and void.

Relying on modern technology to conclude arbitration agreements might raise issues regarding enforceability and formal requirements pursuant to the NYC provisions, with special reference to Article II. This chapter starts by exploring the legal issues in enforcing electronic arbitration agreements according to the provisions of the NYC by defining the meaning of the requirement “in writing” and highlighting the obstacles to fulfilling the formal requirements.

The second part of the chapter examines possible solutions to enforcing the electronic arbitration agreement based on the provisions of the NYC, including relying on electronic

signatures, the DC and DIFCC interpreting Article II broadly, and applying the principle of the most-favourable-law. The study explains these solutions and examines the ability of the DC and DIFCC to implement them.

Implementing the principle of the most-favourable-law solution enables the court to rely on the national law rather than the provisions of the Convention. The core is the principle that “the provisions of the Convention shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such an award is sought to be relied upon”.¹ According to this solution, the applicable law determines the validity of electronic arbitration agreements. Therefore, whether the principle of the most-favourable-law can be applied in Dubai and DIFC is examined by investigating whether the legislation in these jurisdictions supports the validity of electronic arbitration agreement.

It should be noted that the new Draft Law might be a reliable solution for the parties enforcing the final award concluded via electronic arbitration agreement. However, the law was drafted some time ago and has not yet been enforced. Moreover, applying the most-favourable-law to enforce the arbitration agreement is not guaranteed, as will be explained later in the chapter. Finally, relying on the DIFCC to enforce the final award concluded via electronic agreement might be expensive, and the court conducting procedures in English may cost the parties extra money.

4.2 The Writing Requirement under the NYC

Article II of the NYC states the formal requirements of an arbitration agreement, including that the agreement should be in writing in order to be considered valid:

¹ <http://folk.uio.no/giudittm/Form%20arb%20clause%20ICC.pdf> Last Accessed 03/04/2016.

“1. Each Contracting State shall recognize an agreement in writing; under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term ‘agreement’ in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.

Lew and Mistelis identified the importance of the arbitration agreement as a proof that the parties consented to the submission of any future dispute to arbitration.² In addition to proving the consent of parties to submit potential disputes to arbitration,³ an arbitration agreement is required in writing under the NYC to ensure that it gives the arbitration tribunal authority to settle the dispute, and to enable enforcement, as the enforcement court requires the party seeking enforcement to produce a written arbitration agreement with the award.⁴

By setting the requirements of the arbitration agreement, the NYC prevents enforcement courts from requiring stricter conditions other than those stated under Article II.⁵ For example, the courts shall not require a particular font size for the arbitration agreement, nor require the agreement to be on a separate page. Nor do courts require a separate signature for the parties on the arbitration clause.

² Julian Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, 2003), para.6-2.

³ *Ibid.*, para.7-7.

⁴ Hong-Lin Yu, 'Written arbitration agreements - what written arbitration agreements?' (2012) 32(1) *Civil Justice Quarterly* 68.

⁵ Julian Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, 2003), para.26-58. AJ van den Berg (ed.), 'Consolidated Commentary on the New York Convention: 203 and 204. 2. Formal Validity, Uniform rule and Municipal Law' (2003) XXVIII Y. B. Comm. Arb. 584–587.

Based on the Article above, the term “in writing” means that the arbitration agreement should be signed or contained in an exchange of letters or telegrams. However, a conflict may arise in interpreting Article II(2), in terms of whether it requires only the arbitration agreement to be signed or contained in an exchange of letters or telegrams, or both the arbitration agreement and arbitral clause. Consequently, courts took different approaches in interpreting Article II(2). For example, in 1994 the Court of Appeals for the fifth Circuit⁶ interpreted the meaning of Article II(2) by dividing the term “agreement” into: a) the arbitral clause found in a contract; and b) an arbitration agreement signed by the parties or found in an exchange of telegrams or letters. Conversely, other courts applied a different view by stating that both arbitral agreement and clause shall be signed or contained in an exchange of letters or telegrams.⁷

The US District Court in *Mar, Inc v. Tiger Petroleum Corporation*⁸ took a different approach by affirming that either the arbitration clause or the arbitration agreement should be signed or contained in an exchange of letters or telegrams to be considered valid. This approach was also applied in the case of *Krauss Maffei Verfahrenstechnik GmbH (Germany) v. Bristol Myers Squibb (Italy)*,⁹ as it was explained that Article II(2) requires both the arbitral clause and arbitration agreement to be signed or included in an exchange of letters or telegrams. The latter is a more expedient approach as it assures the real and explicit intention of the parties to arbitrate, and according to the cases above, requiring both the clause and agreement will ensure unanimity of acceptance in all jurisdictions.

It can be concluded that the “writing” requirement should be applied to both the arbitral clause and arbitration agreement. In other words, both an arbitration clause in a contract

⁶ *Sphere Drake Insurance plc v. Marine Towing, Inc.*, 23 March 1994, (16 F 3d 666, Yearbook Commercial Arbitration XX (1995), p. 937).

⁷ US 341. United States District Court, Southern District of California, 26 April 2000.

⁸ *Sen Mar, Inc v. Tiger Petroleum Corporation* (1991)(774 F Supp. 879).

⁹ *Krauss Maffei Verfahrenstechnik GmbH (Germany) v. Bristol Myers Squibb (Italy)*, 10 March 2000, (Yearbook Commercial Arbitration XXVI (2001), p. 816

and a separate arbitration agreement should be signed by the parties or contained in an exchange of letters or telegrams. Nevertheless, in the wording of NYC Article II there is no reference to arbitration agreements concluded via modern communications, as it is stated explicitly that both arbitration clause and arbitration agreement should be in writing either signed or contained in an exchange of letters or telegrams.

Several scholars have highlighted the issue of the validity of the electronic arbitration agreement, stating that it does not fulfil the formal requirements of the NYC.¹⁰ The problem is attributable to the drafters of the NYC not being able to anticipate the possibility of electronic exchanges becoming a normal part of daily communication and transactions.¹¹ However, several solutions have been implemented in order to enforce electronic arbitration agreements, such as relying on the electronic signature, interpreting Article II broadly and reliance on the principle of the most-favourable-law. However, the efficiency of each solution depends on the courts of enforcement. The next part examines the efficiency of each solution before DC and DIFCC.

4.3 Solution for the Validity of Electronic Arbitration Agreement under the NYC before DC and DIFCC

The first solution is to rely on the electronic signature to enforce the online arbitration agreement, if the law states that the electronic signature can replace the manual signature. As stated above, an arbitration agreement shall be signed or contained in an exchange of letters or telegrams, therefore electronic signature should have the same legal effect and should be able to replace the manual signature according to the law of the enforcement court in order to be considered valid and enforceable. Indeed, this solution might be

¹⁰ M.H.M. Schellekens, "Online Arbitration and E-Commerce" (2002) 9 *Electronic Communication Law Review* 113. Alejandro López Ortiz, "Arbitration and IT" (2005) 21(3) *Arbitration International* 353.

¹¹ *United Nations Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration, Electronic Arbitration* (2003) UNCTAD/EDM/Misc.232/Add.20, pp.3–55.

efficient if parties are able to rely on electronic signature and the law of enforcement court recognises the electronic signature. The validity and enforceability of electronic signature is uncertain and may raise some issues before DC and DIFCC.¹² Hence, this solution is unreliable and parties may not benefit from relying on it.

The second solution depends on the courts' interpretation of Article II, and whether it interprets the requirements exclusively.¹³ The core of this solution is that at the time of drafting the NYC, the most modern technologies available comprised "an exchange of letters or telegrams". Hence, the intention of the Convention is to support and recognise modern technologies concluded by absent parties.

In this regard there are two approaches. Several courts in their decisions interpreted Article II widely to include arbitration agreements concluded in communications other than an exchange of letters or telegrams,¹⁴ as supported by Giuditta Cordero Moss:

"The question whether an arbitration clause entered into electronically meets the requirement of the written form, which is set by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, seems relatively easy to answer affirmatively, on the basis of an extensive interpretation of the New York Convention".¹⁵

On the other hand, some courts took the opposite approach by stating that the requirements under Article II(2) are exhaustive.¹⁶ In both cases, the Fifth and Second

¹² This issue has been discussed in further detail with the electronic authentication in Chapter Seven.

¹³ Article 1 of the Recommendation reads: 'Recommends that article II, paragraph 2, of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive; . . .'

¹⁴ For example, the Austrian decision published in *Yearbook Commercial Arbitration* I (1976), 183 and the Swiss decisions published in *Yearbook Commercial Arbitration* XII (1987), 502 and XXI (1996), 681. The Swiss decision published in *Yearbook Commercial Arbitration* XXI (1996), 685.

¹⁵ Giuditta Cordero Moss, 'Risk of Conflict Between the New York Convention and Newer Arbitration-Friendly National Legislation?' (2003) 2 *Stockholm Arbitration Report* 1.

¹⁶ *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir.), cert. denied 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994); *Kahn Lucas*, 186 F.3d at 215-18.

Circuits stated that the main issue regarding the enforceability of the arbitration clause is whether it fulfils the requirements of the term “in writing”. Moreover, the United States District Court, Southern District of California, stated that:

“The term ‘Agreement In Writing’ is defined solely by Article II, Section 2 of the Convention, and is not given any broadened scope by Congress’s Implementing Legislation, specifically 9 U.S.C. § 202”.¹⁷

The court concluded that the requirements stated under Article II(2) of the NYC are not the minimum, rather they are the mandatory requirements to be applied by courts.

Indeed, communication technology used between parties in transactions has developed over time since the NYC was drafted in the era of letters and telegrams, and some courts have stated that the telex fulfilled the formal requirements under Article II of the Convention despite not being expressly referred to in Article II.¹⁸ Following telex, fax was utilised between parties to exchange communication, and the arbitration agreement concluded via fax communications was also recognised by some courts as valid, although again it is not stated expressly in Article II of the NYC.¹⁹ In order to clarify and establish a uniform interpretation of Article II, the General Assembly adopted the UNCITRAL “Recommendation regarding the interpretation of article II(2) and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session”.²⁰

¹⁷ US 341. United States District Court, Southern District of California, 26 April 2000.

¹⁸ See e.g. the Austrian decision published in Yearbook Commercial Arbitration I (1976) at 183 and the Swiss decisions published in Yearbook Commercial Arbitration XII (1987) at 502 and XXI (1996), 681.

¹⁹ See e.g. the Swiss decision published in Yearbook Commercial Arbitration XXI (1996), 685.

²⁰ A/RES/61/33, <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf> . Last Accessed 03/04/2016.

The Recommendation suggests that Article II of the NYC should be interpreted widely.²¹ Further, the exchange of letters or telegrams was stated in the Convention as an *example*, which is not exhaustive and which could include other means of communication. Nevertheless, the Recommendation is not binding on signatory states or judges. Further, these recommendations might not be regarded as an authoritative interpretation of Article II, as the UNCITRAL is not considered as an enacting body. Thus, the second solution might not always be efficient as it depends on the courts' approach and interpretation of Article II, which is not necessarily followed in practice.

It should be noted that in Dubai, only two decisions have been issued by the DC related to the NYC,²² neither of which examined the formal requirements of Article II of the Convention. In the DIFC, no cases have examined or interpreted the formal requirements under Article II(2).²³ Hence, it is hard to determine whether or not the courts' approach in Dubai and DIFC is to consider Article II exhaustive.

The two solutions examined above might help to enforce the electronic arbitral awards. On the one hand, the first requires electronically signed documents to enforce the arbitration agreement, although it does not support the exchange of unsigned documents. On the other hand, the second solution provides a solution based on the enforcement court's interpretation of Article II. However, neither solution might be sufficient to enforce unsigned documents transferred electronically before the courts of Dubai and DIFC, due to the lack of cases that examined this issue in particular.

²¹ Article 1 of the Recommendation reads: 'Recommends that article II, paragraph 2, of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive; . . .'

²² Dubai Court of Cassation, Petition No. 132 of 2012 issued on 22 February 2012. Dubai Court of Appeal, Petition No. 531 of 2011 issued on 6 October 2011.

²³ *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* unreported 27 May 2014 (CFI (DIFC)). XX (1) X1 (2) X2 v (1) Y1 (2) Y2 Jul 29, 2015. ARB 002/2013 (1) X1, (2) X2 v (1) Y1, (2) Y2, Nov 28, 2014. Available at <http://difccourts.ae/publications/judgments-2/arbitration/> Last Accessed 24/03/2016.

Scholars have suggested a third solution,²⁴ which is to apply the principle of the most-favourable-law, an approach suggested under the NYC provisions as a solution for the court to enforce an arbitration agreement concluded via electronic methods when the national law is more arbitration-friendly than the provisions of the NYC.

The NYC is based on a pro-enforcement bias, which means that the court should facilitate and safeguard the enforcement of arbitral awards. This was stressed in the *Guide to the Interpretation of the 1958 NYC: A Handbook for Judges* (May 2012 edition) (“ICCA Guide”). Moreover, Van den Berg supported the idea of the pro-enforcement basis of the NYC.²⁵ Several further cases reiterated this idea, for instance Mance L. J. considered the pro-enforcement principle further in *Dardana Ltd v Yukos Oil Company*²⁶, stating that:

“As far as the object and purpose of the New York Convention are concerned, they are to facilitate the enforcement of arbitration agreements within its purview and of foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration”.

The pro-enforcement bias means that the court is allowed to take a less strict approach to enforce the arbitration awards by applying the principle of the most-favourable-law stated under Article VII(1). Article VII(1) of the Convention provides that:

“The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and

²⁴ Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (May 2012 edition), UNCITRAL Working Group II. Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), December 14, 2005. Doc. A/CN.9/WG.II/WP.139. at 25.

²⁵ Van den Berg(ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International, The Hague, 1999), p. 143.

²⁶ *Dardana Ltd v Yukos Oil Company* [2002] EWCA Civ 543; [2002] 1 All E.R. (Comm) 819; [2002] 2 Lloyd’s Rep. 326.

enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon”.

The most-favourable-law principle aims to ease the enforcement and recognition of arbitral awards, and reflects the pro-enforcement regime. The view that the courts have the ability to apply less strict rules than those found in the NYC was supported by the “ICCA Guide”,²⁷ which states the main objects and purposes of the NYC as follows:

“The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions”.

Moreover, the principle of the most-favourable-law was affirmed by the UNCITRAL Working Group,²⁸ which stated that the courts may rely on the principle stated under Article VII(1) to enforce such an award. According to the UNCITRAL Recommendations, Article VII is only valid at the enforcement stage if the law of the enforcement court requires less formal standards than those stated under the NYC. In other words, Article VII shall not be applied even if the law of the seat of arbitration provides less formal requirements.

The principle of the most-favourable-law might be a suitable solution for the validity of online arbitration agreement, as it gives the courts the power to apply the national law to

²⁷ ICCA's Guide to the Interpretation of the 1958 New York Convention (2013) 51. Available at http://www.arbitration-icca.org/publications/NYC_Guide.html (Last Accessed 29/11/2015).

²⁸ UNCITRAL Working Group II. Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), December 14, 2005. Doc. A/CN.9/WG.II/WP.139. at 25.

enforce the electronic arbitration agreement, if the national law has less formal requirements and supports the use of modern communications to enforce arbitration. Otherwise, there is no advantage in relying on it.

Noticeably, in the new arbitration laws such as the UNCITRAL Model Law on International Commercial Arbitration,²⁹ the English Arbitration Act,³⁰ and the Jordanian Arbitration Act,³¹ the arbitration agreement has been defined widely in order to include arbitration agreements concluded via modern methods. However, under the DIFC and Dubai legislation, this issue has not been examined before. Therefore, the next part is divided into two sections: the first examines the approach under the DIFC legal system and explores whether it supports arbitration agreements concluded via modern technology, while the second examines the DC approach and whether the current statutes are sufficient to enforce electronic arbitration agreement. However, in order to achieve this goal it is necessary to understand the formal requirements and the meaning of the arbitration agreement in both DIFC and Dubai.

4.4 The Writing Requirement and Validity of Electronic Arbitration Agreement under the DIFC Arbitration Law

The DIFC Arbitration Law requires the arbitration agreement to be in writing, as clarified in terms of four situations in which the arbitration agreement is considered to fulfil this requirement:

- A. Article 12(7) states the situation when the arbitration agreement by reference to another document might be considered valid under DIFC Arbitration Law:

²⁹ United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (United Nations Publication, Sales No: E.08 V.04, ISBN 978-92-1-133773-0), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (Last Accessed 29/11/2015). Article 7(2).

³⁰ English Arbitration Act 1996. Section 5.

³¹ Jordanian Arbitration Law 2001. Article 10(a).

“The reference in a contract to any document containing an arbitration clause constitutes an Arbitration Agreement in writing, provided that the reference is such as to make that clause part of the contract”.³²

- B. Article 12(6) states that if one of the parties alleges the existence of an arbitration agreement otherwise than in writing, and the respondent does not deny it, if one of the parties then commences court proceedings, and the respondent claims that an arbitration agreement is effective, whether oral or written, and the claimant does not deny these claims, this constitutes an agreement between those parties in writing to the effect alleged.
- C. The DIFC Arbitration Law clearly states the ability of parties to agree to arbitration by an electronic communication.³³
- D. Under the provisions of the DIFC Arbitration Law, parties may prove their arbitration agreement if it can be recorded “in any form”. Several forms of arbitration agreement may be considered valid if the content could be recorded. For example, if parties agreed to the general terms of the contract, including the arbitration agreement, but they did not finalise the agreement on the other terms of the main contract.

Pursuant to the provisions of the DIFC Arbitration Law, it can be stated that the term “in writing” under the DIFC Arbitration Law supports electronic communications. Article 12(5) states clearly that an arbitration agreement may be concluded by an electronic communication, which has been defined as “any communication that the parties make by means of data messages”.³⁴ Moreover, a “data message” is defined under the same article as “information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic

³² DIFC Arbitration Law 2008 art.12(7).

³³ *ibid*, art.12(5).

³⁴ *ibid*, art.12(5).

mail, telegram, telex or telecopy”.³⁵ This clearly provides that the parties may agree to arbitrate by exchanging emails, BlackBerry Messenger or faxes as long as they have stated clearly their intention to arbitrate in these electronic communications.

4.5 The Writing Requirement and Validity of Electronic Arbitration Agreement under Dubai Legal System

Before applying the Civil Procedures Code, the UAE legal system did not require the arbitration agreement to be in writing; even in Dubai, none of the applicable laws required the arbitration agreement to be in writing. However, according to Article (1) of the Federal Law of Civil Transaction, Sharia shall be applied if there is no provision in regard to a particular matter. By applying the Islamic Law, the arbitration agreement need not be in a written form, but the proof of agreement should be done by a statement of witnesses and by tendering the oath back.³⁶

However, after the Civil Procedures Code was enforced in 1992, it was stated clearly that the arbitration agreement should be evidenced in writing, as clearly stated in Article 203(2): “No agreement for arbitration shall be valid unless evidenced in writing”. The main aim of requiring the arbitration agreement to be in writing is to ensure that the real intention of parties is to refer any potential dispute to arbitration.³⁷

Therefore, parties are no longer able to rely on witnesses to evidence the arbitration agreement, even though the general rules of evidence in the UAE allow procuring evidence by witness statements in several cases provided for in Article 37 of the Federal

³⁵ *ibid*, art.12(5).

³⁶ Civil challenge No. 53 dd. 16/10/1991, *Litigation & Legislation Journal*, Issue 2, page 466.

³⁷ Saloni Kantaria, 'Is your arbitration agreement valid in the United Arab Emirates?' (2014) 80(1) *Arbitration* 16.

Law of Evidence.³⁸ However, these rules cannot be applied in relation to an arbitration agreement for several reasons listed below.

First, the Civil Procedures Code refers on several occasions to the arbitration document, which means that it is essential that the arbitration agreement be in writing. For instance, Article 216(2)(A) stated that “the arbitration award shall be subject to nullity if it is issued without the arbitration document or on the basis of an invalid arbitration document”, and Article 213(1) “requires that the award should be filed with the original arbitration document”.

Secondly, the written form of an arbitration agreement is considered as a customary practice in the field of arbitration, and in Dubai customary practice is considered to be the first source of law after legislation in commercial transactions.³⁹

Finally, most countries at the international level require that the award should be in writing, otherwise the court may refuse to enforce the award.⁴⁰ This was stated clearly by the Dubai Supreme Court in one of its recent judgments as the court stated that if the party fails to produce a written arbitration agreement, it will give rise to the nullity of the award.⁴¹

Consequently, relying on oral agreement as evidence to prove the arbitration agreement might be challenged and insufficient according to the Civil Procedures Code. It should be noted that the Draft Law explicitly validates the electronic arbitration agreement, as stated in Article 8:

³⁸ As example for the applications of this provision, see Dubai civil challenge No 345 dd. 14/12/1997, Litigation and Legislation Journal, issue 8, page 1092.

³⁹ Art. 2 of the Federal Law of Commercial Transactions; it is also worth noting that the customary practice is one of the sources for application of law in civil matters, as provided for in Art 1 of the Federal Civil Transactions Law.

⁴⁰ Hong-Lin Yu, 'Written arbitration agreements - what written arbitration agreements?' (2012) 32(1) *Civil Justice Quarterly* 68.

⁴¹ Civil challenge 99 dd. 29/4/2001, Judicature & Legislation Journal, issue 12, page 370.

“a. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams, or other communications that provide a record of the agreement or other means of telecommunication in accordance with the valid rules of electronic transaction.

b. The reference in a contract to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference to such clause is clear in regarding that clause as a part of the contract.

c. If the parties agree to arbitration while a court is reviewing the dispute, the court shall refer the dispute to arbitration and its decision shall be deemed as an arbitration agreement in writing”.⁴²

Under the rules of the Draft Law, electronic arbitration agreements are included within the meaning of “in writing”; however, these rules have not yet been enforced. Under the current Civil Procedures Code the validity of modern technology to conclude the arbitration agreement is still unclear, due to the lack of explicit provisions that deal with the enforceability of electronic arbitration agreement and few practical cases having examined this issue. Hence, this study critically analyses the position of modern technology in such cases and highlights solutions that might be applied in order to enforce arbitration agreements concluded via modern electronic communications.

It is clear that the DIFC Arbitration Law explicitly recognises the electronic arbitral award; however, the situation might be different before DC, due to the lack of a clear definition of the term “in writing” and the lack of cases that have examined the enforceability of electronic arbitration agreement, making enforceability before DC

⁴² Author’s translation.

uncertain. The following sub-sections suggest solutions that might be applicable to validating the electronic arbitration agreement before DC. The main suggested solutions examined include relying on the validity of unsigned documents under UAE Federal Law 1/2006 on Electronic Transactions and Commerce (ETCL), to prove that the acceptance was sent from the machine of the sender, to rely on electronic exchange communication signed manually, and to rely on the DIFCC to enforce awards concluded via electronic arbitration agreement.

4.5.1 The Validity of Unsigned Documents under the ETCL

In regard to the validity of unsigned arbitration agreements concluded via electronic methods, given the lack of provisions and cases that regulate this matter, this part considers each form of electronic communication and verifies whether it may fulfil the writing requirement before the DC. In the UAE, including Dubai, in order to meet the changes and developments that have been taking place at the international level in the field of electronic commerce, and to implement the UNCITRAL Model Law on Electronic Commerce and other related documents, the UAE enacted Federal Law No.(1) of the Year 2006 in Respect of the ETCL, which applies to electronic records, documents and signatures pertaining to the electronic transactions and commerce.⁴³ The ETCL defines the terms “electronic information”, “electronic document” and “electronic message” in Article 1 as:

Electronic Information: “Data or information of electronic characteristics in the form of provisions or symbol or sounds or drawings or pictures or software or otherwise”.

⁴³ Article 2, Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law.

Electronic Document: “Record or document composed or stored or extracted or copied or sent or intimated or received by an electronic means on tangible medium or any other electronic medium which shall be liable to a feedback in a manner which can be understood”.

Electronic Message: “Electronic information to be sent or received by electronic means whatsoever the manner of its reproduction in the place where it is received”.

Under the ETCL, the electronic message shall not lose its legal effect or its capability of being executed owing to the fact that it is in an electronic form.⁴⁴ Article 7 of the ETCL states that:

“If the law requires any statement, document, record, transaction or evidence to be written, or if determines specific results upon non-writing, the electronic document or record shall satisfy this condition if the provisions of paragraph (1) of Article 5 of this Law is observed”.

Hence, the ETCL states several requirements under Article 5(1) to consider the electronic record sufficient to fulfil the writing requirement:

1. It is in the same format as the original or is an accurate depiction of the information contained in the original.
2. It is possible to retrieve and access the electronic record for use a later time.
3. It is possible to determine the origin and destination of the electronic record, and the dates of sending and reception.

The first condition to validate the electronic record and fulfil the writing requirement before DC is the ability to keep the electronic record in its original form. In this regard,

⁴⁴ *ibid*, Article 4.

Article 9 of the ETCL states the requirements to consider the electronic message to be deemed original. According to this Article, the first requirement means that the parties shall use reliable technical evidence that the information contained in the electronic message is said to be technically correct as made for the first time in its final form as an electronic document or record. However, the ETCL does not state what shall be considered as reliable technical evidence, and it was left to be determined based on the purpose for which the information was generated. This criterion raises some issues as it is hard to determine the reliability based on the purpose of the information and it does not explain clearly the particular method of determining the degree of reliability. The second requirement under Article 9 is the ability to display the information in the electronic message in order for it to be submitted on demand, which is also the second condition required under Article 5.

In regard to the third condition under Article 5, the ability to determine the origin and destination of the electronic record, and its dates of sending and reception. With particular regard to the ability to determine the sender or origin, Article 13(1) of the ETCL states that in order to assume that the electronic record was sent from a particular sender then the record should be issued by the sender himself. Article 13(2) states other circumstances under which the record is assumed to be sent from a particular sender, such as sending the record issued by the sender's agent, or transmitted by the sender's computer system. Furthermore, in the absence of definite knowledge regard the sender of the electronic record, the receiver may consider the electronic record sent by a particular sender in several cases by applying a particular verification procedure that was agreed previously with the sender, or if the electronic record was received as a result of the actions of a

person having a relationship with the sender so that the person was able to retrieve the message after becoming aware of a method used by the sender to identify his messages.⁴⁵

If the receiver knows that a message was actually sent by the sender, or is entitled to so assume, then the sender may also assume that the message is what the sender intended to send, and act accordingly.⁴⁶ If the receiver either knew or should have known that an error was made in the transmission, the receiver may not make this assumption.⁴⁷ Parties are allowed to separate and treat as independent each message in the transmitted messages, unless a reasonable person should have concluded that a second message was a duplicate of the first.⁴⁸ Nevertheless, under several circumstances the receiver is not entitled to consider that a particular sender has sent the electronic message, such as the sender not having notified the receiver that he did not send the message; the receiver should know or have known that the sender did not send the message, and it would be irrational for the sender to assume that a particular sender actually sent the message, or to act on that assumption.⁴⁹

Consequently, the electronic record is sufficient to fulfil the writing requirement before DC subject to three conditions: the ability to preserve the electronic record in its original form, to access the information later, and finally to determine the origin, time and destination of the electronic message.

This part critically analyses the common methods by which commercial contracts can be made by electronic means, in order to verify whether these methods fulfil the required elements stated in ETCL. The methods most commonly used to conclude online contracts, examined here, are email, click-wrap, browse-wrap and shrink-wrap.

⁴⁵ Article 13(3), Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law.

⁴⁶ *ibid*, Article 13(4)(d).

⁴⁷ *ibid*, Article 13(6).

⁴⁸ *ibid*, Article 13(5).

⁴⁹ *ibid*, Article 13(4).

4.5.1.1 Email

An email can be defined as the exchange of electronic mail.⁵⁰ Put simply, parties may use the exchange of emails to make or to accept an offer. There is a clear consensus about the validity of email communications at the international level. Arsic⁵¹ argued that there should be no obstacles in recognising the exchange of emails, as it intrinsically satisfies the writing requirement; Hill⁵² supported the same view, stating that “it is difficult to see much difference between telegrams, telex, facsimile and email”.

According to the ICCA Guide, an email may fulfil the writing requirement under the NYC provisions. It explains that the NYC aimed to cover the available communication media existing in 1958, and it assumed that “there should be record in writing of the arbitration agreement”, and as long as the communication can provide this criterion it should be considered valid and to fulfil the requirements of Article II(2); this includes faxes and emails.

In general, an arbitration agreement found in an exchange of emails has been considered as a sufficient and valid electronic communication that fulfils the writing requirement, and it has been treated as a valid electronic communication to conclude online contracts. For example, in the UK, the court held that an email is valid to communicate acceptance, despite having been treated as spam.⁵³ In another case in the US, *Rosenfeld v Zerneck*, the court stated that an email is a form of communication by which an offer can be accepted and validated.⁵⁴ In South Africa, in the case of *Jafta v Ezemvelo KZN Wildlife*,

⁵⁰ Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015)(2) *Journal of Business Law* 87 .

⁵¹ Jasna Arsic, 'International commercial arbitration on the Internet: has the future come too early?' (1997) *Journal of International Arbitration* 209.

⁵² Richard Hill, 'On-line arbitration: issues and solutions' (1999) *Arbitration International* 199.

⁵³ *Bernuth Lines Ltd v High Seas Shipping Ltd* (The Eastern Navigator) [2005] EWHC 3020 (Comm); [2006] 1 All E.R. (Comm) 359.

⁵⁴ *Rosenfeld v Zerneck* 4 Misc. 3d 193, 776 N.Y.S. 2d 458 (Sup. Ct. Kings Co., NY, May 4, 2004).

the court found that an SMS is an effective mode of communication analogous to an email or another written document.⁵⁵

Nonetheless, courts have taken various approaches toward the validity of arbitration agreements contained in an exchange of emails pursuant to Article II. On the one hand, in Norway the Court of Appeal of Halogaland⁵⁶ held that the arbitration agreement contained in the exchange of emails is not considered valid and does not fulfil the sense of Article II of the NYC. In addition, it was not signed by parties, which means that it is just a copy that does not fulfil the requirement of the arbitration agreement according to the NYC requirements.

On the other hand, in the recent case of *Lombard-Knight v Rainstorm Pictures Inc.*,⁵⁷ the court stated that a copy of the email should be sufficient to enforce the arbitration award, explaining that the court was supporting the principle of pro-enforcement of the NYC as it aims to ensure the enforcement of the arbitration award. In this case, the main concern was whether the court shall enforce the award and accept a copy of the arbitration agreement without requiring the party to provide the court with the original document. However, the court held that it is hard to ask for the original copy of the arbitration agreement in modern business conditions, especially as the arbitration agreement in most cases is available in an exchange of emails, which makes it hard for each party to provide the court with the original document. Consequently, the court stated that the exchange of emails is equivalent to the exchange of fax and telexes, and validates the arbitration agreement.

⁵⁵ *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84; [2008] 10 B.L.L.R. 954 (LC); (2009) 30 I.L.J. 131 (LC) (July 1, 2008).

⁵⁶ The Norwegian decision by the Halogaland Court of Appeal, August 16, 1999, XXVII YBCA 519 (2002) 522.

⁵⁷ [2014] EWCA Civ 356

In Dubai, no cases have discussed the enforceability issue of arbitration agreement concluded via emails pursuant to the NYC. Also, according to the cases above, there is no particular compulsory approach toward the enforceability of arbitration agreement concluded via email, as courts may vary in interpreting the formal requirements stated in the NYC. Nevertheless, in case No. 277/2009 the Dubai Court of Cassation held that electronic dealings such as email should be enforced and considered to be valid according to Article 3 of the ETCL, if they can be traced to the sender's sent folder, or when the email in question relates to the point at issue, so that it can be used as proof.⁵⁸ According to this case, the contents of an email might be a source of evidence of binding legal agreements, including arbitration agreements. Further, the ruling serves as strong evidence that any legal agreement, even if not signed by parties, can still support the validity of agreements binding on parties.

The Court stated that ETCL Art. 2 and 4 can consider documents, electronic records and signatures to be valid evidence, if the contents of the electronic record could be made available for examination at the sender system. Furthermore, according to Article 10, electronic signatures or messages in original or copy can be accepted as evidence. Hence, emails must fulfil the requirements stated under Article 5 in order to fulfil the writing requirement, especially that in emails parties may retain the original message and access it at any time, and it is easy to determine the sender of the electronic message.⁵⁹

In conclusion, the DC may consider electronic communications via email to comprise the same evidentiary proof as physical communications, and parties may agree and bind themselves into an arbitration agreement by sending an email.

⁵⁸ Civil Case of Cassation Court Dubai: UAE No. 277/2009 date of decision 13 December 2009 unpublished.

⁵⁹ Khaled Aljneibi, 'The scope of electronic transactions and electronic evidence in the courts of the United Arab Emirates' (2015) *Digital Evidence and Electronic Signature Law Review* 37.

4.5.1.2 Click-wrap and browser-wrap

The other type of forming an online contract in which the arbitration agreement may be included is the click-wrap agreement. Under this type of contract, the party agrees to the terms and conditions of the contract at the end of the transaction by filling an order and clicking “Submit”, “I Accept” or something similar.⁶⁰ Unlike the exchange of emails, this type of contract might be considered as a take-it-or-leave-it contract, for the reason that the receiver is not able to negotiate the terms of the contracts, although the party may be able to view, read and download them. This situation can raise the issue of the enforceability of arbitration agreement concluded in this type of contract, as discussed in the next chapter.

However, in this type of contract, sellers usually send an email confirming the details of the transaction and enhance the legal certainty. For example, Amazon will send the customer an email containing the quantity, price, delivery address, date of delivery and other details of his order; however, this email does not mean that Amazon confirms acceptance of the customer’s offer to buy products, but merely confirms the order’s details. Amazon sends another email to the customer confirming the estimated date of delivery and the acceptance of the customers’ offer, and it is this communication that concludes the contract of sale.⁶¹ The importance of these procedures is to ensure that customers have the opportunity to review and revise their orders and print a hard copy of terms and conditions or download them as PDF files.

Browser-wrap is the third common method of forming online contracts, and it is very similar to click-wrap. Browser-wrap refers to terms for which the provider/seller purports

⁶⁰ Rebecca Ong, 'Consumer based electronic commerce: a comparative analysis of the position in Malaysia and Hong Kong' (2004) *International Journal of Law & Information Technology* 101.

⁶¹ "Amazon Conditions of Use & Sale", <https://www.amazon.co.uk/gp/help/customer/display.html?ie=UTF8&nodeId=1040616&pop-up=1#> Last Accessed 7/10/2015.

to obtain implicit assent through the customer's opportunity to view the terms while browsing the site.⁶² It is debatable whether assent can be validly obtained through this method.⁶³ It is suggested that the quality of assent may depend on how the terms and conditions are arranged and displayed on the website.⁶⁴ It is also possible that the terms and conditions of browse-wrap agreements are accepted by conduct.⁶⁵ In order to enhance the certainty, website operators may wish to collect users' consent to the terms of service when users enter the website for the first time.

The main difference between click-wrap and browse-wrap is that in the former agreements, the user is provided with the terms and conditions of the contract, usually an end-user agreement, at the end of which an "I agree" dialogue box pops up on the screen, or the user activates consent by responding to a parallel email, with the possibility to download the agreement. On the other hand, in browse-wrap agreements, the user is not presented with the terms and conditions of the contract, but is provided with a hyperlink to another website on which those terms are included.⁶⁶

By examining the NYC requirements as they pertain to browser-wrap and click-wrap, it can be concluded that these two types of contract do not clearly fulfil the formal requirements under Article (II) of the NYC, as neither of them is signed by the parties nor contained in an exchange of letters or telegrams. However, they are sufficient to fulfil the writing requirement stated under Article 5 of the ETCL. Both types of contract fulfil the first and second requirements, as they are capable of providing records of the original electronic message, and parties could easily access them at any time in the future, as these

⁶² Mann R and Winn J, *Electronic Commerce*, 2nd edn (New York: Aspen Publishing, 2005), p.275.

⁶³ Trakman LE, 'The boundaries of contract law in cyberspace' (2009)(2) *International Business Law Journal* 159.

⁶⁴ *Specht v Netscape* 306 F. 3d 17 (2d Cir. 2002).

⁶⁵ *Ryanair v Billigfluege.de* [2010] IEHC 47.

⁶⁶ Trakman LE, 'The boundaries of contract law in cyberspace' (2009)(2) *International Business Law Journal* 159.

types of contract can be saved and printed out in Microsoft Word and/or a PDF document.⁶⁷ In regard to the third condition under Article 5, the sender in this type of contract is known to the recipient, and it is not hard to recognise him, as usually the party will access a particular website and will assume that the sender is the owner of the website.

In conclusion, both types should be sufficient and enforceable before DC, as an arbitration agreement concluded via browser-wrap or click-wrap could be evidenced in writing, as both parties can access the electronic message at any time and the sender could be recognised, in addition to the time of the contract.

4.5.1.3 Shrink-wrap

A shrink-wrap agreement is usually used in software products and software licence agreements. Its main feature is that the terms and conditions are not available for the consumer to read until he pays and starts to download the software on his computer or smartphone. However, this type of contract is not sufficient, as the parties will not be able to provide the court with a written agreement, and often there is inability to determine the identity of parties. The second solution for parties to guarantee enforceable arbitration agreement is to rely on the exchange of emails, click-wrap and browser-wrap, which may be sufficient methods to enforce an arbitration agreement.

4.5.1.4 Summary

In conclusion, parties may rely on emails, browser-wrap and click-wrap to conclude their arbitration agreement and these should be valid before DC, because the three communication methods fulfil the requirements in Article 5: the ability to retrieve the

⁶⁷ Francis M Buono and Jonathan A. Friedman, 'Maximizing the Enforceability of Click-Wrap Agreements' (1999) 4(3) *Journal of Technology Law & Policy* 3.

original copy, the ability to access the information at any time later, and the ability to determine the origin and time of the electronic message.

4.5.2 To Prove that the Acceptance was Sent from the Machine of the Sender

The second solution to enforcing the electronic award is to confirm that the sender used his own machine to send the acceptance. In Petition No. 220 of 2004 issued on 17 January 2005, the Dubai Court of Cassation provided that:

“It is not compulsory for the parties’ agreement to arbitration to be established within one document signed by both parties. It is permissible for one party’s offer to refer their dispute to arbitration to be established in a document and for the other party’s acceptance to be established in another document, provided that the offer confirms the acceptance and both are identical. Furthermore, the parties’ agreement to refer their dispute to arbitration can be proved either by a written document signed by both parties or by letter or any other means of written communications are signed by the sender or their transmission is proved to be made from the machine of the sender”.

According to this decision, the arbitration agreement should be in writing and should be signed. Alternatively, if the agreement was not signed by the parties then it should be proven that the transmission was made from the machine of the sender.⁶⁸ In other words, there are two ways to conclude a valid arbitration agreement: to establish a written arbitration agreement that is signed by the parties; or to establish a written arbitration agreement that was made from the machine of the sender, which is accessible only to him.

It is hard to guarantee this approach in terms of whether it expands the requirement of the machine of the sender to include other electronic communications such as email. For

⁶⁸ Dubai Court of Cassation, Petition No. 220 of 2004 issued on 17 January 2005.

example, each party has his own email account, but the email could be accessed from different computers, which means that the court may strictly demand the party to prove that the email was sent from the sender's machine; otherwise it will not validate such an agreement.

4.5.3 Manual Signature

The third solution is to sign the document manually and exchange it between parties via fax or any other electronic communication. The parties may rely on a signed document that includes an arbitration agreement or rely on a signed arbitration agreement in order to enforce it. While there is no problem regarding reliance on the manual signature, the electronic signature may raise several issues regarding enforceability, as examined in chapter ?.

Petition No. 132 of 2012 issued on 22 February 2012 by the Dubai Court of Cassation enforced an arbitration agreement signed by parties and concluded via fax. In this case, the petitioner challenged the arbitration agreement on the grounds that it was not signed by an authorised person, hence the faxed copy of the arbitration agreement should not be enforced. However, the court dismissed this argument and considered the arbitration agreement valid, as the petitioner was given a chance before the first court to prove the nullity of the agreement and he failed to do so before the lower courts.

Consequently, this decision illustrates that the DC considers the arbitration agreement valid as long as the parties have signed the agreement manually. Moreover, parties are not required to submit the original documents, which means that any modern communication can be used to conclude the arbitration agreement, as long as it is signed. Therefore, an arbitration agreement signed manually and transmitted via email or any other type of modern communication shall be considered valid before the DC.

4.5.4 *To Enforce the Award before DIFCC*

In Dubai, parties have the opportunity to choose between enforcing the award before DC and DIFCC, hence they are allowed to decide between UAE legislation and DIFC legislation. Indeed, each law has different requirements regarding what constitutes a valid arbitration agreement.

If the award debtor has assets within the jurisdiction of the DIFC, the award creditor can pursue enforcement proceedings in the DIFCC. If the award debtor has assets in Dubai the award creditor can seek recognition of its award in the DIFC courts followed by enforcement in the local Dubai courts.⁶⁹

This solution might be utilised when parties are aiming to avoid the long enforcement procedures before DC, especially when debtors may delay matters by dragging obstacles through the enforcement proceedings.⁷⁰ The winning party usually refers to DIFCC rather than DC to enforce domestic awards, because the former are more likely to reject enforcement on procedural grounds.⁷¹ Hence, the winning party prefers DIFCC judgments that are usually more predictable, as the debtor is unable to attempt to delay enforcement proceedings.

The DIFC Court in Case No. ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2⁷² held that the Court has jurisdiction over the enforceability of domestic arbitral awards:

“Article 5(A)(1)(e) of the Judicial Authority Law must be read with Article 8(2) of Dubai Law No. 9 of 2004, as amended by Dubai Law No. 7 of 2011, which provides that the jurisdiction of the DIFC Courts is to be determined by

⁶⁹ Mischa Balen, 'Using the DIFC's off-shore jurisdiction to enforce arbitration awards in on-shore Dubai' (2016) 82(3) *Arbitration* 233.

⁷⁰ *ibid.*

⁷¹ Civil Procedure Code, Article 216.

⁷² <http://difccourts.ae/arb-0022013-1-x1-2-x2-v-1-y1-2-y2/> Last Accessed 02/04/2016.

‘the Centre’s Laws’. Article 5(A)(1)(e) of the Judicial Authority Law reflects that provision.

Article 42(1) of the DIFC Arbitration Law provides that an arbitral award, irrespective of the State or jurisdiction in which it was made, ‘shall be recognized as binding within the DIFC’; subject to the provisions of Articles 43 and 44. Article 44(1) describes the circumstances (and the only circumstances) in which recognition may be refused by the DIFC Court.

It is important to appreciate that the jurisdiction, in relation to recognition, conferred on the DIFC Courts by Article 42(1) of the DIFC Arbitration Law is jurisdiction to recognize that the arbitral award is binding within the DIFC”.

According to this decision, the Court concluded that it has jurisdiction to recognise and enforce domestic arbitral awards. However, in regard to foreign arbitral awards, in *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*,⁷³ the court ruled that it has the right to enforce and recognise foreign arbitral awards seated in Dubai, even if there is no connection with the DIFC. In *Meydan*, the DIFC court held that use of the recognition procedure provided by Art.7 of the Jurisdiction Authority Law when the debtors had no assets within the DIFC was not abusive because the creditor had employed the process as provided for by law and for the purpose intended by the drafter to obtain enforcement by competent authorities in the DIFC and in non-DIFC Dubai.⁷⁴ Hence, the DIFC extended its jurisdiction to include the recognition and enforcement of foreign arbitral awards. In another recent case, in *DNB Bank ASA v Gulf Eyadah Corporation*,⁷⁵ the Court also held

⁷³ *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* unreported 27 May 2014 (CFI (DIFC)). Lucas Pitts and Dustin Appel, 'The DIFC as a conduit jurisdiction for enforcement of arbitral awards in Dubai' (2016)(3) *International Arbitration Law Review* N30.

⁷⁴ *ibid.*

⁷⁵ *DNB Bank ASA v Gulf Eyadah Corporation*, Case CFI 043/2014, DIFC Court of First Instance, July 2 2015.

that it has jurisdiction to enforce and recognise foreign arbitral awards. Nevertheless, the court stated that the winning party is not allowed to use the DIFCC as a “conduit” jurisdiction instead of the DC.

Therefore, this solution might be applicable and the winning party may enforce and recognise the award before the DIFC in order to benefit from the modern arbitration law before DIFC. According to Judicial Authority Law, which is supplemented by the 2009 Protocol of Enforcement between the DIFCC and the DC, parties are allowed to enforce awards recognised by the DIFCC before DC.⁷⁶ Article 7(2) of the Protocol gives permission for parties to enforce arbitral awards and judgments ratified by the DIFCC before DC, subject to certain procedural requirements which generally provide that the award is final and appropriate for enforcement, that the award shall be enforced by an executive judge of the DC, and that the award should be translated into Arabic. Furthermore, the terms of the protocol prevent the latter from examining the merits of the award.

4.5.5 Summary

In conclusion, the current arbitration rules under the Civil Procedures Code in Dubai do not enforce the electronic arbitration agreement explicitly. However, the winning party may rely on other solutions to enforce such an agreement. This analysis suggests four solutions as follows: (1) to rely on the ETCL; (2) to prove that the acceptance was sent from the machine of the sender; (3) to sign the documents manually and exchange them electronically; (4) and to enforce the award before the DIFC.

⁷⁶ The protocol has been codified by Law 16/2011, which amended Law 12/2004. Lucas Pitts and Dustin Appel, 'The DIFC as a conduit jurisdiction for enforcement of arbitral awards in Dubai' (2016)(3) International Arbitration Law Review N30.

To increase legal safeguards and encourage a uniform interpretation of the NYC regarding the enforceability of arbitration agreements concluded via electronic methods, Dubai will enforce the new federal arbitration law that will remove any legal uncertainty regarding online contracts and follow the approach applied by DIFC Arbitration Law and in different countries.⁷⁷ Indeed, it shall be stated clearly that contracts concluded by electronic means have the same legal validity as contracts concluded by traditional means; however, the solutions mentioned earlier are optional and not mandatory.

Finally, it is suggested that the provisions of the NYC be amended to suit modern technology and to ensure the enforcement of such an arbitration agreement at the international level. Further, such an amendment implies that the courts must enforce and validate electronic arbitration agreements, although it does leave the option for the court or the arbitration law to decide whether the arbitration agreement is valid or not. However, there are some challenges to amending the provisions of the NYC.⁷⁸ For example, Albert Jan van den Berg suggested that the Recommendations of the UNCITRAL are complicated:

“When I saw UNCITRAL’s recommendation of 2006 interpreting article II(2) of the Convention, I thought that it was too complicated for courts and, moreover, difficult to square with the text of article II(2).”⁷⁹

However, amending the NYC is subject to further challenges such as the ability to reach an agreement among the state parties of the NYC; each of the state parties may need to enact implementing legislation.⁸⁰ Therefore, the ideal solution would be to amend the

⁷⁷ See *National Conference of State Legislatures, "Uniform Electronic Transactions Act (UETA)"*, <http://www.ncsl.org/research/telecommunications-and-information-technology/uniform-electronic-transactions-acts.aspx> Last Accessed 8/10/2015. China Contract Law 1999 art.11.

⁷⁸ Q&A with Albert Jan van den Berg
http://www.arbitration-icca.org/media/1/13318252772820/new_ny_conv.pdf Last Accessed 23/05/2016.
⁷⁹ *ibid.*

⁸⁰ Lamm, C, “Comments on the Proposal to Amend the New York Convention”, *The New York Convention* at 50, 2008.

provisions of the arbitration law in order to support arbitration agreements concluded via modern technologies.

4.6 Conclusion

The first part of the chapter explained the issue of the formal validity requirements of an arbitration agreement concluded via electronic methods according to Article II of the NYC. It was concluded that electronic arbitration agreements are not stated explicitly in Article II(2), hence it is not sufficient to fulfil the meaning of the term “in writing” available under Article II(2) of the NYC. The second part of the chapter examined several suggested solutions to settle this issue, including relying on electronic signature, interpreting Article II widely, and applying most-favourable-law, as stated under Article VII(1), to enforce an online arbitration agreement.

It was found that the validity of the electronic signature depends on the legislation in the enforcement court, and whether it recognises and enforces this technology. In respect to interpreting broadly the exchange of letters or telegrams, it was found that this depends on the courts, therefore there is no guarantee of validation of an electronic arbitration agreement unless the court interprets Article II widely.

The last part examined the ability to rely on the most-favourite-law principle before the DC and DIFCC, by examining the formal requirements for electronic arbitration agreement under the relevant arbitration law. On the one hand, the DIFC Arbitration Law explicitly recognises modern communication in concluding arbitration agreements, while the Civil Procedures Code does not explicitly support the validity of online arbitration agreement. Therefore, this chapter explored and examined several solutions to validating arbitration concluded via electronic methods according to the current legal system.

The first solution is to rely on the ETCL. The second is to sign the documents manually and exchange them via any electronic communication. The third is to prove that the sender transmitted the document from his machine. The last potential solution for parties to enforce electronic awards in Dubai is to benefit from the provisions of the DIFC Arbitration Law, as it supports modern technology by enforcing the award before DIFCC.

Finally, it is suggested that, for the sake of clarity, the Civil Procedures Code should expressly contain a broad definition of “writing” and refer specifically to electronic communications.

5 Chapter Five: Enforcement Related Issues of Consumer Arbitration Agreement in DIFC and Dubai

5.1 Introduction

As discussed in the previous chapter, the first issue that might face parties who are willing to rely on online arbitration is the validity of the electronic arbitration agreement. Nevertheless, considering the arbitration agreement to be valid before the enforcement court might not be sufficient to enforce the final award, especially when a consumer is involved.

E-commerce poses risks/challenges that may be addressed by including arbitration clauses in online contracts. In other words, by completing and agreeing to the terms and conditions of the online contracts, there is a possibility that consumers might have agreed on an arbitration clause among the general conditions; hence, consumers might be compelled to arbitrate and waive their right to take legal action before their local courts.¹ However, effective consumer protection against unfair arbitration clauses is uncertain in Dubai. The main concern regarding consumer disputes is that the consumer is not well protected from unfair arbitration clauses in the UAE due to the lack of provisions and cases that clearly protect consumers. Therefore, this chapter explores DC approaches in regard to arbitration clauses to examine the possibility of establishing a control for arbitration agreements in consumer contracts under the current legal system.

The main concern regarding consumer arbitration is that a large number of online transactions are based on adhesion contracts, under which consumers are not usually allowed to amend or negotiate any of the terms and conditions. Therefore, it is agreed to confer an equal level of protection for online and offline transactions for consumers,

¹ http://unctad.org/en/docs/edmmisc232add20_en.pdf Last Accessed 13/11/2015.

because arbitration may represent a threat to consumers, especially if the cost of arbitration is high or the consumers will have to deal with foreign laws with which they are unfamiliar. However, the validity of arbitration agreements in consumer contracts relates to two different aspects, the type of agreement and the applicable law.²

The first part of this chapter explains the main differences between pre- and post-dispute arbitration agreement in consumer contracts, to explain the importance of controlling the enforceability of pre-dispute rather than post-dispute arbitration agreements.

In the second part, the study examines DIFC and DC approaches toward the enforceability of arbitration clauses.

In the final part, given the lack of consumer protection in Dubai, the study suggests several potential solutions to guarantee consumer protection in Dubai based on the current law.

5.2 The differences between pre- and post-dispute arbitration agreements

Pre-dispute arbitration agreement refers to settling any potential dispute by arbitration before the dispute arises. On the other hand, post-dispute means that the parties have agreed to refer their dispute to arbitration retroactively, after the dispute arose.

Another difference between pre- and post-dispute arbitration agreement is that the latter usually more detailed clause, as disputants may set out the comprehensive details of the agreement, including the applicable law, the arbitrators, the manner of exchanging documents, the place of arbitration and other different procedures. On the other hand, the pre-dispute agreement is just a short line usually included within the terms and conditions

² Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009), pp.171–185 and Pablo Cortés and Fernando Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' (2013) 62(02) *International and Comparative Law Quarterly* 407.

of the standard contract, indicating that any dispute that might arise in the future between the parties will be submitted to arbitration.

In regard to the enforceability of each type, post-dispute arbitration agreement is considered in most countries to be valid because parties have the choice to decide the most appropriate mechanism to settle their dispute after it arises, which clearly indicates that their real intention is to arbitrate, and none of the parties was compelled to arbitrate. On contrast, pre-dispute agreement or arbitration clause is usually considered invalid and unenforceable by most legal systems, especially in contracts concluded between a weak party who has no choice in the terms of the contract and a strong party who usually sets the terms and conditions according to his interest.³

However, if the parties' intention was to arbitrate and they agree to refer their dispute to arbitration after it arises, then the clause shall be considered valid, especially that the consumer has the opportunity to choose between litigation and arbitration. However, according to some laws this is not always the case in consumer contracts, i.e., the post-dispute arbitration agreement might be considered to be invalid even if the parties agreed to arbitrate after the dispute arises, which is the case in the UK, according to the English Arbitration Act 1996 if the amount of the dispute does not exceed £5000,⁴ the clause will be considered invalid.

The NYC does not invalid the pre-dispute arbitration agreement clearly and there is no difference between the validity of pre- and post-dispute arbitration agreement according to the provisions of the convention. Although in some countries consumer arbitral award

³ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004), p 173; French Civil Code, Art.2061 states that domestic pre-dispute arbitration agreements with consumers are invalid.

⁴ Arbitration Act 1996, s. 91 (1) and Unfair Arbitration Agreements (Specified Amounts) Order 1999/2167, Article 3. Section 1 (1) of the Consumer Arbitration Agreements Act 1988 used to contain a complete prohibition of all domestic pre-dispute arbitration clauses in consumer contracts, but this has been repealed by the 1996 Act.

may be set aside and considered to be invalid and unenforceable on the grounds that it is contrary to the public policy under Article V(2)(b) of the NYC, the restriction in Article V(2)(b) may apply to consumer disputes as long as the applicable law considers consumer protection part of the country's public policy.⁵

The main aim to control pre-dispute arbitration agreements in consumer contracts is states' intention to protect their domestic consumers from referring to arbitration instead of local courts, as it affects a vital right to litigate (in addition to the high costs of arbitration).⁶ Besides the fact that pre-dispute arbitration agreement affects a vital right to litigate, consumers may not appreciate the importance of this clause initially as they are not expecting any disputes to arise in the future, and they may not consider the effect of this clause at the time of the agreement.⁷ According to Hörnle, the issue of arbitration clause found in consumer contracts is that the consent of the weaker party (consumer) is not clear compared to other types of contracts. These contracts are offered on a take-it-or-leave-it basis, and the consumer has limited choices between leaving and accepting the contract as it stands.

In conclusion, post-dispute arbitration agreement in consumer contracts is usually enforceable with some exceptions. On the other hand, due to the lack of international regulation regarding the enforceability of pre-dispute arbitration agreements, the enforceability of pre-dispute arbitration agreement depends on the country's approach.

5.3 Consumer Protection and Public Policy in Dubai and DIFC

⁵ UNCITRAL Working Group III (Online Dispute Resolution) twenty-sixth session (Vienna, 5-9 November 2012). A/CN.9/WG.III/XXIII/CPR.1/Add.1 para 21.

⁶ *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 168-169 (5 h Cir 2004).

⁷ Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009), pp.171–185.

Several countries are aiming to protect their consumers from referring to unfair arbitration by legislating strict laws that invalidate this type of arbitration agreement.⁸ However, the courts approach in Dubai toward the enforceability of pre-dispute arbitration agreement in consumer contracts is uncertain due to the lack of explicit provisions in this regard. Moreover, no study examined consumer protection against pre-dispute arbitration agreements under the laws of Dubai and DIFC. Therefore, this part of the chapter examines the applied approach toward the enforceability of consumer arbitration in DIFC and Dubai, and suggests solutions to protect consumers from pre-dispute arbitration clauses in consumer contracts based on the established law. It should be noted that the argument below to explain whether consumer protection could be part of the public policy in the UAE, which allow the courts to set the award aside according to Article V(2)(b) of the NYC.⁹ However, it is suggested that the law should be reformed in the UAE to state clearly that consumer protection is part of the public policy, such as the approach applied in the EU.¹⁰ Hence, the main question here is whether the DC and DIFCC would be able to consider consumer protection part of the public policy, which has not been considered in any particular case or study.

First of all, it should be stated that if the DC or DIFCC finds that the award is contrary to the public policy then it is obliged to set the award aside. This was stated by the Federal Supreme Court, Petition No. 32 of the 23rd Judicial Year issued on 8 June 2003; the Court provides that according to its adjudication, it may “set the award aside on the grounds that the court may not have jurisdiction to examine the merits of the award unless it is contrary to public policy”, further stating that:

⁸ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004), P 173; French Civil Code, Art.2061 states that domestic pre-dispute arbitration agreements with consumers are invalid.

⁹ A/CN.9/WG.III/XXIII/CPR.1/Add.1 para 21.

¹⁰ *Mostaza Claro v Centro Movil Milenium SL* [2007] Bus. L.R. 60.

“The arbitrator’s decision shall be according to the rules of the law unless if it were authorized with the reconciliation, then it shall not be obliged with such rules except with those to the public order.”

This means that when an award is considered by the Court for ratification, the Court shall not discuss the subject matter of the award and the extent to which it conforms to the provisions of the law, except with respect to public order. It should be noticed that the UAE courts may refer to “public policy” as “public order”; however, it is not clear that a difference exists between these concepts.¹¹

Moreover, this approach was applied in other cases. For example, Dubai Court of Cassation, Petition No. 72 of 2007, issued on 10 June 2007 stated that it cannot review the merits of the award unless it breaches a rule relating to public order.

The issue regard the public policy is whether the court will apply the local or international meaning to examine the award. With regard the notion of public policy under Article V(2)(b), it is debatable whether it refers to international or local public policy. There is a view that suggests the courts in international arbitration disputes should apply the international public policy.¹² However, applying the international public policy means that the court has a narrower meaning for public policy compared to the local public policy, as explained by the International Law Association as a notion that must be understood in its private international law context, namely:

“... that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. ... It is not to be understood in these Recommendations as referring to a public policy which is common to many States (which is better referred to as

¹¹ Mohamed Al-Nasair and Ilias Bantekas, 'The effect of public policy on the enforcement of foreign arbitral awards in Bahrain and UAE' (2013)(3) International Arbitration Law Review 88.

¹² *Renusagar Power Co Ltd v General Electric Co*, reported in (1995) XX Y.B. Comm. Arb., p.700.

‘transnational public policy’) or to public policy which is part of public international law. International public policy is generally considered to be narrower in scope than domestic public policy.”¹³

Hence, there is no particular approach that should be applied by the courts; some courts may apply the international public policy, while others may apply the local public policy. However, in Dubai the courts apply the local public policy to examine the award. For example, in Petition No. 146 of 2008 issued on 9 November 2008, Dubai Court of Cassation provided that the court shall verify the breach of public policy in light of the applicable rules in the judge’s country and not in any other country.

Consequently, is the definition of local public policy includes consumer protection. The local public policy was defined in Article 3 of the UAE Civil Code¹⁴ in the following manner:

“Rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Sharia.”

Moreover, in Dubai Court of Cassation, Petition No. 14 of 2012 issued on 16 September 2012, the Court gave an unprecedentedly wide interpretation to the concept of public policy as something that:

“relates to the fundamental interests of a society and forms the basis for the social, political, economic and ethical rules that are issues by the state.”

¹³ ILA, New Delhi Conference, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002), para.11.

¹⁴ Federal Law No.5/1985.

According to the definition above, consumer protection is not considered to be contrary to the public policy; however, according to the case above UAE courts may expand the meaning of public policy itself. Therefore, the court may consider consumer arbitration contrary to public policy and rely on the aspect that it affect values citizens' right to settle their disputes before their local courts, and consider it as a path to the protection and justice. In support of this approach, the Dubai Court of Cassation ruled that the right to use the judicial system is available to all.¹⁵

Therefore, DC may refuse to enforce the arbitration award in consumer contracts according to Article V(2)(b), as it might be considered contrary to the public policy, relying on its authority to interpret the meaning of public policy widely, in a way that includes consumer arbitration.¹⁶

Nevertheless, considering consumer protection part of the public policy is not sufficient to protect consumers from referring to unfair arbitration, there should be an approach to examine the fairness of such an arbitration agreement, in order to able the court to decide the enforceability of the arbitration agreement. The next part shall examine whether the DIFC and Dubai legislation provide for such an approach.

5.4 Consumer protection under the DIFC arbitration law

DIFC Arbitration Law states clearly the issue of consumer arbitration along with the issue of employment arbitration. Article 12(1) of the DIFC Arbitration Law states clearly that parties may agree on arbitration which might be concluded at any stage, either prior or subsequent to a dispute arising. Nevertheless, Article 12(2) of the same Law states the

¹⁵ Dubai Court of Cassation on January 21 2001 in Appeal 312/2000.

¹⁶ Dubai Court of Cassation, Petition No.14 of 2012 issues on 16 September 2012.

circumstances that the pre-dispute arbitration agreement shall be invalid if it was concluded in an employment or consumer contracts.

However, arbitration agreement in employment contracts within the meaning of the DIFC Employment Law 2005 will not be enforceable except where the employee has given written consent or submitted to arbitration proceedings under the arbitration agreement.¹⁷ A similar approach is applied in relation to consumer contracts. DIFC Arbitration Law states the exceptions when the court may validate the arbitration agreement in this type of contracts. These exceptions are stated in Article 12(2)(b) as follows:

*“(i) with his written consent given after the dispute in question has arisen; or
(ii) where he has submitted to arbitration proceedings commenced under the Arbitration Agreement, whether in respect of that dispute or any other dispute;
or
(iii) where the DIFC Court has made an order disapplying this Article on the grounds that the DIFC Court is satisfied that it is not detrimental to the interests of the employee or consumer for the dispute in question to be referred to arbitration in pursuance of the Arbitration Agreement instead of being determined by proceedings before a Court. For the purposes of this Article, “consumer” means “any natural or legal person who is acting for purposes which are outside his trade, business or profession.”*

Article 12(2)(b) implies that the real intention of the consumer is important and it should be expressed explicitly by one of the three situations below:

¹⁷ Christopher Mainwaring-Taylor, 'Amended Arbitration Law for the Dubai International Financial Centre: DIFC as the seat of arbitration' (2008) 11(6) International Arbitration Law Review N90.

Firstly, post-dispute arbitration agreement is always valid. Article 12 (2)(b) states that the consumer or employee should provide the court with a written consent to arbitrate after the dispute has arisen.

Secondly, if the employee or consumer has commenced a proceeding before the arbitral tribunal. In other words, the law requires to ensure that the consumer was not enforced to arbitration and he consent to arbitrate.

Finally, the DIFCC shall examine pre-dispute arbitration agreement before enforce it. In this case, the court have to determine the enforceability of the arbitration agreement according to the court convenience whether it finds that the arbitration shall be for the benefit of consumer or not. However, applying the final exception in the lack of a specific control and standard may lead to inappropriate decisions.

Under the DIFC legal system, consumers obtain greater protection when referring to alternative dispute resolutions, especially arbitration. This might be considered as an ideal approach in regard to consumer protection, for the reasons explained earlier in this chapter, which are the high costs of arbitration, the uncertainty of the real intention to arbitrate and the consumer might find himself dealing with a foreign legal system that he is not familiar with.

5.5 Enforceability of pre-dispute arbitration agreement in Dubai

Contrary to the DIFC Arbitration Law, the Civil Procedural Code does not differ between pre- and post-dispute arbitration agreement and does not provide any protection for consumers.

Before pre-dispute arbitration agreements and the issuing of the Civil Procedures Code, traditional Arab-Islamic law in the politics of the modern UAE was silent in regard to pre-dispute arbitration agreements, which silence was interpreted as a prohibition.¹⁸ Thus, the courts that examine the validity of pre-dispute arbitration agreement in consumer contracts according to the Islamic law consider it null and void.

However, there is no rule that explicitly invalidates consumer arbitration agreement, whether pre- or post-dispute, under the current Civil Procedural Code and the Draft Law. However, few writers have been able to draw the consumer arbitration issue under the UAE legal system.¹⁹

As explained earlier, consumers in the UAE do not gain any protection according to the applicable law. Consequently, the enforceability of pre-dispute arbitration agreement in general shall be examined by DC on a case by case basis. Therefore, the next part examines the DC general approach toward pre-dispute arbitration agreements.

Consumers might agree on an arbitration clause incorporated by reference.²⁰ However, DC approach is uncertain toward this type of arbitration agreement either it is found in commercial or consumer contracts. Therefore, it implies the importance to examine the Courts' approach toward this type of arbitration clause in general.

The next part examines the DC criteria to enforce arbitration clause incorporated by reference. The Civil Procedure Code does not state explicitly the enforceability of arbitration clauses incorporated by reference in a contract; consequently, the enforceability might differ based on the form (whether it was by reference to a standard

¹⁸ Daniel Brawn, 'Commercial arbitration in Dubai' (2014) 80(2) *Arbitration* 156.

¹⁹ See: Richard Ashmore and Herbert Smith Freehills. Unilateral Option to Arbitrate: Valid in the UAE? Available at <http://kluwerarbitrationblog.com/blog/2015/03/04/unilateral-option-to-arbitrate-valid-in-the-uae/> Last Accessed 04/01/2016. Philip Punwar and Maria Musika, 'The United Arab Emirates ("UAE")' (2010) 16(1) *Yearbook of Islamic and Middle Eastern Law Online* 229.

²⁰ *Walker v. BuildDirect.com Technologies, Inc.*, 2015 OK 30 (2015) (on certification from 10th Cir).

unchangeable document, or by reference to unsigned terms and conditions that may be available on request or publicly).

5.5.1 DC approach toward arbitration clause

In general, parties usually tend to include arbitration clauses in the main body of a contract. However, this situation might vary as contractual parties may find it more convenient to agree on specific terms and conditions of a contract in one document then refer to another document for the standard terms. For example, parties may make a reference to the arbitration agreement in a standard unchangeable document, by reference to unsigned terms and conditions that may be available on request or publicly and by reference to a clause included in a third party contract. However, consumers might deal with similar type of contracts, although the most common is to include the arbitration agreement within the contract. The study will examine the enforceability of arbitration clauses incorporated by reference to other documents in order to clarify the criteria applied by DC.

5.5.1.1 Enforcement of arbitration clause incorporated with the general contract

Article 203(2) of the Civil Procedure Code states that the only requirement of arbitration validity is to be in writing. Further, Saloni Kantaria²¹ added that the UAE Courts require a clear intention of the parties to submit their dispute to arbitration, which is established by writing according to Article 203(2).

The Court in Dubai may invalidate the arbitration clause on grounds clearly stated in the Civil Procedure Code to be invalid, such as that the party who signed the arbitration

²¹ Saloni Kantaria, 'Is your arbitration agreement valid in the United Arab Emirates?' (2014) 80(1) *Arbitration* 16.

agreement does not have authority to bind the company.²² For example, the Dubai Court of Cassation in Petition No. 273 of 2006 issued on 5 March 2007 stated that:

“According to the provisions of Article 203(4) of the Civil Procedure Code, as well as what is established in the adjudication of this Court, the agreement to resort to arbitration may only be made by the party having capacity to dispose of the disputed right and not by those who have the capacity to resort to litigation.”

In another case, Dubai Court of Cassation in Petition 537 of 1999 on 23 April 2000 enforced an award despite the argument of the Petitioner to set the award aside on the ground of lack of capacity to agree to arbitration on behalf of the company.

Under the provisions of the Civil Procedure Code, if the party failed to provide the court with the arbitration agreement, it is not a ground for refusal. Nevertheless, the courts’ judgments approved that this might not be the situation. The Dubai Court of Cassation in 1997 accepted an appeal from the lower court’s ratification of an award on the grounds that the award did not contain either the arbitration clause or terms of reference.²³ This requirement has since been applied by the Federal Supreme Court as follows:

“The lawmaker mandates that provisions relating to arbitration should be followed such as that the arbitration agreement must be attached to a copy of the award, with an addendum of the statements and documents of the parties, grounds, pronouncement, date and place of issue of the award and signatures of the arbitrators.”²⁴

²² Civil Procedure Code Article 203(4) & 58(2).

²³ Dubai Cassation No. 173/1996 dated 16 March 1997. The court held that this was a breach of the requirements of UAE Civil Procedure Code, Article 212.

²⁴ Federal Supreme Court No. 449/21 dated 11 April 2001.

Moreover, DC do not necessarily require the arbitration agreement to be physically attached to an award, but the Dubai Court of Cassation in its decisions stated that compliance can be achieved by quoting the arbitration agreement in an award, rather than including a full copy.²⁵ However, if the parties failed to evidence such an agreement it might be a ground for challenge. In a recent court decision, the Dubai court of Cassation stated that the legislator required the arbitration agreement to be attached to the award in order to able the court to ensure that the arbitral tribunal did not exceed its authority, and failing to do so will lead to invalidation of the award.²⁶ Michael Grose²⁷ explained that the rationale for this requirement is that a court, in the exercise of its residual supervisory jurisdiction, must be able to ensure that the scope of an arbitration agreement has not been exceeded,²⁸ one of the prescribed grounds for annulment.²⁹

Accordingly, DC are generally willing to enforce the arbitration clause,³⁰ unless there is an article that states clearly the prohibition or invalidity of such an agreement that the party can prove is applicable to the matter in his case. Moreover, the party who is seeking the enforcement should provide the court with a valid arbitration agreement to guarantee the enforcement. However, even if the party provided the court with the arbitration agreement, still the court may refuse to enforce the final award as explained in the section below.

²⁵ Dubai Cassation No. 277/2002 dated 13 October 2002 and 32/2014 dated 31 March 2014.

²⁶ Dubai Cassation No.282/2012 dated 3 February 2013.

²⁷ Michael Grose "Construction Law in the United Arab Emirates and the Gulf" (John Wiley & Sons, 2016), P. 274.

²⁸ Dubai Cassation No.39/2005 dated 16 April 2005 in which the court allowed the appeal and reinstated the arbitration award on the basis that this recited the agreement to arbitrate, Dubai Cassation No. 486/2008 dated 30 October 2008 and Abu Dhabi cassation No. 519/2013 dated 2 July 2013.

²⁹ UAE Civil Procedure Code, Article 216(1)(a).

³⁰ Saloni Kantaria, 'Is your arbitration agreement valid in the United Arab Emirates?' (2014) 80(1) *Arbitration* 16.

5.5.1.2 Arbitration by reference to a standard unchangeable document

In order to avoid repetitiveness, the parties may refer to an arbitration clause that is included in a different unchangeable contract or document which is not part of the original contract. For example, parties would sign a customised contract that is made for a particular matter then refer to the arbitration agreement stipulated in another contract.

Arbitration agreements by reference to a different standard document are generally widespread in construction contracts. The courts of Dubai toward this type of arbitration clause can be found in the Dubai Court of Cassation decision in Petition No. 462/2002 in 2/3/2003. The Court decided that arbitration agreement incorporated by reference to International Federation of Consulting engineering (FIDIC) Conditions of Contract for Electrical and Mechanical Works is valid and recognised. In this case, parties referred to clause 50.2 of the FIDIC Conditions of Contract for Electrical and Mechanical Works, which provides that any disputes arise between parties will be referred to arbitration under the rules of International Chamber of Commerce.

However, there are different ways for parties to incorporate the arbitration clause into their contract. For example, parties may state that “Clause 50.2 the FIDIC Conditions of Contract for Electrical and Mechanical Works is hereby included in this contract”, or they may state that “any dispute arises Clause 50.2 the FIDIC Conditions of Contract for Electrical and Mechanical works, shall apply....”

This was confirmed by the Dubai Court of Cassation in a similar case wherein an arbitral award was ratified whereby the parties agreed to settle their disputes in accordance with the FIDIC:

“The tender documents included the tender terms and conditions which referred to FIDIC general terms and conditions specifically clause 67(1) that

deals with arbitration in accordance with Dubai Chamber of Commerce rules and FIDIC.”³¹

Generally, an arbitration clause that was not specifically signed by one of the contracting parties might be considered valid and enforceable according to DC, if the parties referred to it in a standard and unchangeable document.

5.5.1.3 Arbitration by reference to unsigned terms and conditions that may be available on request or publicly

In this case, parties may refer to an arbitration clause that is contained in a variable and/or unilateral document that is unsigned. However, DC may refuse to enforce this type of agreement unless parties explicitly refer to the arbitration in their agreement. In a Dubai Court of Cassation case in 2012 (Real Estate appeal 153 of 2011, issued on 19 February 2012) the court held that:

“reference made in the main agreement to an arbitration clause can be construed as an arbitration agreement only if such reference is incorporated explicitly in the main agreement. However, in the event the reference is generally made to incorporate general terms and conditions without including an explicit reference to arbitration to indicate that both parties have agreed to the arbitration, the reference then does not extend to include the arbitration clause.”

DC invalidate this type of arbitration agreements, and it provides that this type of agreements would be valid if the parties explicitly reference to the arbitration clause. Moreover, an arbitration clause that is located in an external document such as company’s terms and conditions might be considered invalid as well, for the reason that it is not

³¹ <http://www.tamimi.com/en/magazine/law-update/section-5/april-5/uae-ratification-of-a-domestic-arbitral-award-and-the-issue-of-arbitration-clauses-incorporated-by-r.html> Last Accessed (3/12/2015)

signed by the parties which make it subject to be modified in the future. In this circumstance, even though the parties may not be able to amend the terms and conditions, the courts may refuse to validate the arbitration agreement on the grounds that the parties failed to refer to an arbitration agreement explicitly. Hence, in order to consider this type of arbitration clause valid, parties should agree explicitly on the arbitration clause and sign it in order to ensure the enforceability of such an agreement.

5.5.1.4 Arbitration by reference to a clause included in a third party contract

Parties may agree to arbitrate by referring to an arbitration clause that is found in an external contract that is related to one of the parties only (with a third party). However, the DC took the same approach by invalidating this type of arbitration agreement unless the parties made an explicit reference to arbitration.³² Otherwise, it is unlikely to validate the arbitration agreement.

The DC consider reference to an external arbitration agreement to be wholly and procedurally deficient. Moreover, the party will not bind himself into an external arbitration agreement in a contract that is subject to amendments and modification by third parties. In short, the DC will invalidate this type of arbitration agreements as it falls far short of the unequivocal and steadfast certainty, unless the parties explicitly referred to an arbitration agreement.

In Petition No. 51 (18/5/2003), Dubai Court of Cassation enforced an arbitration agreement despite it having referred to an arbitration agreement existing in a charter party contract. The case facts were that the Respondent (a ship owner) agreed to transit and ship a consignment of sulphur fuel oil on board of his vessel from Saudi Arabia to UAE, to be delivered to a third party. However, upon delivery it was found that the consignment had

³² Dubai Court of Cassation, Petition No. 51 (18/5/2003).

become contaminated in transit. Nevertheless, under the insurance policy the consignment owner was to be compensated for any damage arising from the transport or shipment. The parties agreed to appoint a loss adjuster to compensate the loss; the loss adjusters' survey held the Respondent responsible for the damage affecting the consignment, and assessed the loss to amount to US\$2,340,065.45. The Appellant paid the amount to the third party and then brought the claim against the Respondent for compensation.

The insurance company brought judicial procedures against the ship owner, claiming US\$2,364,065 (AED 8,676,120.20). The respondent argued that the dispute should be referred to arbitration, and the court proceedings should be dismissed. The Respondent stated that "arbitration clauses contained in the vessel's charter party are herewith incorporated and form a part hereof". However, the Court of First Instance held that the court had jurisdiction over the dispute and dismissed the objection of the respondent in regard the existence of an arbitration clause, and ordered the respondent to pay the amount of US\$ 2,340,065.45, plus interest.

However, the Court of Appeal overturned the court decision and decided that there be an arbitration clause. This decision was upheld by the Dubai Court of Cassation, as it stated that the arbitration clauses in charter party agreements are often incorporated by reference to the bill of lading. While mere reference in a bill of lading to the validity of all the conditions of a charter party is not sufficient to incorporate the arbitration provisions into the bill, a charter party arbitration clause that is clearly referred to in the bill will be incorporated. It follows that the parties to the bill of lading intended to refer their dispute to arbitration according to the arbitration clause contained in the charter party.

Nevertheless, in order to obtain a valid and effective arbitration agreement by reference to a standard unchangeable document, parties should clearly verify their intention by

stating the word “arbitration” in their contracts, and not just to write the number of the article indexing the arbitration agreement. The reason for this is to state with certainty that the party who is waiving his right to litigate has a real intention to arbitrate and recognise the effect of such a clause.

In another recent case *Al Buhaira National Insurance Co. v. The Shipping Corporation of India Limited*,³³ the court held that, where the words of incorporation in a bill of lading include a clear reference to the arbitration clause of a charterparty, then that arbitration clause will be deemed to be incorporated into the bill of lading. Mere reference in a bill of lading to the conditions of a charterparty, without express reference to the arbitration clause, is not sufficient to incorporate the arbitration provisions into the bill of lading, as was noted by the Dubai Court of Cassation in this case.

However, the approach under the provisions of the new federal arbitration law is the same as the current approach under the Civil Procedurals Code, as it states clearly that if parties referred to an arbitration clause in another document, the parties should explicitly refer to the arbitration clause. Article 8(2)(b) states:

“The reference in a contract to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference to such clause is clear in regarding that clause as a part of the contract.”

In conclusion, according to the discussion above, if the parties stated the arbitration clause clearly in their agreement or referred to it explicitly then the arbitration clause shall be enforceable. However, the lack of provisions implies that the courts are not intended to

³³ Cassation No. 363 of 2011, Civil Appeal. <http://www.incelaw.com/en/knowledge-bank/publications/dubai-court-of-cassation-rules-on-incorporation-of-charterparty-terms-into-a-bill-of-lading> accessed 13/06/2016.

enforce an arbitration clause in consumer contracts. Furthermore, consumer disputes are not one of the circumstances stated clearly in Article 216 of the Civil Procedure Code, thus the arbitral award could be considered null and void. Moreover, under the Federal Law No. (24) of 2006³⁴ on Consumer Protection in the UAE, it is not stated that the consumer may gain any protection from referring their disputes to arbitration. It is assumed that the court will enforce arbitration clause in consumer contracts.

However, in consumer contracts it is not enough to examine whether the arbitration clause was stated clearly in the contract or if the parties made reference to the clause explicitly. This approach is not appropriate for consumer contracts, as the arbitration clause might be included among the terms and conditions of the original contract, or made by reference to a standard unchangeable document, yet the real intention of the consumer was not to arbitrate. Therefore, under the terms of the new law there shall be more consumer protection, and the courts in Dubai shall apply more strict rules to examine the arbitration agreement.

5.5.2 Suggested solutions to grant more protection for consumers in Dubai

There is a lack of cases in DC regarding pre-dispute arbitration agreement in consumer contracts, and the provisions that regulate arbitration in Dubai do not state clearly whether this type of arbitration agreements is valid or not. This study therefore explores different approaches applied in different countries and examines whether they might be applied in the UAE according to the current legal system, and it states solutions for other grounds DC may rely on in order to set pre-dispute arbitration agreement aside.

It is not clear whether the DC will refuse to enforce a pre-dispute arbitration agreement in adhesion contracts according to the Civil Procedural Code, because the Civil

³⁴[http://www.ded.rak.ae/en/customerprotection/protection/Documents/Federal%20Law%20No%20\(24\)%20of%202006%20on%20Consumer%20Protection.pdf](http://www.ded.rak.ae/en/customerprotection/protection/Documents/Federal%20Law%20No%20(24)%20of%202006%20on%20Consumer%20Protection.pdf) (Last accessed 3/12/2015)

Procedural Code does not distinguish between the two types of the arbitration agreement, and both types are treated equally under the Civil Procedures Code provisions. Conversely, the DIFC Arbitration Law states clearly that the circumstances in which consumers are held to arbitration agreement in consumer contracts are enforceable.

This section examines the grounds for refusal that are applied by the courts in different countries to negate and invalidate arbitration agreement and examines whether they might be applied in the UAE. The grounds examined that might consider the arbitration agreement in consumer contracts contrary to the public policy are the uncertainty of the agreement, the agreement being unconscionable and the unfairness test.

5.5.2.1 Uncertainty of the arbitration agreement

The approach of invalidating the arbitration agreement on the ground of uncertainty is applied in Turkey, as the Turkish 11th Civil Division Court held in the case No. 2013/16901 that arbitration clause is an exceptional way to settle disputes, therefore arbitration agreement should state clearly and unequivocally whether all or certain disputes will be submitted to arbitration. In this case, if parties agree that disputes could not be resolved by arbitration, they should be settled by the courts of Istanbul. However, the court invalidates the arbitration agreement on the basis that it was incompatible with Turkey's International Arbitration Law due to a lack of clear and definitive intent to arbitrate.

This ground has been applied clearly by DC. Dubai Court of Cassation No. 51/1992 stated explicitly that arbitration is an alternative path to litigation, therefore both parties must expressly agree to arbitrate. As arbitration is an alternative dispute resolution to litigation, issues might arise if parties give jurisdiction to arbitration on certain disputes over courts. Therefore, parties should be clear in their arbitration agreement, as it will be an

exceptional way to settle their dispute. In other words, if the clause does not state clearly whether a particular dispute will be submitted to arbitration or court, this may lead to invalidating the arbitration agreement under the UAE law due to a lack of clear and definitive intent to arbitrate.

In addition, DC require the clear consent of both parties in order to enforce the arbitration agreement, which is a matter of both parties, who are required to prove that their real intention went to submit the potential disputes to arbitration. This was stated by Dubai Court of Cassation in Petition No. 220 of 2004:

“The arbitration agreement can only be valid when it is proved that the parties had the joint intention to refer their dispute to arbitration, which can be inferred from the existence of an arbitration clause within the agreement or from both parties signing a subsequent arbitration agreement.”

Special requirements might be emphasised in relation to pre-dispute arbitration agreements. For example, Dubai Court of Cassation stated that the pre-dispute arbitration agreement will be considered void if it was unreadable and printed in a small font that a regular person would not be able to read.³⁵ However, parties are not required to agree on all the conditions and terms of the arbitration in the pre-dispute agreements in order to be valid, as the dispute has not arisen at the time the contract is signed.³⁶

Consequently, DC may require more strict rules in order to enforce pre-dispute arbitration agreement, such as explicit agreement to arbitrate, the consent of both parties and other formal requirements; essentially, this means that the real intention of the parties to arbitrate should be clear. According to the preceding discussion, it can be established that uncertainty might be applied by DC to invalidate consumer arbitration agreements.

³⁵ Dubai Court of Cassation No.87 of 2003 dated 10/5/2003.

³⁶ Dubai Court of Cassation No.91 of 1992 dated 21/11/1992.

5.5.2.2 *Unconscionability of arbitration agreement*

The doctrine of unconscionability is widespread in the US. Drahozal & Friel³⁷ defined it as:

“A certain provision of the arbitration agreement is so unfair that the provision, or the arbitration agreement as a whole, is unenforceable.”

This means that the unconscionability was recognised in order to protect consumers from any non-meaningful choice to arbitrate, and where the arbitration is favourable for a party rather than the other.

It is interesting to note that the Federal Arbitration Act governs virtually all consumer arbitration agreements.³⁸ In *AT&T Mobility*³⁹ the US Supreme Court held that the Federal Arbitration Act pre-empted the Federal Law, which means that the arbitration agreement in class actions are valid even that the California State Contract Law deems the arbitration agreement waived in a class action invalid and unenforceable. The Supreme Court interpreted that the Federal Law stands as an obstacle in the way of the Federal Arbitration Act, and the objective and purposes of Congress.

However, it is still not obvious where Federal Law should apply to examine the unconscionability doctrine. In *Discover Bank*⁴⁰ the decision was made under the Federal Law (California Law) among the Federal Arbitration Act, and the California Supreme

³⁷ Christoher Drahozal and Raymond Friel, ‘A comparative view of consumer arbitration’ (2005) *Arbitration* 131.

³⁸ The Federal Arbitration Act applies to an arbitration provision “in any maritime transaction or a contract evidencing a transaction involving commerce.” 9 U.S.C. s.2. The Supreme Court has construed the scope of the Federal Arbitration Act broadly, to apply to the full reach of Congress’s power to regulate interstate commerce. *Allied-Bruce Terminix Co v Dobson* 513 U.S. 265 S. Ct. (1995), at 277; *Citizens Bank v Alafabco* (2003) 539 U.S. 52.

³⁹ *AT&T Mobility LLP v Vincent Concepcion Et Ux* 563 U.S. 2011 (April 27, 2011).

⁴⁰ *Discover Bank v Superior Court* 36 Cal. 4th 148 (2005).

Court held that arbitration clauses of adhesion excluding class actions are unconscionable as it stated that:

“When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then... the waiver becomes in practice the exemption of the party ‘from responsibility for its own fraud, or wilful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.”

Even if the Federal Arbitration Act does not apply, most of the federal laws support the enforceability of arbitration agreement.⁴¹ The Supreme Court of Texas affirmed that the pro-arbitration policy is favoured by both federal and state laws,⁴² which policy considers consumer disputes arbitrable and enforces the pre-dispute arbitration clause in consumer disputes. On the other hand, there are several grounds to consider the arbitration clause invalid and null, including the following two concepts.

Firstly, for claims arising under federal statutes, even if the claim is one that generally is subject to arbitration, a court may permit a consumer to bring the claim in court if the procedures in arbitration “preclude [the] litigant ... from effectively vindicating her federal statutory rights in the arbitral forum.”⁴³ Therefore, a pre-dispute agreement might

⁴¹ Sarah Rudolph Cole, 'Uniform Arbitration: One Size Fits All Does Not Fit' (2000) 16 *Ohio St.J.Disp.Resol.* 759.

⁴² *Prudential Securities Inc v Marshall* 909 S.W. 2d 896 (Tex. 1995).

⁴³ *Green Tree Financial Corp. v Randolph*, 531 U.S 79 (2000).at 90.

be considered unconscionable in several circumstances, such as the cost of arbitration being too high and excessively costly for the consumer.

Secondly, parties can raise general contract law defences such as the manner in which the contract was entered into, to defeat the enforceability of agreements to arbitrate.⁴⁴

The main general rule is that the arbitration clause is valid under the Federal Arbitration Act, which is the same in the UAE. Both countries have the same approach as there is no difference between the enforceability of the arbitration agreement in B2B and B2C contracts as long as they are considered “valid, irrevocable, and enforceable”.⁴⁵

In addition, the US Supreme Court has encouraged the pro-arbitration policy,⁴⁶ however it failed to limit the application of the doctrine of unconscionability. According to Posner,⁴⁷ the Supreme Court’s pro-arbitration stance refers the Law and Economics (L&E) movement, which played a major role in producing efficient contract terms that are favourable to contract drafters and consumers. The L&E analysis held that the courts would not need to undertake any unconscionability test, i.e. looking at bargaining power, consent or fairness, and strict enforcement of contract terms became a requirement.⁴⁸ In addition, the “Turn Against Law” movement in the 1970s favoured arbitration instead of litigation, which was criticised as excessively procedural and socially and economically damaging.⁴⁹

⁴⁴ 9 U.S.C. s.2 (arbitration agreement “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); *Allied-Bruce* 265.

⁴⁵ *Allied-Bruce Terminix Co v Dobson* 513 U.S. 265 S. Ct. (1995), where the US SC extended the application of the Federal Arbitration Act to consumer contracts.

⁴⁶ *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* 473 U.S. 614, 105 S. Ct. 3346 (1985).

⁴⁷ Richard A Posner, ‘Economic analysis of law’ (Boston: Little, Brown & Co., 1973).

⁴⁸ Ian Ayres and Robert Gertner, ‘Filling gaps in incomplete contracts: An economic theory of default rules’ (1989) 99(1) *Yale Law J* 87.

⁴⁹ Marc Galanter, “The Turn against Law: The Recoil against Expanding Accountability”, (2002) 81 *Tex L Rev* 285.

However, the application of the unconscionability doctrine may differ from case to case. The next part examines practical cases in the US Courts in order to understand the core of the doctrine of unconscionability.

5.5.2.2.1 The court considered the arbitration agreement unconscionable

The court has to examine each case to decide whether the arbitration clause is conscionable or not. In some cases, the court may not accept the arbitral clause as valid because of the high cost of arbitration. A similar case happened in *Brower v Gateway Inc.*⁵⁰ in which the fees of arbitration were \$4000 paid for the International Chamber of Commerce Court of Arbitration in Paris, while the claim involved purchase of a personal case worth no more than \$1000. Therefore, the New York Appellate Court held that the arbitration agreement was not valid and was thus unenforceable.

In another case named *Campbell*,⁵¹ the Court of Appeal held that the arbitration agreement is unconscionable, as one of the defendants failed to prove that the employees noticed the new policy of referring disputes that arise between them to arbitration. The Court noted that it is not enough to demonstrate that employees had checked their emails to determine that they were aware or had verified the new dispute resolution policy.

Furthermore, in *Ting v. AT&T*⁵² the state and federal court of California considered an arbitration clause in which the adhesion contract had a standard term contract whereby a party may gain bargain advantages from class action rather than from arbitration. The Ninth Circuit Court of Appeals held the clause to be unconscionable and unenforceable. In *Bragg v Linden Research Inc.*⁵³ the court held that the arbitration agreement was invalid and void, as the stronger party in an adhesion contract allowed himself to choose

⁵⁰ *Brower v Gateway2000 Inc* 676 N.Y.S. 2d 569, 572 (1998).

⁵¹ *Campbell v General Dynamics Government Systems Corp* 407 F.3d 546 C.A.1 (Mass. 2005).

⁵² *Ting v AT&T* 319 F3d 1126, 1148 (9th Cir Cal 2003).

⁵³ 487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007).

the forum, imposing high costs on the weaker party by enforcing him to arbitrate moreover imposing confidentiality on arbitral proceedings.

5.5.2.2.2 The court held that the arbitration agreement is conscionable

In several cases, the court held that the arbitration agreement is valid and enforceable. In *Green Tree Financial Corp. v. Randolph*,⁵⁴ the court provided that the arbitration agreement is valid, as the plaintiff did not prove to the court how the arbitration would be prohibitively expensive. The court held that:

“Randolph’s agreement to arbitrate is not rendered unenforceable simply because it says nothing about arbitration costs, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum.”

In another case, the Court of California of Appeal in *Gutierrez v. Autowest*⁵⁵ held the arbitration agreement enforceable and stated that in order to consider the arbitration agreement invalid the fees of arbitration should be unaffordable, and there is no opportunity to seek a fee waiver according to the arbitration agreement.

In general, the main US approach toward the consumer arbitration agreements is that they are considered valid and enforceable unless there are specific circumstances rendering such clauses unconscionable, and the cases mentioned above are good examples when the courts consider the arbitration clause unconscionable and when they are not.

A study of court decisions regarding the unconscionability of the arbitration agreements between 1990-2008 found that the US courts prefer to invalidate the arbitration clause

⁵⁴ *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000).

⁵⁵ *Gutierrez v. Autowest, Inc.*, 2003 Cal. App. LEXIS 1817 (Ct. App. 2003).

and are willing to uphold the unconscionability defence against the arbitration clause.⁵⁶ In conclusion, the doctrine of unconscionability is based on the court's assessment, and there are no particular standards to consider the arbitral clause unconscionable. However, based on the cases above, the court will examine whether the arbitration costs are effective, whether there are more advantages to arbitration than litigation and the consent of parties to arbitrate.

The courts in the US had to consider several points in order to assess the validity of the agreement when applying the doctrine of unconscionability, such as whether (if the agreement was obvious in the contract) the consumer had the opportunity to understand the terms of the contract, and the manner in which the contract was made. Hence, the court shall examine the effectiveness and equivalence aspects of the arbitration agreement.

5.5.2.2.3 The ability to apply the doctrine of unconscionability by DC

According to the discussion above, the doctrine of unconscionability examines both the effectiveness and equivalence aspects. However, the question that arises here is whether a similar approach might be applied in the UAE. Under UAE law, the rule of thumb is that the court is not allowed to interfere in what parties have agreed under the contract; hence, it presents some assurance that the terms agreed are enforceable. However, a Contract of Adhesion is excluded from this rule.

DC may invalidate an arbitration agreement if it found that there is an inequality of bargaining power or the agreement allowing the stronger party to choose the forum. UAE law aims to set a balance between parties; this concept is stated in Articles 145 and 248

⁵⁶ Charles L Knapp, 'Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device' (2009) 46 *San Diego L.Rev.* 609.

of the Civil Code. Article 145 of the Civil Code states that the contract of adhesion would be satisfied as:

“Acceptance in contracts of adhesion shall be by virtue of simple delivery on conditions similar to those made to all his customers by an offer or who does not accept any negotiation about those conditions.”

According to Article 145, adhesion contract would be if the supplier provide customers standard terms and conditions that are similar to the terms and conditions he/she offer to all other customers; and if the terms and conditions within the contract are non-negotiable. However, in Article 145 both conditions are required to apply to e-commerce contracts and consumer contracts. Article 248 of the Civil Code states that the court may intervene in Adhesion Contracts:

“If the contract is made by way of adhesion and contains unfair provisions, it shall be permissible for the judge to vary those provisions or to exempt the adhering party therefrom in accordance with the requirements of justice, and any agreement to the contrary shall be void.”

According to Articles 145 and 248 of the Civil Procedure Code, the court may set aside arbitration agreements in an Adhesion Contract if the court found that there is an imbalance power between the parties and the weak party has been enforced to agree on the terms and conditions. Rather, the Contract of Adhesion stated that any uncertainty in the contract must be solved in favour of the customer.

Therefore, DC have the right to amend the oppressive provisions in the adhesion contracts, such as to reduce the burden on the adhering party or to exempt him from in accordance with the dictates of justice. Furthermore, DC require the arbitration agreement to be effective, and parties should expressly agree to arbitrate in order to be enforceable,

otherwise the court will invalidate the arbitration agreement. This was stated by the Dubai Court of Cassation⁵⁷ as follows:

“It is settled that arbitration is an exceptional path for disputes between parties and it must be expressly agreed upon because it involves a departure from the path of litigating before the competent courts of law and the guarantee bestowed by the ordinary courts.”

As explained previously, this doctrine is mostly widespread in the US, and there are several cases where the award has been set aside on the grounds that the arbitration agreement is unconscionable. Although there are no practical cases in the UAE, the core of the doctrine might be applied in the state and the provisions examined above support the ability of the DC to apply this doctrine.

Nevertheless, there are two main issue that might arise here. Firstly, the courts in Dubai are aiming to avoid applying article 248 unless the contract is obviously an ad hoc contract. In Petition No. 472 of 2005, the court held the rent agreement between the parties is not an ad hoc contract hence the court is not allowed to intervene in the terms of the contract.

Secondly, the issue that might arise here is that the supplier might make minor amendments to the terms and conditions of the contract in order to avoid the application of Article 145 of the Civil Code. In addition, he might negotiate the contract with the consumer in order to avoid applying this Article, to prevent the court from intervening in the arbitration clause. Therefore, it is hard to rely on Article 145 because of uncertainty whether the contract fulfils the requirements of the adhesion contract.

⁵⁷ Dubai Court of Cassation No. 51/1992 dated 24/5/1992.

5.5.2.3 *The unfairness test*

Some countries consider consumer arbitration to be against public policy if it is unfair and breach the balance of parties such as in Russia and UK as explained below. Therefore, the award might be set aside pursuant to Article V(2)(b) of the NYC, which implies that the recognition and enforcement of an award may be refused where the competent authority of the country where the recognition is sought finds that such recognition and enforcement would be contrary to the public policy of that country.⁵⁸

Considering consumer arbitration to be against the country's public policy without stating particular provisions or tests to invalidate it is applied in several countries. For example, in Russia in CJSC Russian Telephone Company v Sony Ericsson Mobil Communications Rus, the Presidium of the Supreme Arbitrazh Court held that the arbitration agreement is invalid as it gives the right for one party (Sony) to refer to the local court. In this case, both companies agreed to arbitrate their claims under the International Chamber of Commerce rules in London. However, the service provider (Sony) reserved a right to file a court claim. Therefore, the court decided that the arbitration agreement breaches the "balance of rights of the parties" and the arbitration agreement invalid as a matter of public policy.

Moreover in the UK, the control of unfair terms is applied to examine the validity of arbitration agreement in disputes exceeding the amount of GBP 5,000.

The UK law in this area is largely based on the EC Directive 93/13/EEC on unfair terms in consumer contracts, and it implements the Unfair Terms in Consumer Contracts

⁵⁸ UNCITRAL Working Group III (Online Dispute Resolution) twenty-sixth session (Vienna, 5-9 November 2012). A/CN.9/WG.III/XXIII/CPR.1/Add.1 para 21.

Regulations (1999). The UK Office of Fair Trading (OFT) in its Unfair Contract Terms Guidance explains its interpretation of the English Arbitration Act (1996):

17.2 Under section 91 of the Arbitration Act 1996, a compulsory arbitration clause is automatically unfair if it relates to claims of £5,000 or less. This is currently the only instance of a term that is always unfair under the Regulations regardless of circumstances. A compulsory arbitration clause forbidden by the 1996 Act is both legally ineffective and open to regulatory action in all cases.

17.3 If such a term is not to be deleted, the element of compulsion should be removed, for instance by making clear that consumers (or both parties) have a free choice whether to go to arbitration or not. Arbitration in the UK is fully covered by legal provisions, and so non-compulsory arbitration clauses are unlikely to encounter objections provided they are in clear language and not misleading.⁵⁹

The OFT provides that the arbitration clause in claims that its amount does not exceed GBP 5,000 to be unenforceable and unfair. On the other hand, businesses should make it clear that consumers may still refer to court, and the arbitration is not compulsory, otherwise the arbitration clause should be deleted.

Under s.91 of the English Arbitration Act (1996), if the amount of the claim exceeds the amount of GBP 5,000 the agreement will be evaluated under the general standards of unfairness set out in the Directive 93/13/EEC, implemented by the Unfair Terms in Consumer Contracts Regulations 1999.⁶⁰ Under ss.89 and 91 of English Arbitration Act,

⁵⁹ Office of Fair Trading, *Unfair Contract Terms Guidance* (February 2001), paras 17.2 and 17.3.

⁶⁰ Margaret Doyle, Katrina Ritters and Steve Brooker, *Seeking Resolution: The Availability and Usage of Consumer-to-Business Alternative Dispute Resolution in the United Kingdom* (DTI, 2004).

the Regulations 1999 application has been extended to include arbitration clauses in consumer contracts.⁶¹

However, several concerns have been raised regard the application of the EC Directive and the implementing Regulations 1999 on the international consumer disputes. Reg. 4(2)(b) of the Regulations 1999 states that the contractual terms governed by international conventions do not apply to the Regulations 1999. In other words, arbitration clauses found in international consumer disputes that are covered by the NYC will not be governed by the application of the Regulations 1999. In contrast, the European Court of Justice (ECJ) held in *Mostaza v Centro*⁶² implicitly that the consumer should be protected, whether the contractual agreement was national or international, and that the Directive should be applied to protect the interest of the consumers, whether the contract is governed by international conventions or not. This approach has been supported by the ECJ in *Eco Swiss*, as it implemented the invalidation of arbitral awards “founded on failure to comply with Community rules.”⁶³ Therefore, in consumer disputes, both national and international arbitration agreements that fulfil the requirements under Article II of the NYC shall be examined by the fairness test of the Directive 93/13/EEC and Regulation 1999.

The Annex in the Directive 93/13/EEC has pointed an illustrative list of examples to what to be among the unfair terms. However, the most relevant example for consumer arbitration is an example (q), which discusses the issue of preventing or excluding the consumer’s right to take legal action before the courts and referring to arbitration instead by means of:

⁶¹ SI 1999/2083 implementing Council Directive 93/13 of April 5, 1993 on unfair terms in consumer contracts [1993] OJ L095/0029 (the Directive). References to the Directive apply equally to the Regulations and vice versa.

⁶² *Mostaza Claro v Centro Móvil Milenium SL* (C-168/05) [2006] E.C.R. I-10421.

⁶³ *Eco Swiss China Time Ltd v Benetton International NV* (C126/97) [1999] E.C.R. I-3055 at [32], [37] and [39].

“excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”.

The meaning of the term “legal provisions” in the article above was not obvious, and several explanations were offered. For example, Hörnle⁶⁴ explained that this term might:

“Distinguish private arbitration from public forms of ‘arbitration’, such as small claims procedures or a statutory Ombudsman scheme. On the other hand it could refer to a distinction between arbitration based on the applicable law and arbitration where the arbitrator does not base his or her decision on strict law.”

On the other hand, Treitel⁶⁵ argued that the purpose of this term:

“May be to narrow the category of unfair arbitration clauses to those in which the parties have agreed to exclude the powers of the courts to control the arbitrator’s decision”.

Moreover, Arnold⁶⁶ suggested that the term refers to the form of the procedures. For example, ad hoc arbitrations that are free of any mechanism of control of the arbitral process. In *Picardi v Cuniberti*, the Queen’s Bench provided that the term “legal provisions” aims to distinct between arbitration that is based on the applicable law and arbitration, whereby the arbitrator does not base his or her decision on the strict law.⁶⁷ However, all interpretations of the term “legal provisions” state that this article should be

⁶⁴ Julia Hornle, ‘Legal controls on the use of arbitration clauses in B2C e-commerce contracts’ (2006) *Electronic Business Law* 8(8).

⁶⁵ GH Treitel and Edwin Peel, *Treitel on the Law of Contract* (Sweet and Maxwell 2007) para.7-105.

⁶⁶ Arnold Vahrenwald, “Out-of-Court Dispute Settlement Systems for E-commerce” *Report on Legal Issues, Part IV: Arbitration*, October 31, 2000, pp.149 and 199

⁶⁷ *Picardi (t/a Picardi Architects) v Cuniberti* [2002] EWHC 2923 (TCC); [2003] B.L.R. 487.

applied if there is no particular monitor by the courts or the law on the arbitration procedures.

5.5.2.3.1 The main elements to be considered when applying the unfairness test

The court should apply three main elements to assess the fairness of arbitration clause, which are good faith, the significant imbalance and obligations under the contract to the detriment of the consumer. In the UK, this has been stated clearly in the UK Consumer Rights Act 2015 in s.62 as follows:

“A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.”⁶⁸

Ramsey J., in the recent case of *Mylcryst Builders Ltd v Buck*,⁶⁹ explained these elements. The meaning of the “significant imbalance” if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. It explained the meaning of the second element “detriment to the consumer” in terms of there being a significant imbalance against the consumer, rather than the seller or supplier. However, the requirement of good faith is one of fair and open dealing in which:

(a) Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms, which might operate disadvantageously to the customer.

⁶⁸ The Consumer Rights Act 2015, http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0180/cbill_2013-20140180_en_1.htm Last Accessed 20/11/2015.

⁶⁹ *Mylcryst Builders Ltd v Buck* [2008] EWHC 2172 (TCC); [2009] 2 All E.R. (Comm) 259.

(b) Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract.

5.5.2.3.2 Practical cases from the English courts

The English courts have applied two elements to examine the fairness, which are “significant imbalance” and “contrary to good faith”.⁷⁰ Significant imbalance was explained by Lord Bingham in the *Director General of Fair Trading v First National Bank*,⁷¹ in which he stated that:

“the requirement of significant imbalance is met if a term is so weighed in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour.”

Moreover, in *Picardi v Cuniberti* the Court required the consumer to be properly informed regard the existence of an arbitration clause. In this case, the court held that the arbitration clause in a contract between an architect and the consumer onerous term as the arbitration clause has not been sufficiently drawn to the consumer's attention. Therefore, as the consumer was unaware of the adjudication provisions, the court held that this is a significant imbalance. The Queen's Bench decided that:

“The architect had failed to draw the consumer's attention to the onerous nature of the arbitration clause, which detrimentally affected the balance of a consumer's interest.”⁷²

⁷⁰ Khalil Mechantaf, 'Balancing protection and autonomy in consumer arbitrations: an international perspective' (2012) 78(3) *Arbitration* 232.

⁷¹ *Director General of Fair Trading* [2001] UKHL 52; [2002] 1 A.C. 481 at [17].

⁷² *Picardi (t/a Picardi Architects) v Cuniberti* [2002] EWHC 2923 (TCC); [2003] B.L.R. 487.

In an obiter dictum in *Spurling v Bradshaw*, Lord Denning went further than that as he stated that the arbitration clause “*should be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.*”

However, in regard the good faith element. McKendrick provides that the good faith requirement embraces elements of both procedural and substantive fairness.⁷³ Lord Millett, in the *Director General of Fair Trading*, described the notion of good faith when he stated that it is not enough to draw the attention of the consumer to the arbitration clause, but also whether it is substantially fair in itself.⁷⁴ In other words, the assessment implied by the court had to assess twin procedural and substantive element, which means that it is not enough that consumer attention is drawn to the term, but also whether it is substantially fair.⁷⁵ Therefore, it is not enough to hold the pre-dispute arbitration agreement in consumer contracts valid by relying on the consumer awareness to the arbitration clause. Hence, the element of good faith requires the court to examine whether the arbitration clause is substantially fair.

5.5.2.3.3 The ability to apply the unfairness test in the UAE

According to the application of the unfairness test in the UK. It has been stated that the Courts in the UK apply two main elements, which are the significant imbalance and good faith. According to the definition and the case interpretation of the element of significant imbalance, it can be seen that there are similar provisions in the UAE that could be applied on the test. For example, there is a similar provision to the element of the significant imbalance under Article 248 of the Civil Code. According to this Article, that has been

⁷³ Ewan McKendrick, *Contract Law*, 9th edn (Basingstoke: Palgrave Macmillan, 2011), p.314.

⁷⁴ *ibid.*

⁷⁵ *Director General of Fair Trading v First National Bank plc.* [2002] 1 AC 481 (HL) paras 17 (Lord Bingham), 36-37 (Lord Steyn).

explained earlier in this chapter, the court should examine the terms of adhesion contract and if any of the terms was unfair it is the court's decision to consider it void.

On the other hand, the element of good faith is stated explicitly in the UAE, under Article 246(1) of the UAE Civil Code the element of good faith was mentioned as the Article provides that "The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith." In other words, if the parties failed to fulfil the requirement of good faith the arbitration clause might be challenged on the grounds that it has been made pursuant to a unilateral option clause that is exercised in bad faith. Furthermore, the contracting parties should perform all the things that are deemed important in the contract based on the usage, fairness and rules of law. Fairness involves actions that will discourage breach of contract. Generally speaking, UAE Law depends on the idea of good faith to assist the performance of contractual promises instead of a way of escaping responsibilities stated in the contract.

The core of the unfairness test that is applied by the English Courts could be applied in the UAE as well. However, the lack of clear provisions to apply the fairness test on consumer contracts might be an obstacle.

Finally, DC may consider an arbitration agreement invalid and contrary to public policy if they determine that the agreement does not provide for bilateral rights,⁷⁶ which affects the fundamental interests of society.⁷⁷ It should be noticed that according to Article 203(1) of the Civil Procedures Code, the respondent who is seeking to stay proceedings must challenge the court proceeding on the earlier process that is in the first hearing.

⁷⁶ Richard Ashmore and Herbert Smith Freehills. Unilateral Option to Arbitrate: Valid in the UAE? Available at <http://kluwerarbitrationblog.com/blog/2015/03/04/unilateral-option-to-arbitrate-valid-in-the-uae/> Last Accessed 17/10/2015.

⁷⁷ Dubai Court of Cassation, Petition No.14 of 2012 issued on 16 September 2012.

Otherwise, the court will entertain the proceedings and consider the failure party as a waiver of the right to compel arbitration.⁷⁸ As Article 203(5) states:

“If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does not have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be cancelled.”

In conclusion, even though there is no explicit rule in the UAE laws that invalidates an arbitration agreement in consumer contracts, the DC may rely on the current legal system to enforce the arbitration agreement in consumer contracts. Furthermore, as discussed earlier, there is no particular approach that is applied by the DC. However, by examining the different approaches applied in different countries to examine and invalidate arbitration agreements in consumer contracts and consider it against public policy by applying these approaches the uncertainty of arbitration agreement, the doctrine of unconscionability and the test of unfairness. Further, the study concluded that any of the approaches examined above could be applied in the UAE.

Hence, the application of these approaches is uncertain and depends on the attitude of the courts themselves. Therefore, it is suggested that the law in Dubai should be reformed in order to provide extra protection and certainty for consumers, as indeed reflected in the approach of the DIFC Arbitration Law, which states clearly that pre-dispute consumer arbitration is unenforceable unless the consumer commenced the arbitration procedure or the Court finds that the arbitration would be more efficient for consumers.⁷⁹ Another approach that might be efficient in Dubai is to apply the same approach as in the UK,

⁷⁸ Civil Procedural Code art.203(5); Dubai Court of Cassation Case No.228/2007, judgment dated February 24, 2007.

⁷⁹ DIFC Arbitration Law Article 12(2)(b)

which is to set a minimum amount for consumer disputes that could be referred to arbitration, with the efficiency of potential arbitration being assayed by the court.⁸⁰

5.6 Conclusion

The chapter began by considering the main differences between pre- and post-dispute arbitration agreement, in order to explain why consumers should be particularly protected from the former rather than the latter.

The second part examined the validity of pre-dispute arbitration agreement under both DIFC and Dubai legal systems. It was found that the DIFC Arbitration Law distinguishes between the validity of pre- and post-dispute arbitration agreements, and invalidates consumer arbitration agreements with several exceptions that offer extra protection for consumers.

On the other hand, the Civil Procedures Code does not distinguish between the two types of arbitration agreement and there are no clear provisions to control the enforceability of arbitration agreements in consumer contracts, which means consumers have less protection under Dubai's legal system. Therefore, the chapter examined the approach of the DC to different forms of arbitration clause and the validity of each type. It was concluded that arbitration clauses are usually enforced if the parties agreed on them clearly in their contract, or if they referred to the arbitration agreement explicitly in their contract. Moreover, there are no cases where the court invalidated the arbitration clause on the grounds that it was not efficient or that it made an imbalance between the parties. Further, UAE law is silent about the enforceability of arbitration awards concluded in consumer contracts.

⁸⁰ Arbitration Act 1996, s. 91 (1).

The chapter then explored the grounds for refusal applied in different countries and examined the ability of the courts of Dubai to apply them. These grounds, which might consider the consumer arbitration contrary to public policy, include uncertainty of the arbitration agreement, the doctrine of unconscionability and the unfairness test.

Consumer arbitration is not considered within the meaning of situations that are contrary to public policy. However, as the courts in Dubai have the authority to expand the meaning of public policy, they may consider consumer arbitration contrary to public policy as it affects the right to litigate and the joint of bilateral might be considered to affect the fundamental interests of society. However, several approaches applied in different countries were examined, as to whether they could be applied in the UAE: the uncertainty of arbitration agreement, unconscionability and the unfairness test.

Concerning the uncertainty of arbitration agreement, this might be efficient in Dubai, as the courts have already invalidated arbitration agreements on the grounds of the parties not making explicit reference to arbitration.

Unconscionability as applied in the US is based on the twin aspects of effectiveness and equivalence. By examining whether these aspects could be applied in the UAE, the study found that Articles 145 and 248 of the Civil Procedures Code have similar meanings to these aspects, and the courts of Dubai may rely on them to invalidate arbitration agreements. However, these Articles only apply in Adhesion Contracts, and businesses can make minor amendments to contracts based on consumer requests to exclude the contract from Adhesion.

The test of unfairness as applied in the UK is used in consumer disputes exceeding the value of £5,000, and the two elements applied are significant imbalance and good faith. This study has already examined significant imbalance; however, pursuant to Article

246(1) of the Civil Procedures Code, the parties should perform their contract on the basis of good faith.

In general, there are provisions in UAE law that might be applied to invalidate the arbitration agreement and awards in consumer contracts. However, the law in the UAE should be reformed in order to set clearly a control to be applied by DC. Otherwise, consumer protection is not guaranteed, and is subject to the scope of the individual court.

6 Chapter Six: The Effect of Mandatory Rules in National and NYC on Online Arbitration Procedures

6.1 Introduction

The previous chapter examined, first, the issue of arbitration agreement and, second, the issues related to consumer arbitration. As the study is concerned with the issues related to enforcing the final award conducted via online arbitration, in arbitration parties may conduct the whole procedures online, which might affect the enforcement of the final award.

A third issue that might affect using IT in arbitration is the matter of control of the arbitral procedures by the enforcing court. This issue might restrict the parties from referring to online arbitration, where using IT might set the award aside or affect the enforceability of such an award.

One of the most favourable features of arbitration is the autonomy of parties and its procedural flexibility,¹ as stated in most arbitration laws.² Parties may benefit from this concept and agree to conduct the arbitral procedures partly or fully online in order to save costs and time. Using electronic means to conduct arbitration offers greater flexibility and could be easier; parties may track the process of arbitration through conference calls or by documentary submissions, in addition to being able to make subsequent submissions via email. However, the issue arises of whether and to what extent applying these tools affects the fairness of the arbitral procedures and hence the enforcement of the final award.

¹ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 13.

² Article 28(1) of the UNCITRAL Model Law, s. 46(1) of the English Arbitration Act, s. 1051(1) of the German Civil Procedure Act ("ZPO"), article 35(1) of the UNCITRAL Rules Art 35(1), article 21(1) of the ICC Rules, article 22(3) LCIA Rules.

Every electronic arbitration procedure remains subject to general principles of arbitration law, since “contractual freedom cannot undermine the mandatory regulations that govern the arbitration procedure”.³ Therefore, an analysis of applicable mandatory rules is of great practical importance in order to produce enforceable awards before the DIFCC and DC. There are noticeably different sources of law that the arbitral tribunal should consider when determining procedure, such as the law of the seat of arbitration, the mandatory rules before the enforcement court, and rules of conventions, if applicable.⁴ There are further sources of law, particularly regarding consumer disputes. For example, Hornle⁵ stated that the relevant sources of mandatory rules in consumer arbitration are:

“Professional codes of conduct, institutional (and other arbitration) rules, national arbitration legislation, common law, constitutional and human rights standards and international conventions and standards.”

However, this study is concerned with the mandatory rules that are applied by the enforcement courts in the UAE, whether in the DC or DIFCC, and the required rules under the NYC. However, it is beyond the scope of the study to examine the mandatory rules of the law of the seat of arbitration because it is hard to assume the seat of arbitration, the variety of mandatory rules and the concept of due process in each country.⁶

The chapter starts by explaining the mandatory requirements under the NYC and how these rules have been applied by courts, and then states the mandatory rules in Dubai according to the Civil Procedures Code and in DIFC according to the DIFC Arbitration Law. It also examines whether these requirements could be secured in online proceedings,

³ Oliver Cachard, *International Commercial Arbitration: Electronic Arbitration* (New York: United Nations Conference on Trade and Development, 2003).

⁴ Luca Beffa, 'Enforcement of "Default Awards"' (2013) 31(4) *ASA Bulletin* 756.

⁵ Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009).

⁶ Ekin Omeroglu, 'Taking evidence in international arbitration' (2016)(20) *Coventry Law Journal* 1.

the advantages and disadvantages regarding conducting the whole procedures online, and the issues that might arise therefrom.

The second part of the chapter examines the effect of the delocalization of arbitral awards on the enforcement of the award. According to Article V(1)(d), the NYC provides that one of the grounds to set the award aside is if the arbitrators fail to comply with the mandatory rules of the seat of arbitration. Therefore, the study examines the importance of the seat in online arbitration and the effect of delocalisation on the enforcement of the award before DIFCC and DC.

The third part examines the effect of ESI disclosure on awards before DC and DIFCC and the enforceability of an award based on US-style discovery. It states the importance of applying clear rules regarding ESI production by parties to secure the enforcement of the award.

6.2 Limits on Arbitration Flexibility and Fairness Procedures

The findings of the QMLU/PwC report⁷ show that one of the most desirable features in arbitration is the flexibility of the procedures, as parties have the ability to agree on the preferred route.⁸ Arbitration procedures differ from Court procedures in that parties are free to choose the appropriate methods, which can help cut costs and avoids the delays of adversarial processes.⁹ Hörnle explained how parties may benefit from autonomy to agree on more flexible arbitral procedures:¹⁰

⁷ <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>
Last Accessed 16/2/2016.

⁸ Rana Rashda, 'Is adjudication killing arbitration?' (2009) 75(2) Arbitration 223.

⁹ Matti Kurkela and Santtu Turunen, *Due process in international commercial arbitration* (Oxford University Press, USA, 2010).

¹⁰ Julia Hornle, 'Legal controls on the use of arbitration clauses in B2C e-commerce contracts' (2006) *Electronic Business Law* 8(8), 9-11.

“The parties (or the institutional rules, by default) can, for example: restrict the length of the parties written submissions by setting a word limit; limit or forgo disclosure; restrict the evidence adduced; renounce an oral hearings or cross-examination, proceed exclusively by written submission,¹¹ or, conversely, limit themselves to an oral procedure. They can also limit the time allowed to prepare the case. Furthermore, it is possible to restrict the number of witnesses and in particular, expert witnesses,¹² or decide not to call witnesses at all. Frequently, arbitrators appoint experts according to a secret, non-transparent procedure. Furthermore, they can adopt a more inquisitorial approach, where the witnesses are not examined by the parties but where the tribunal takes greater control of the procedure, decides which witnesses to hear (and not to hear) and puts the questions to the witnesses, if any.”

However, the flexibility of procedures has its limitations. Since arbitration is based on the parties’ agreement, it is hard for lawmakers to set minimum procedural standards, and if parties failed to agree on the arbitral procedures, an arbitral tribunal would set the most appropriate arbitral proceedings.¹³

Therefore, the arbitral tribunal has to consider the minimum requirement procedures to avoid the award being set aside in the future. The literature on mandatory rules has often presented the issue in stark terms, as posing a fundamental “conflict between the will of the State having promulgated the mandatory rules of law, on the one hand, and, on the other hand, the will of the parties from which the arbitrator’s own authority is derived.”¹⁴

¹¹ English Arbitration Act s.43(1) and (2)(h).

¹² For example, *Egmatra AG v. Marco Trading Corporation* [1999] 1 Lloyd’s Rep 862 (Comm), 866.

¹³ Ekin Omeroglu, 'Taking evidence in international arbitration' (2016)(20) *Coventry Law Journal* 1. Section 34 of the English Arbitration Act, article 1464 of the French Civil Procedure Act Art, article 182 of the Swiss Private International Law Act.

¹⁴ Pierre Mayer, 'Mandatory rules of law in international arbitration' (1986) 2(4) *Arbitration International* 274.

Furthermore, the issue of arbitral procedures' fairness might be more complicated in international arbitration, as the procedure might be linked to more than one jurisdiction, which leads to a large number of requirements to decide the essential elements for fair procedures. In addition, the concept of due process is subject to variations in different legal systems and cultural expectations.¹⁵

It is difficult to state and encompass all the essential principles required to achieve fairness in arbitral proceedings, which might vary between countries, particularly mandatory rules within the seat of arbitration. However, the enforcement court may apply its national mandatory rules to examine the validity of the award.¹⁶ Therefore, this chapter explains the main essential requirements to be examined by the DIFCC and DC with special reference to those that might be affected by conducting the procedures online, relying on the provisions of NYC and also the mandatory provisions in the Civil Procedure Code of the UAE and DIFC Arbitration Law.

6.3 The Applicable Rules

This part focuses on the mandatory rules applied by the courts of Dubai and DIFC to examine the enforceability of the arbitral award that should be considered by arbitrators and might be affected by online arbitration. Therefore, the study starts by examining the provisions of the NYC, then the mandatory rules in the Civil Procedure Code, the Draft Law and finally the mandatory rules in the DIFC Arbitration Law.

¹⁵ Jaksic, Aleksandar, *Arbitration and human rights* (P. Lang, 2002), p. 230 and 235. William W.Park, *Procedural evolution in business arbitration* (Oxford University Press, 2005), p. 51.

¹⁶ Article V(2)(b) of the New York Convention allows the enforcement court to set aside the award if it is contrary to the public policy.

6.3.1 The NYC

The NYC recognises and gives effect to mandatory requirements of procedural fairness and regularity of arbitral proceedings by permitting awards to be denied recognition by the enforcement court if the arbitral tribunal failed to comply with basic international requirements of procedural fairness under Article V(1)(b), which reads as follows:

“(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case...”

The NYC also leaves scope for the application of non-discriminatory rules of mandatory national law to deny recognition if any other matters related to fairness procedures been raised, by applying Article V(2)(b), which states the grounds for refusal in regard to arbitration procedures that are contrary to public policy. It should be noted that there are other requirements under the NYC related to arbitral proceedings, such as Article V(1)(c), which provides the court with the ability to set the award aside if the arbitrators have acted beyond their jurisdiction, and Article V(1)(d), which provides grounds for refusal due to improper composition of arbitral panel or arbitral procedures. The reason that these articles are not examined in this part, despite being related to arbitral proceedings, as both articles could be guaranteed in online and offline arbitration, and they are not affected by conducting the procedures online. For example, the court would not have an issue examining whether the arbitrators acted beyond their jurisdiction and the court would be able to monitor the composition of the arbitral panel regardless of conducting the arbitration proceedings online. On the contrary, Article V(1)(b) which requires the party's right to present his case might be affected directly by online arbitration, as explained in the following part.

Moreover, in respect to Article V(1)(c), some scholars argue that this defence is not strong enough and it is hard to apply, as “the enforcing courts do not want to second-guess panel determinations from their own jurisdictions”.¹⁷ In addition, giving the court the ability to enforce the part that is within the scope of the arbitration agreement reflects the NYC approach that fundamentally favours enforcement of the award rather than setting it aside. Courts rarely refuse the enforcement of the award due to the arbitral tribunal exceeding its authority.¹⁸

As stated earlier, the NYC pursuant to Article V(2)(b) leaves some room for the mandatory provisions in the state of enforcement to set the award aside on the ground being contrary to public policy. Indeed, there are some procedures that violate the due process that are not stated in Article V(1)(b) either in the NYC provisions or in the mandatory rules in the law of the enforcement court. Hence, the Convention allows the court to rely on Article V(2)(b), to set the award aside if any procedure could affect the arbitration fairness on the grounds of being contrary to the public policy.

Courts may monitor arbitral procedural fairness by applying Article V(2)(b). According to this Article, the court may set aside the award if it considers that the arbitration procedures violate public policy. Thus, the application of this Article may vary differently according to the definition of public policy in the enforcement country, as explained later in this part.

Consequently, the party who opposes the enforcement of the award on the grounds that it violates due process may rely on Article V(1)(b) if it violates one of the rights stated in this article or pursuant to Article V(2)(b), on the basis that the award is contrary to the

¹⁷ Ramona Martinez, ‘Recognition and enforcement of international arbitral awards under the United Nations Convention of 1958: the “refusal” provisions’ (1990) *The International Lawyer* 487, 502.

¹⁸ Van den Berg, “Court Decisions on the New York Convention”, Swiss Arbitration Association Conference, February 1996, Collected Reports, 86.

public policy. However, one of the main differences between relying on Article V(1)(b) and Article V(2)(b) is that in the latter the court may examine the fairness of the procedures by itself, while in the former one of the parties should oppose the enforcement.¹⁹

In addition, Article V(2)(b) gives the court wider grounds to set the award aside if it is contrary to the mandatory rules of the enforcement court, even if it complies with the applicable law of the seat of arbitration. For example, the Bavarian Highest Regional Court considered the lack of notification against the public policy in annulling an award according to Article V(2)(b), instead of Article V(1)(b).²⁰ The party alleged that he did not receive the request or any order from the arbitral tribunal to participate. Therefore, the party invoked the objection in the basis of lack of notification Article V(1)(b), before the Bavarian Highest Regional Court. However, the tribunal held that informing the party of his last known address fulfils the requirement of Article 3 of the Russian Law concerning International Commercial Arbitration. By examining the case details, the court held that the procedure does not breach the right to be heard and it fulfils the requirements of Article 3. Nevertheless, the court held that this procedure is contrary to the public policy and held that in such a situation a party could not be required to challenge the award at the place of arbitration, but could invoke the violation of the right to be heard directly in the enforcement proceedings.

Indeed, Article V(2)(b) provides extra protection for parties and states other essential elements than the ability of the party's to present its case to be considered by the courts. For example, the Madrid Court cancelled the arbitral award rendered by an arbitration

¹⁹ *French Seller v German Buyer* December 16, 2010 Bundesgerichtshof; (2011) 36 YB Com Arb 273. Switzerland: Camera di Esecuzione e Fallimenti, Canton Ticino, XX Y.B. Com. Arb. 762, 765 (1995).

²⁰ Stefan M. Kroll, 'Recognition and enforcement of foreign arbitral awards in Germany' (2002) 5 *INT'L ARB.L.REV.* 160, 165.

institution called the Asociacion Europea de Arbitaje de Derecho y Equidad (AEADE),²¹ on the grounds that it was contrary to public policy due to the arbitrators' lack of independence and impartiality. The court's examination showed that the award rendered by AEADE appointed the same arbitrators, which means that there is a strict correlation between the arbitrators and the association, which affects the impartiality of the arbitrator. Finally, grounds for refusal under Article V(1)(b) of the NYC are referred to as due process.²² The main elements are whether the parties have been treated fairly and given the chance to be heard or to present their cases.

In conclusion, the NYC provides the enforcement courts several grounds to set the award aside in case it violates the procedure fairness. Article V(1)(b) refers directly to the application of due process, necessitating examination of whether it may be affected by conducting the procedures online. Moreover, in regard to Article V(2)(b), the study will examine the arbitral procedures that may affect public policy before the courts in Dubai and DIFC, as Article V(2)(b) gives the court the ability to set the award aside if the parties failed to comply with major essential element other than those in Article V(1)(b). However, Articles V(1)(c) and V(1)(d), may not have a major effect on the enforcement of electronic awards, as these Articles are not relevant if the parties conducted the procedures online, as explained previously.

6.3.2 Applicable Rules by DC on Foreign Awards

According to Article 212(4) of the Civil Procedure Code, the arbitral award shall be issued in the UAE in order to be considered domestic award. The importance of determining whether the award is foreign or domestic is to state the rules that shall be applied. With relation to domestic awards, DC allow the parties to request the annulment of the award

²¹ Marie Fernet and Caroline Asfar Cazenave, 'The uniform law on international commercial arbitration' (2014) *International Business Law Journal* 219.

²² Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009).

in certain and limited circumstances stated under Article 216 in the Civil Procedure Code. Otherwise, the court shall ratify and enforce the award unless it is contrary to public policy.

According to Article 216, there are several circumstances whereby the party may challenge the award at the enforcement stage; these circumstances are non-waivable, and even if the party failed to raise them during the arbitral proceedings before the arbitral tribunal, he will still have the right to raise them in an annulment application before the enforcement court in Dubai.²³

In regard to the foreign awards, prior to the accession of the UAE to the NYC, DC used to examine the enforceability of foreign awards pursuant to Articles 235 and 236 of the Civil Procedure Code. According to Article 235, the grounds for refusal before DC were the lack of proper jurisdiction of the tribunal at the place of arbitration, deficiencies in the issuance of the arbitral award at the place of arbitration, improper summoning or representation of one of the parties in the foreign arbitration proceedings, or the incompatibility of the foreign award with a previous UAE judgment or its violation of public policy or *bonos mores*, as understood in the UAE. The main concern regard enforcing the foreign award before DC is that they used to apply different formal procedural rules from the Civil Procedure Code on foreign awards that should be applied on domestic awards only. In other words, DC used to apply different grounds other than those stated in Article 235 to set the foreign award aside.²⁴

This approach was clearly symptomatic of the UAE courts' distrust of arbitration as a dispute resolution mechanism, and more specifically of their discomfort at ceding jurisdiction to foreign arbitrators. Applying this old approach was further motivated by

²³ Article 216(2), The UAE Civil Procedure Code, Federal Law No. (11) of 1992.

²⁴ Gordon Blanke and Soraya Corm-Bakhos, 'Enforcement of New York Convention awards: are the UAE courts coming of age?' (2012) 78(4) *Arbitration* 359.

the absence from the Civil Procedures Code of a specific procedure for the enforcement of foreign awards, an absence that in turn gave the UAE courts an incentive to rely upon the ratification process put in place for domestic awards instead. However, this issue has had less impact since the UAE acceded to the NYC, and DC stated clearly in different rulings that they do not examine the merits of awards and the obligation to comply with international treaties and conventions,²⁵ which under UAE law form part of the domestic law, in the enforcement of foreign awards.²⁶

Consequently, DC no longer have to apply Article 235 in formal procedural grounds under the Civil Procedural Code, unless the foreign award was issued in a country that is not a signatory to the NYC.²⁷ Further, the only grounds on which the award could be challenged are those indicated in Articles 4 and 5 of the Federal Decree No. 43 of 2006 (under which the UAE acceded to the NYC on the Recognition and Enforcement of Foreign Arbitral Awards). Therefore, DC shall examine the same due process required pursuant to the NYC provisions on foreign arbitral awards.

Other essential procedures may arise not stated in the provisions of the NYC that are still related to the arbitration procedures, which may affect procedural fairness. These procedures might lead to set the award aside if they are considered to be contrary to the public policy, which still could be applied by the DC for foreign awards. The famous procedures that are considered to be contrary to public policy are the independence and

²⁵ Dubai Court of Cassation, No.556 dated 19/4/2005.

²⁶ Dubai Court of Cassation, No.774 dated 7/4/2005.

²⁷ Abu Dhabi Court of Cassation, Petition No. 679 of 2010 issued on 16 June 2011. Gordon Blanke and Soraya Corm-Bakhos, 'Enforcement of New York Convention awards: are the UAE courts coming of age?' (2012) 78(4) *Arbitration* 359.

impartially of arbitrator are those deemed contrary to public policy,²⁸ and the swearing of the oath according to Article 211.²⁹

In conclusion, the DC examine foreign awards according to the NYC provisions only, however, in some cases the court has to examine whether the proceedings are contrary to the public policy, such as the independence and impartiality of the arbitrator, and swearing the oath.

6.3.3 *Draft New Arbitration Federal Rules*

Article 52 of the Draft Law specified several situations in which the award is set aside. Moreover, the provisions of Article 2 of the Draft Law, contrary to the approach applied in the Civil Procedure Code, apply to both foreign and domestic arbitrations.³⁰ The provisions of the proposed arbitration law dealing with the grounds for refusing recognition or enforcement of foreign arbitral awards is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law). This is a significant improvement from the Civil Procedure Code, since it is now clear that the proposed law is intended to cover both domestic and international arbitrations, and to come into conformity with international arbitration best practice. However, the grounds for refusal in UNCITRAL and those stated in the Draft Law are the same as those in NYC.

6.3.4 *DIFC Arbitration Law*

Grounds for refusal stated in Article 44 should apply on both domestic and foreign arbitral awards, as Article 44 states clearly that it applies on any awards “irrespective of the State

²⁸ Dubai Court of Appeal, Petition No. 531 of 2011 issued on 6 Oct 2011. Abu Dhabi Court of Cassation, Petition No.980 of 2010 issued on 23 February 2011.

²⁹ <http://www.tamimi.com/en/magazine/law-update/section-11/section-13/a-checklist-for-what-you-need-for-an-enforceable-uae-arbitral-award.html> (Last Accessed 16/02/2016).

³⁰ The proposed arbitration law art.2.

or jurisdiction in which it was made.” The DIFC Arbitration Law, Article 44(1)(a)(ii) conformity with Article V(1)(b) in NYC and Article (41) of the Model Law reads as follows:

“The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case”.

According to this Article, the same mandatory rules stated in the NYC are applied in the DIFC Arbitration Law, which is the right of parties to present their cases. Article 44(2)(b)(vi) states clearly that what is considered to be contrary to the public policy of the UAE shall be applied by the DIFCC by setting the award aside, In *Meydan*,³¹ the court cited the clear authority that the enacted laws of the UAE are the "primary source" of its public policy. Therefore, there is no need to examine the public policy in DIFC, as it is the same in Dubai

6.3.5 *Summary*

According to the discussion above, DIFCC and DC examine whether the award is in accordance with due process under Article V(1)(b), V(2)(b) of the NYC, in addition to the mandatory rules that consider any particular arbitration procedure contrary to public policy, such as the independence and impartiality of the arbitrator and swearing the oath. In conclusion, the essential elements that shall be explained in more detail to examine the effect of online arbitration include violation of due process (Article V(1)(b)), and the grounds related to public policy which are swearing of the oath and the independence and impartial of the arbitrator.

³¹ *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* unreported 27 May 2014 (CFI (DIFC)). Lucas Pitts and Dustin Appel, 'The DIFC as a conduit jurisdiction for enforcement of arbitral awards in Dubai' (2016)(3) *International Arbitration Law Review* N30.

6.4 The Essential Elements and its Effect on Conducting the Procedures Online

In the previous part, the study explored the applicable rules applied on foreign awards by the Courts in Dubai and DIFC. It was found that the main essential elements that the arbitrator should consider are violation of due process, swearing of the oath, and the independence and impartial of the arbitrator. The next part explains these elements in more detail and states the advantages and disadvantages of conducting the procedures online toward these elements.

6.4.1 Violation of Due Process

6.4.1.1 The Application of Violation Due Process

Due to the lack of cases in Dubai and DIFC that apply Article V(1)(b), the study explores the decisions from different courts other than DC and DIFCC. Examining other courts' application of Article V(1)(b) is of great importance to understand how the core of this article and how online arbitration might be affected by this Article.

The grounds for refusal under Article V(1)(b) of the NYC is referred to as due process.³² According to Strong, the term due process refers to “a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called principle de la contradiction and equal treatment.”³³ This defence is one of the strongest and most important defences in the NYC,³⁴ as it guarantees minimum requirements for a fair arbitral procedure. Nevertheless, there are a few cases in which the court set the award aside on the grounds

³² Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009).

³³ Stacie I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 University of Pennsylvania Journal of International Law 1.

³⁴ Nicola Christine Port, Dirk Otto, Patricia Nacimiento and Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), p. 233. Joseph E Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary* (Kluwer Law Intl, 1989), p 550.

of a lack of due process. According to a recent survey, courts tend to enforce the award despite a party invoking Article V(1)(b), as only objections were only successful in setting the award aside in fourteen out of 136 court decisions.³⁵ However, it is the court decision to decide whether the arbitral tribunal failed to comply with the meaning of due process.

There is a lack of particular definition for the meaning of due process. However, Colman explained the applicability of Article V(1)(b) when the party opposing the enforcement was not given the chance to present his case by matters outside of his control, in a way that might affect the rules of natural justice.³⁶ Some courts have applied this standard. For example, in *Bauer & Grossmann OHG v. Fratelli Cerrone Alfredo e Raffaele*,³⁷ Naples Court of Appeal (Italy) refused the enforcement of an Austrian award on the grounds that the respondent was not afforded sufficient time to attend the hearing in Vienna, because the respondent's area had been hit by a major earthquake. Therefore, the Court held that the award is unenforceable as the respondent could not attend the hearing due to matters beyond his control, and the court concluded that one-months' notice was insufficient.

A further example that illustrates a successful attempt to use this defence is the court decision in *Kanoria v Guinness*,³⁸ in which the court refused to enforce the award as it found that the arbitral tribunal did not afford the respondent the chance to present his case, as the latter could not attend due to a serious illness. In another case, the court refused the enforcement and it gave the party opposing the enforcement a chance to prove that he could not present his case by matters outside of his control.³⁹ Moreover, a Spanish

³⁵ Emmanuel Gaillard and DOMENICO Di Pietro, 'Enforcement of Arbitration Agreements and International Arbitral Awards' (2008), pp. 679, 692. It appears from this report that courts accepted Art. V(1)(b) defences only in approximately 10% of all cases. Nicola Christine Port, Dirk Otto, Patricia Nacimiento and Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), p. 233.

³⁶ *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647

³⁷ Italy: Corte di Appello, Naples (Salerno Section), 18 May 1982 (*Bauer & Grossmann OHG v. Fratelli Cerrone Alfredo e Raffaele*) Yearbook Commercial Arbitration X (1985) pp. 461-462 (Italy no. 70).

³⁸ *Kanoria v Guinness* [2006] EWCA Civ 222; [2006] 1 Lloyd's Rep 701

³⁹ *Cukurova Holding A.S v Sonera Holding B.V* [2014] 1 C.L.C. 643.

judge refused to enforce the award because the defendant was not given the chance to defend himself, and he was unable to be represented by his lawyer as he had been convened to appear in a criminal case at the same time on the same day.⁴⁰

Conversely, in *Parsons v. Whittemore*,⁴¹ the court enforced the award despite the arbitrators having refused to reschedule a hearing for the convenience of a witness. The Court stated that the inability to produce a witness “is a risk inherent in an agreement to submit to arbitration,” since the right to subpoena witnesses, which a litigant may have in court, does not exist as such in arbitrations.⁴² The Supreme Court held the award enforceable and stated that the party opposing the enforcement defence is not realistic; the opposing party claimed that he did not receive proper notice of the arbitration, but the court rejected his argument on the grounds that he was aware of the arbitration proceedings and he was involved in the exchange of correspondence.⁴³

Moreover, in *Five Oceans Salvage Ltd v Wenzhou Timber Group Co*,⁴⁴ the court enforced the award despite one of the parties arguing a lack of notice, citing that he did not receive written notice to participate in arbitration, as his former lawyer received it instead; however, the court dismissed this objection on the basis that there had been no breach of natural justice, and it was not the party’s obligation to make further investigations whether the other party representative is still duly and properly represented by its representative in the proceedings.

⁴⁰ Marie Fernet and Caroline Asfar Cazenave, 'The uniform law on international commercial arbitration' (2014) *International Business Law Journal* 219.

⁴¹ 508 F.2d 969 (1974).

⁴² *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale (RAKTA) et al.*, 508 F.2d 969 (1974).

⁴³ http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf Last Accessed 20/01/2016.

⁴⁴ [2011] EWHC 3282 (Comm); [2012] 1 Lloyd's Rep. 289 (QBD (Comm)).

The ICCA Guide stated several of cases and examples wherein the award was enforced despite the objection being invoked of a lack of due process.⁴⁵ For example, in one case the court refused to set the award aside despite that the arbitral tribunal refused to grant further adjournments despite the bankruptcy proceedings; another example of unsuccessful challenge that the opposing party argued that the arbitral tribunal allegedly relied on new legal theories in the award that were not previously argued; the award was enforced regardless that the company representative being unable to attend the hearing because he could not obtain a visa; and the parties not attending hearings because they feared arrest in the forum State.

Consequently, it can be seen that there is no particular standard that governs the due process and that leads the court to state whether the arbitral tribunal sufficiently applied Article V(1)(b) and gave parties the opportunity to present their cases. However, the core element of Article V(1)(b) has been clarified and explained clearly by Scherer, who looked at all aspects of the inability to present one's case in Article V(1)(b), reviewing the practically relevant rights: to submit evidence, to make submissions, to have an oral hearing, to have one's submissions considered, to comment on evidence and on the arguments of the other side.⁴⁶

In Dubai, the meaning of due process applied on domestic awards was explained by El-Ahdab,⁴⁷ who stated that under the Civil Procedure Code an arbitral award might be set aside for violation of due process if there is a lack of notice to either party of the appointment of arbitrator(s) and of the arbitration proceedings. Due process may also be

⁴⁵http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf Last Accessed 18/02/2016

⁴⁶ Maxi Scherer, 'New York Convention: Violation of Due Process, Article V (1)(b)' (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, A Commentary (R. Wolff, ed.), CH Beck/Hart/Nomos 2012).

⁴⁷ Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Wolters Kluwer 2011), p. 822.

violated if there is a violation of a party's right to be heard and the right to present a case and submit a defence. Additionally, the parties must be treated equally, and bias by the court in favour of one party against the other would be grounds for setting aside an arbitral award.⁴⁸

Based on the cases mentioned above, courts' decisions and scholars' arguments, "due process" as a general element is the right to present one's case, which also encompasses equal treatment of parties and the right to be heard. "Party equality" means that no party shall be given an advantage over the other party, and "the equal opportunity to present one's case" is designed to ensure that parties have enough time to state their cases.⁴⁹

6.4.1.2 *The Effect of the Violation of Due Process Principle on Online Arbitration*

In regard the party's right to present his case in online arbitration, this principle might raise some issues in several circumstances, such as the case when an arbitrator fails to provide both parties with access to the documents and any other evidences.⁵⁰ Schultz argues that parties who enter into online arbitration might face some particular issues regarding equality of treatment, especially if one of the parties fails to access the used technology.⁵¹

If the technology used cannot be equally accessed and mastered by both parties, this could consequently be a substantial disadvantage to one party. If the arbitral tribunal has imposed the use of such technology, and it requires more than a reasonable training in IT matters, then such a disadvantage may constitute a violation of equal treatment.⁵² Some

⁴⁸ *ibid*, p. 823.

⁴⁹ Peter Binder and Jernej Sekolec, *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions* (Sweet & Maxwell, 2005), p. 278.

⁵⁰ Georgios Petrochilos, *Procedural law in international arbitration* (Oxford University Press on Demand, 2004), p. 146.

⁵¹ Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006). p.116.

⁵² *ibid*.

authors consider that even the imposition of videoconferencing by the arbitral tribunal could constitute unequal treatment of the parties.⁵³

Further, in regard the issue of equal treatment, the issue might arise in regard to the *ex parte* communications of the arbitrator with one party. Failing to fulfil this requirement may set the award aside in Dubai and DIFC due to the aspects of the parties' right to present their evidence. Therefore, arbitrators should consider that both parties have been treated equally in regard to communication. However, this problem may be solved by copying the texts and communications between the arbitrator and one party, then sending the dossier to the other party. Further, it cannot prevent the improper *ex parte* communications, as the arbitrator may use different ways to communicate with one party without the other. According to Schultz, such a restriction could constitute a violation of the right to present one's case in an adversarial proceeding on two conditions, and an award may then be challenged on these grounds:

“First, the restriction must be significant enough, i.e., the information exchanged while only one of the parties and the arbitrators had access to it must be sufficiently substantial. Second, the arbitral tribunal must not have ordered a replay of the submissions or provided the opposing party with the submitted information in another way and allowed a specific opportunity to react to it.”⁵⁴

Therefore, arbitral tribunal must consider that both parties have access to the documents and to the information.

⁵³ Oliver Cachard, *International Commercial Arbitration: Electronic Arbitration* (New York: United Nations Conference on Trade and Development, 2003), p.36. Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009). paras 12.042 and 12.054-12.056.

⁵⁴ Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006), p.115.

Conversely, conducting the procedures online might be a great advantage, especially with regard to avoiding setting the award aside pursuant to Article V(1)(b). The enforcement courts justified several grounds to set the award aside; some parties raised other grounds but the courts did not consider them sufficient to set the award aside, including that the respondent was not afforded sufficient time to attend the hearing due to serious illness, and the party could not present his case by matters outside of his control – the tribunal refused to reschedule a hearing for the convenience of a witness who not receive proper notice of the arbitration on the grounds of lack of notice, although the party had not received a written notice.

Indeed, conducting the procedures online might be efficient to reduce these issues. The parties may arrange a date convenient to them and the arbitrators, and as the meetings will be concluded online, it will be easier for parties to set a suitable date. In addition, parties may use particular applications/programs, such as a case management website, to upload and download documents in a shorter time.⁵⁵

On the one hand, the element of party's right to present his case (equal treatment and fair hearing), might raise some issues in online arbitration, and it has some disadvantages if the parties agreed to conduct the procedures online. For example, the arbitrators might not be able to contact both parties on the same way which may affect the matter of *ex parte* communications, and there may be inability to access the documents for one or both parties. On the other hand, conducting the procedures online might help to avoid some issues that arise in offline arbitration, such as obstacles to attending the hearing or presenting the case.

⁵⁵ *ibid*, p.13.

In conclusion, conducting the procedures online may have both advantages and disadvantages regarding the element of the party's right to present his case. Regarding the advantages, it can be stated that online arbitration will help to increase the enforceability of the final award. However, the parties and arbitral tribunal must agree on a suitable mechanism with which both parties are familiar, in order to guarantee that such a mechanism to secure both equal treatment and a fair hearing for both parties. Otherwise, the arbitral tribunal may use an unsuitable mechanism to conduct the procedures online, which may affect equal treatment and a party's right to present his case. This issue may arise if the arbitral tribunal referred to an expensive or complicated technology.

6.4.2 Undertaking the Oath

6.4.2.1 The Application of Swearing the Oath

In international commercial arbitration, the tribunal is not required to consider all the presented evidences but it must consider the presented arguments and make note of the contrary argument. Therefore, parties shall have the opportunity to submit their evidences, claims and facts upon which the arbitral tribunal will rely in their final award. However, if the documents are insufficient to settle the dispute, the disputants may need more evidence to clarify the facts, such as witnesses and experts. In international commercial arbitration, experts and witnesses might be useful and effective in settling disputes; however, relying on experts and witnesses in online arbitration procedures might raise the issue of witness testimony and oath taking.

Article 211 requires all witnesses to give evidence under oath, which should be the same oath as the one required by Article 41(2) of the UAE Federal Law No. 10 of 1992 (the Law of Proof in Civil and Commercial Transactions). However, the issue of swearing the oath before the arbitral tribunal may arise under the Draft Law as well, which attempts in

Article 34 to redress other issues related to the ability of the arbitrators to take an oath “in accordance with the formula prescribed by the tribunal”. Therefore, parties and the tribunal may agree to permit secular affirmation to rely on a deviation from the oath-taking procedure under the Evidence Law in order to resist an award being eliminated.

The aim that this provision was included in an imperative form in the arbitration chapter of the Civil Procedure Code is to ensure the truthfulness and authenticity of witness testimonies, which are of great value and importance. This provision is also aimed at deterring anyone from committing perjury offences and assuring litigants that the testimony of witnesses is truthful and accurate. As such, the law considers a person providing false testimony to have committed the offence of perjury laid down in Article 252 of the Penal Code. By virtue of the law, any person who commits perjury before a panel with the authority to hear the testimony of witnesses shall be penalized.

According to Article 211, the arbitrator must cause the witnesses to take an oath. Failing to do so may set the award aside according to Article 216 of the Civil Procedure Code, which states that the court is allowed to set the award aside if a procedural irregularity has a substantial effect on the arbitral award.⁵⁶ Other examples of the irregularity of procedures include the case when arbitrators failed to sign both the reasoning and the disposition of the award,⁵⁷ or if the arbitral tribunal failed to administer oaths before oral evidence.⁵⁸ Due to this Article, the DC used to set foreign awards aside if the arbitrator failed to provide the witness testimony under the oath before the UAE acceded to the

⁵⁶ Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Wolters Kluwer 2011). Gordon Blanke and Karim Nassif, ‘Arbitration in the UAE 2011’ available at <http://www.mondaq.com/x/131338/Arbitration+Dispute+Resolution/Arbitration+In+the+UAE+2011> Last Accessed 28/06/2016. AFM Maniruzzaman and Ahmed Almutawa, ‘The UAE’s Pilgrimage to International Arbitration Stardom-A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub’ (2015) 12(2) Transnational Dispute Management (TDM).

⁵⁷ Dubai Court of Cassation, Petition No. 233/2007, Judgment, 13 January 2008.

⁵⁸ Gordon Blanke and Karim Nassif, ‘Arbitration in the UAE 2011’ available at <http://www.mondaq.com/x/131338/Arbitration+Dispute+Resolution/Arbitration+In+the+UAE+2011> Last Accessed 28/06/2016.

NYC. For example, the Dubai Court of Cassation, Petition to Cassation No. 503 of 2003 issued on 15 May 2005,⁵⁹ stated that the arbitrators shall require witnesses to take the oath before they provide their testimonies, whether parties request it or not. The court argued that if the arbitrator failed to comply with this procedure, the award would be considered null and void pursuant to Article 211 of the Civil Procedure Code.

However, following the UAE accession to the NYC, this article should not be applied on foreign awards. However, the main concern is whether swearing the oath is considered to be contrary to public policy or not. Robert Karrar-Lewsley and Dalal Al Houti argue that swearing the oath is part of public policy, and if a tribunal relies on testimony that was not sworn under oath, then as a matter of public policy the award will be annulled.⁶⁰ Moreover, in *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai Unreported*,⁶¹ the court held that swearing witnesses is part of the public policy, and a failure of arbitral tribunals to swear-in witnesses is itself sufficient reason to set the award aside. On comments at the courts' decision, Bantekas argued that "it is inconceivable that the Dubai Court of Cassation could have assumed that awards sought to be enforced in the UAE ought to comply with its civil procedure law".⁶² Moreover, the impact of the decision is to affect the fundamental principle of party autonomy and reduces the credibility of that particular legal system.⁶³

⁵⁹ *International Bechtel v. Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Case No. 503/2003, judgment dated 15 May 2005.

⁶⁰ A checklist for what you need for an enforceable UAE Arbitral Award by Robert Karrar-Lewsley & Dalal Al Houti. Available at <http://www.tamimi.com/en/magazine/law-update/section-11/section-13/a-checklist-for-what-you-need-for-an-enforceable-uae-arbitral-award.html> (Last Accessed 16/02/2016).

⁶¹ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, case No.503/2003, judgment (May 15, 2004). This same result was later reaffirmed by the court in case No.322/2004, judgment (April 11, 2005).

⁶² Mohamed Al-Nasair and Ilias Bantekas, 'The effect of public policy on the enforcement of foreign arbitral awards in Bahrain and UAE' (2013)(3) International Arbitration Law Review 88.

⁶³ Alan Scott Rau, 'Fear of Freedom' (2006) 17 Am Rev of Int'l Arb 469.

On the other hand, in different case DC refused to consider swearing the oath part of the public policy. In *Maxtel International FZE v Airmec Dubai LLC*,⁶⁴ the party challenged the enforceability of the award on the grounds that the arbitrator failed to apply the mandatory provisions of UAE law on oath-taking for witnesses, and the Dubai Court of First Instance held:

“The Court’s supervisory role when looking to recognize and enforce a foreign arbitral award is strictly to ensure that it does not conflict with the Federal Decree under which the UAE acceded to the NYC on the recognition and enforcement of foreign arbitral awards and satisfied the requirements of Articles IV and V of the Decree in terms of being duly authenticated”.

Consequently, it might be assumed that swearing the oath is not considered contrary to public policy and it is within the merits of the award that the court shall not be examined by the enforcement court. It should be noticed that even if the arbitral tribunal did not take the witness testimony under oath and the arbitrator did not rely on the witness testimony in his final decision, then the award is valid and the testimony should be void.⁶⁵

6.4.2.2 The Effect of Swearing the Oath on Online Arbitration

Despite the fact that failing to take the testimonies under oath might not be contrary to public policy, hence, DC and DIFCC may not set foreign awards aside on this ground. However, in online arbitration, the challenge might be how to assure that the party has actually taken the oath, in addition to how to guarantee that the witness is alone and no one is telling him what to say.

⁶⁴ Court of First Instance Commercial Action No.268/2010, dated January 12, 2011.

⁶⁵ Abu Dhabi Court of Cassation, Petition No 924 of 2009 issued on 17 December 2009.

It should be remembered that only the tribunal has the power to administer the oath.⁶⁶ Therefore, even if an arbitrator, out of ignorance, invites a party's representative or the tribunal secretary to administer the oath, the representative should politely decline and insist that the tribunal administer it.⁶⁷ Alternatively, in order to guarantee correct conduct of electronic hearings, a trusted third party such as a local arbitral institution or a notary could be involved. Of course, such restrictions diminish the attractiveness of online arbitration in terms of its cost, time and convenience.

In many circumstances, it would be recommendable to have all parties represented, or a member of the tribunal, present at each end of the video-link. A simpler method to hear a witness could consist in using other than videoconferencing, synchronous (real-time) online technologies, such as teleconference (audio transmission) or online chat (written text messages, e.g. Internet Relay Chat). However, they cannot constitute a real alternative to audiovisual hearing, because of difficulties to assess the credibility of a witness and other like reasons.

Therefore, online testimony might be challengeable. First, the parties may found the award unenforceable as the arbitral tribunal failed to take the testimony under oath, or the testimony might be considered void. Secondly, arbitral tribunals might find obstacles to holding the testimony online by bringing all the parties and the witnesses together. Finally, holding the testimony online might be challenged on the grounds that the witness was not alone, thus the testimony would be void.

⁶⁶ Civil Procedure Code, Article 211.

⁶⁷ <http://www.tamimi.com/en/magazine/law-update/section-11/section-13/a-checklist-for-what-you-need-for-an-enforceable-uae-arbitral-award.html> (Last Accessed 16/02/2016).

6.4.3 The Independence and Impartiality of the Arbitrator

6.4.3.1 The Application of the Independence and Impartiality of the Arbitrator

As explained earlier, the NYC allows DC and DIFCC to set the award aside on the grounds of being contrary to public policy.⁶⁸ The Dubai Court of Cassation stated clearly that public policy should be taken into consideration at the enforcement stage, as it is one of the essential criteria that applies to the enforcement of judgments and awards.⁶⁹ Further, DIFC Arbitration Law states clearly that foreign awards might be set aside if contrary to public policy.⁷⁰ However, it should be noticed that the meaning of public policy is applied in the same manner in all UAE courts.⁷¹

Abu Dhabi Court stated that the independence and impartial of the arbitrator principle is considered contrary to the public policy in the UAE.⁷² Abu Dhabi Court of Cassation, Petition No. 980 of 2010 issued on 23 February 2011 stated that:

“The independence and impartiality of an arbitrator –being a judge settling disputes– is a fundamental guarantee in proceedings before arbitrators. The rules and procedures relating to challenges against arbitrators pertain to public order and cannot be departed from by the parties”.

Indeed, the party may challenge the arbitral proceedings and set the award aside before the enforcement courts of Dubai and DIFC due to the lack of independence and impartiality in cases where the arbitrator had a conflict of interest or any conduct that may affect his independence or impartially.

⁶⁸ New York Convention, Article V(2)(b).

⁶⁹ Dubai Court of Cassation, Petition No. 146/2008, Judgment, 9 November 2008. Karim J. Nassif, ‘Note on Arbitration under UAE Law’ DIAC Journal, Volume 3, Special Edition 2, April-December 2009.

⁷⁰ DIFC Arbitration Law, Article 44(2)(b)(vi).

⁷¹ Public policy is defined under Article 3 of the UAE Civil Code (Federal Law No.5/1985.)

⁷² The matter of public policy should be applied in the same manner by all courts within the UAE.

6.4.3.2 *Effect on Online Arbitration*

The obligation and responsibility of the arbitrator to be independent and impartial has been stipulated in different rules of various arbitration institutions such as AAA and ICC.⁷³ The requirement of impartiality and independence should be fulfilled in online as much as in offline arbitration, and each party should be given the opportunity to communicate. In traditional arbitration proceedings, the parties are not allowed to passively participate in a communications, which should be the same approach in online arbitration. In cases where the parties do not require a particular arbitrator, such as in consumer disputes, and in order to minimize the risk of bias in online arbitration, parties may choose the arbitrator randomly. Such is the approach taken by AAA procedures, as the appointment of the arbitrator is usually chosen by the institution, who notifies the parties of the appointed arbitrator, after which both parties have seven days to submit any factual objections to that arbitrator's service.⁷⁴ This approach to appoint the arbitrator may reduce the bias, as the arbitrator will not favour one of the parties, as they do not have choice in appointing him.

Another problem that might arise in regard to consumer arbitration is that the parties are appointing and paying the arbitrator for the reason that the arbitrator was not paid by the state, unlike judges; this may increase the risk of bias in cases where the arbitrator might expect repeat 'business' from one of the parties.⁷⁵

⁷³ AAA commercial Arbitration Rules, rr. 17(a)(i) and 16; AAA ICDR, Art 7(1); ICC Rules, Arts 7(1) and 11(1). Jeff Waincymer, 'Reconciling conflicting rights in international arbitration: the right to choice of counsel and the right to an independent and impartial tribunal' (2011) *Arbitration International* 597. Daele, Karel, 'The dangers of repeat appointments' (2015) *Legal Business* 66.

⁷⁴ The Consumer-Related Disputes Supplementary Procedures, C-4.

⁷⁵ Constantine Partasides, "International commercial Arbitration", in J. Tackeberry and A. Marriott, Bernstein's Handbook of arbitration and dispute resolution practice, 4th edn (London: Sweet & Maxwell, 2003), 615-706.

6.4.4 *Summary*

Consequently, it should be noted that there is no checklist for the procedural requirements to ensure the minimum degree of procedural fairness either in offline or online arbitral proceedings. However, the elements mentioned above might be considered as the most essential elements that the arbitrators should consider during the arbitration procedures. Otherwise, the arbitral award might be challenged and set aside.

The previous part critically analysed the mandatory rules applied in NYC, Civil Procedure Code, Federal Arbitration Draft Law and DIFC Arbitration Law. Further, the study contributes by stating the essential elements that should be considered by arbitrators, whether in offline or online arbitration, to guarantee the enforcement of the award before DC and DIFCC. In addition, the previous part indicated the limitations and disadvantages of the essential elements when conducting the procedures of online arbitration.

In conclusion, after the UAE ratified the NYC it took a more congenial approach to the enforcement of foreign awards. Furthermore, DC and DIFCC are aiming to strictly apply due process requirements in Article V(1)(b), by which parties have the right to present their case, equal treatment and fair hearing. However, in regard to applying public policy grounds pursuant to Article V(2)(b), this study suggests that the only requirement so far is the independence and impartiality of the arbitrator. In respect to swearing the oath, it is obvious that DC are not willing to consider it part of the public policy in order to avoid intervening the merits and the arbitral procedures of the award.

On the one hand, there are some obstacles with regard to fulfilling the main elements in online arbitration, such as the ability to communicate with both parties equally, and to conduct witnesses' testimonies online. On the other hand, conducting the procedures

online may help to increase the enforceability of arbitral awards, as it will help to overcome some of the grounds to set the award aside.

6.5 The Effect of Delocalization on the Enforceability of Arbitral Awards before the Dubai and DIFCC

One of the issues that might arise in conducting the procedures online is the issue of the seat of arbitration; parties in online arbitration may not meet in one place, and arbitrators may conduct the whole procedures online. Consequently, some scholars argued that online arbitration does not have a seat of arbitration, and it should be delocalized as there is no need for such a seat.⁷⁶ Therefore, this part explains the meaning of delocalization, its effect on arbitration procedures and the enforceability of arbitral awards before DC and DIFCC if the theory of delocalisation is applied.

6.5.1 Delocalization

Despite the vital importance of the seat of arbitration in offline arbitration, some scholars have argued that the seat in online arbitration should be delocalised, stating that online arbitration has no seat,⁷⁷ or “no identifiable seat of arbitration”,⁷⁸ as the procedures do not take place within any particular territory.⁷⁹ However, this argument was opposed by some scholars who stated that the arbitration award shall always be localised and under the supervisory role of courts.⁸⁰

⁷⁶ Eithan Katsch and Janet Rifkin, *Online dispute resolution: Resolving conflicts in cyberspace* (John Wiley & Sons, Inc., 2001). Colin Rule, *Online Dispute Resolution for Business* (Jossey-Bass, 2002). Julia Hörnle, *Cross-border Internet dispute resolution* (Cambridge University Press 2009). Antonis Patrikios, 'The role of transnational online arbitration in regulating cross-border e-business–Part I' (2008) 24(1) *Computer Law & Security Review* 66.

⁷⁷ Paul D. Carrington, 'Virtual arbitration' (1999) 15 *Ohio St.J.on Disp.Resol.* 669.

⁷⁸ Jasna Arsic, “International Commercial Arbitration on the Internet: Has the Future Come Too Early?” (1997) 14 *J. Int’l Arb.* 209.

⁷⁹ Julia Hörnle, “Online Dispute Resolution: More than the Emperor’s New Clothes” in E. Katsh & D. Choi, eds., *Online Dispute Resolution (ODR): Technology as the “Fourth Party”*. *Papers and Proceedings of the 2003 United Nations Forum on ODR* (2003), at 3.

⁸⁰ Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration', 17 *ARB. INT’L* 19 (2001).

Delocalization focuses on the discussion of the proposition that “the local law and local courts (i.e., the courts of the seat of arbitration) have no control or regulatory competence over international arbitration proceedings held on their territory”.⁸¹ Therefore, the idea might be applicable to online arbitration, especially as this type of disputes would usually not be connected to any territory, as the procedurals take place online.

The supporters of this approach argue that the seat of arbitration is not important and they challenge the importance of the seat on several grounds.⁸² In particular, the choice of seat is often a matter of convenience, often not determined by the parties but by the arbitral institution they have selected, often governed by the desire for neutrality, which results in the arbitral tribunal being transitory and the seat having no necessary connection with the dispute. To support their argument the supporters of delocalization cited several cases where courts held that the award might still be enforced even if the court at the seat of arbitration set the award aside or suspended it.⁸³

However, the following subsections demonstrate that there is no need to apply the theory of delocalization in online arbitration, as the seat of arbitration is not in fact an issue. Moreover, applying the delocalization theory might end up setting the award aside before the DC and DIFCC.

⁸¹ Julian DM Lew, 'Achieving the dream: autonomous arbitration' (2006) 22(2) *Arbitration International* 179.

⁸² Loukas Mistelis, 'Delocalization and its Relevance in Post-Award Review' (2013).

⁸³ *Pabalk Ticaret Sirketi v Norsolor* [1985] Rev. Arb. 431 (Cour de cassation October 9, 1984). *Société Polish Ocean Line v. Société Jolasry* [1994] Ybk Commercial Arbitration 662. *Société Hilmatron Ltd v. Société OTV* [1994] Ybk Comm Arbitration 665. *République arabe d’Egypte v. Chromalloy Aeroservices Inc.*, Cour d’appel [CA] [regional court of appeal] Paris, Jan. 14, 1997, Rev. Arb. 1997, 395, Mealey’s Int’l Arb. Rep. 1997, B-1, Y.B.C.A. 1997, 691 (Fr.). Similar cases also exist in a few other jurisdictions, such as the Netherlands.

6.5.2 *Determining the Seat in Online Arbitration*

The location of the arbitral seat is fundamental to define the legal framework for international arbitral proceedings, and can have profound legal and practical consequences in an international arbitration.⁸⁴ As Born defined the seat of arbitration as:

“The arbitral seat is the nation where an international arbitration has its legal domicile or juridical home. As a practical matter, in virtually all cases, the seat will be the state that the parties have specified in their agreement as the place or seat of the arbitration.”⁸⁵

The importance of determining the seat of arbitration arises from the point that the seat usually determines the law that will govern the arbitration. In more detail, the arbitral seat provides the national arbitration legislation applicable to the arbitration, which governs a wide range of “internal” and “external” procedural issues in the arbitration.⁸⁶ In addition, seat of arbitration provides the law presumptively applicable to the substantive validity of the arbitration agreement, and it determines where the award is rendered in order to determine whether it is foreign or domestic for enforcement purposes under the rules of the NYC.

Furthermore, the arbitral seat may affect the nationality and other characteristics of the arbitrators, the general national tenor of the arbitral procedure, the location of hearings in the arbitration and consequently the availability of logistical, technical and other resources for conduct of the arbitral hearings.⁸⁷ Moreover, one of the grounds for refusal under the NYC provisions is if the arbitrators failed to act within the law of the seat of

⁸⁴ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 105.

⁸⁵ *ibid.*

⁸⁶ Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(03) *International and Comparative Law Quarterly* 517.

⁸⁷ Georgios Petrochilos, *Procedural law in international arbitration* (Oxford University Press on Demand, 2004), chapter 2 and 3.

arbitration, if the parties failed to agree on the arbitral procedures, which might be hard to apply if the seat of arbitration is not stated.⁸⁸

It might be argued that conducting all procedures online might raise the issue of the seat of arbitration in addition to the requirement that the arbitrators should physically be in the place of arbitration.⁸⁹ On the contrary, in international arbitration, arbitrators are not required to physically be in the place of arbitration to conduct the hearing or carries on hearing witnesses, experts or the parties, namely, the “venue of hearing”, because there is a distinction between the place of arbitration and the physical place.⁹⁰ Moreover, Born, by defining the seat of arbitration, argued that the seat of arbitration is a legal construct rather than a geographical location.⁹¹ In other words, the parties are free to agree on the seat of arbitration and arbitrators may conduct the procedures at any location other than the seat of arbitration.⁹² Therefore, there are no issues related to the physical place of hearings or other proceedings, or the lack of a physical place of hearings or other proceedings. For example, Article 28 of the Draft Law states expressly that the arbitrators may meet in a place other than the place of arbitration, and in addition the arbitrators may rely on modern technology to conduct the arbitral procedures online regardless of the seat of arbitration. The same rule is applied under Article 27(2) of the DIFC Arbitration Law.

Moreover, there are different approaches to determine the seat of arbitration. For example, Article 27(1) of DIFC Arbitration Law 2008 gives parties the choice to agree on the seat of arbitration; if they fail to agree on the seat and the dispute is governed by the DIFC

⁸⁸ Article V(1)(d) of the New York Convention.

⁸⁹ Jasna Arsic, “International Commercial Arbitration on the Internet: Has the Future Come Too Early?” (1997) 14 *J. Int’l Arb.* 209.

⁹⁰ Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(03) *International and Comparative Law Quarterly* 517.

⁹¹ Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 105.

⁹² Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(03) *International and Comparative Law Quarterly* 517.

law, then the seat shall be the DIFC. Further, the juridical seat of arbitration might be designated by parties, by the arbitrators themselves,⁹³ or by the arbitral institution; for instance, DIAC rules specify Dubai as the seat of arbitration,⁹⁴ DIFC-LCIA specifies the DIFC,⁹⁵ LCIA specifies London and ADCCAC specifies Abu Dhabi.

In conclusion, determining the seat in online arbitration is not an issue, as the parties may agree on the seat and conduct the procedures online without being physically within the seat of arbitration. Therefore, there is no need to apply the delocalization theory, especially as this theory has been criticized for the reason that both international conventions and arbitration litigation are “premised on the nation state as the place of arbitration”.⁹⁶

6.5.3 Examining the Delocalization of Arbitral Award against Enforceability in Dubai and DIFC

Delocalization before DC might raise some issues regarding the applicable rules. As explained earlier, under the Civil Procedure Code the seat of arbitration determines whether the award is domestic or foreign.⁹⁷ Therefore, there should be a particular seat for arbitral awards to state the nationality of the award in order to determine the applicable rules on arbitral proceedings. Accordingly, delocalization raises the issue of the application of the NYC, as its provisions only apply to foreign arbitral awards, which might be an issue in determining whether the award is domestic or foreign before the enforcement court. In regard to domestic awards, Article 212 sets the place of arbitration

⁹³ English Arbitration Act 1996, s 3.

⁹⁴ DIAC Rules, Article 20(1).

⁹⁵ DIFC Arbitration Law, Article 16(1).

⁹⁶ Katherine Lynch, *The forces of economic globalization: Challenges to the regime of international commercial arbitration* (Kluwer Law International, 2003), p 394.

⁹⁷ Civil Procedure Code, Article 212(4).

among the essential elements that should be addressed in the arbitral award by the arbitrators. According to Article 212(5) of the Civil Procedures Code:

“The arbitrators’ award shall be passed by a majority and shall be made in writing and accompanied by the dissenting vote. In particular, the award shall contain a copy of the arbitration agreement, a summary of the statements of the parties, their documents, the grounds and context of the award, the date and place of issue and the signatures of the arbitrators. Should one or more arbitrators refuse to sign the award, such refusal shall be stated in the award; provided, however, that the award shall be valid if signed by a majority of the arbitrators”.

Moreover, the Federal Supreme Court, in Petition No. 32 of the 23rd Judicial Year issued on 8 June 2003, and in Petition No. 118 of the 23rd judicial year 21 January 2004, stated that:

“An award is not obliged to include all the requirements that a court ruling must include, even if the Court requires that the award be given in accordance with the arbitration procedures. It is necessary that the award include, in particular, a photocopy of the arbitration agreement, a summary of the litigant’s statements evidence, the grounds of the decision, the date and place of the award and the signatures of arbitrators.”

Therefore, in domestic awards, if the parties failed to determine the seat in online arbitration, the award might be set aside.

On the other hand, delocalization in foreign awards might raise issues regarding the application of Article V(1)(d). Which states that one of the grounds for refusal is the arbitral tribunal failing to conduct the procedures in accordance with the place of arbitration if the parties failed to agree on arbitral procedures. In other words, failing to

state the place of arbitration and keeping the award delocalized will affect the procedural fairness, hence affect the enforcement before DC and DIFCC, as the arbitrators will not be subject to any mandatory rules at the place of arbitration, which will reduce the application of national mandatory rules,⁹⁸ as the arbitral tribunal will be freed from the mandatory rules and public policy of the place of arbitration.⁹⁹

In practice, most of the national courts prefer to maintain the power to administer the cases to review the arbitral awards as the forum of the arbitration in the name of a few limited justifications, such as safeguarding public policy and ensuring basic justice, and make some amendments to the Model law.¹⁰⁰ Therefore, applying the delocalization theory on arbitral awards may affect the arbitral procedure fairness, because holding the arbitral proceedings without any control by the courts at the seat of arbitration means that the arbitral tribunal is not obliged to follow any mandatory rules other than those stated by parties' agreement, which may not be sufficient to fulfil fairness procedures. Moreover, the enforcement court will not be able to monitor the arbitration procedure with fairness pursuant to Article V(1)(d) of the NYC.

6.6 The Impact of Production of Electronic Document in Online Arbitration before Dubai and DIFCC

As the whole procedure will be conducted online in online arbitration, the issue of production of ESI is more likely to arise than in offline arbitration. The NYC allows the court to set the award aside if one of the parties failed to present his case or if the parties were not treated equally. Therefore, relying on ESI might hold the award unenforceable

⁹⁸ Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge University Press, 2011). p.79.

⁹⁹ Andrew Behrman and Juliana Barbosa Pechincha, 'Enforcement abroad where award set aside at seat' (2016)(2) *International Arbitration Law Review* N11.

¹⁰⁰ Jie Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration Practice' (2011) 22(12) *International Company and Commercial Law Review* 383.

before the enforcement court. This part explains these issues and how the arbitral tribunal might avoid them in order to prevent setting the award aside.

The issue of the production of ESI might emerge in online and offline arbitration. However, as this study is focusing on online arbitral proceedings, it is important to examine the issue of the effect of ESI, which is more likely to emerge in online arbitration. This section examines the effect of ESI disclosure on the enforcement of the arbitral award before DC and DIFCC.

There are two perspectives for the issues related to production of ESI. The first perspective regards the requirement for specific rules to regulate the production of ESI. The second perspective is related to the issue of applying the US-style discovery for document production. The study shall explore each perspective in order to examine the issues that might occur before the courts in Dubai and the DIFC, and suggest solutions to avoid invalidating the award.

6.6.1 First Perspective: The Necessity of New Rules for Electronic Stored Information Disclosure

ESI refers to all forms of data recorded electronically, including memoranda, letters, email communications, spreadsheets or PowerPoint presentations.¹⁰¹ Some scholars call for developing new rules to regulate the production of ESI in international arbitration rather than transposing existing rules instituted for paper documents,¹⁰² while others suggest applying the current rules of paper production to ESI disclosure.¹⁰³

¹⁰¹ Aren Goldsmith, 'Requests for the production of electronic documents in international arbitration: some threshold issues' (2010)(3) *International Business Law Journal* 313.

¹⁰² *Ibid.*

¹⁰³ The ICC Report, Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration. <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production/> (Last Accessed 21/12/2015). Michael E. Schneider, "A Civil Law Perspective: 'Forget E-Discovery'", in *Electronic Disclosure in International Arbitration* (ICC, 2009).

The Commission on Arbitration and ADR supported the second group, stating that there are no differences from the legal perspective between electronic and paper disclosure:

“There should be no difference between the requests for the production of electronic and paper documents as both should remain limited, tailored to the specific circumstances of the case and subject to the general document production principles of specificity, relevance, materiality and proportionality”.¹⁰⁴

Moreover, the ICDR (the international arbitration branch of the American Arbitration Association) established a task force to deal with the issues of production of ESI, and the group’s final recommendation suggested that there is no need to adopt different rules for ESI production. Nevertheless, despite the decision of the task force, the ICDR addressed ESI disclosure in a one-paragraph statement as part of its general “Guidelines Concerning Exchanges of Information”.¹⁰⁵ In respect of “electronic disclosure”, the Guidelines simply state that requests for electronic documents should be “narrowly focused and structured to make searching for them as economical as possible”. In addition, the Guidelines empower the arbitral tribunal to order “testing or other means of focusing and limiting any search”. The ICDR approach states clearly the importance of special rules to deal with ESI disclosure.

Moreover, Goldsmith argues that ESI is fluid and evolving in nature, and there are some great differences between paper and ESI disclosure. He stated several examples to illustrate these differences between the disclosure of paper and ESI, including the ability to search among them and the ability to delete or amend the documents.¹⁰⁶

¹⁰⁴ *ibid.*

¹⁰⁵ The ICDR Guidelines can be found at <http://www.adr.org/si.asp?id=5288> Last Accessed 08/01/2016.

¹⁰⁶ Aren Goldsmith, 'Requests for the production of electronic documents in international arbitration: some threshold issues' (2010)(3) *International Business Law Journal* 313.

Despite the fact that the differences are more related to technical rather than legal issues, some legal concerns are nevertheless raised. For example, the ability to modify and delete ESI compared to paper documents raises the question of the reason behind the deletion or amendments enacted by the party. Goldsmith illustrated that even if a party deleted the documents due to routine maintenance processes, it should explain whether such a process was allowed to run with the foreseeable effect that a “favourable” deletion might result. Therefore, Goldsmith argues that there should be different rules to govern the ESI than those governing the paper disclosure and production.¹⁰⁷

In addition, electronic-document production raises certain challenges, whether it was applied in arbitration or litigation, such as volume, increased chances of inadvertent production and constraints linked to the technology used to store the information.

However, the issues of ESI disclosure become related and implicated, whereby some form of document production has been accepted as part of the procedure governing a given proceeding, which is increasingly common in international commercial arbitration practice today.¹⁰⁸

So far, in international arbitration, international institutions and treaties have already reformed their rules to regulate the ESI disclosure. For example, it has been recognised under Article 3(A) of the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”),¹⁰⁹ as well as the appointment of an ICC Task Force on the Production of Electronic Documents in Arbitration.¹¹⁰

¹⁰⁷ *ibid.*

¹⁰⁸ Grant Hanessian, *ICDR Awards and Commentaries* (Juris Publishing, Inc., 2012), Chapter 2, Electronic Discovery in International Arbitration (Revisited) Julie Bédard and Jonathan L. Frank I

¹⁰⁹ <http://www.ibanet.org> (Last Accessed 21/12/2015)

¹¹⁰ <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production/> Last Accessed 27/01/2016.

Not all arbitration institutions and treaties have considered the ESI disclosure. However, we support the first group that calls to reform the ESI disclosure due to the special nature of the production of ESI and the fact that the issue of production of ESI might arise at any stage of online arbitration. Therefore, the study will examine whether the enforcement of the award before DC and DIFCC will be affected if the parties and the arbitral tribunal fail to regulate or consider the issue of ESI disclosure.

6.6.2 *Second Perspective: Applying the US-Style Discovery in International Arbitration*

Before examining the US-Style discovery, it is important to explain briefly the traditional discovery in litigation and how it is applied in the US, due to the fact that the US-style discovery applied in international arbitration is influenced by the US-style discovery applied in litigation as Smit and Robinson supported:

“The primary purposes of disclosure are the same in international arbitration as they are in litigation: to avoid unfair surprise at trial or hearing and to discover the facts and get to the truth in order to create the record necessary for a just result”.¹¹¹

According to Dupont, discovery in its traditional meaning refers to “the pre-trial investigation phase that precedes civil and commercial litigation during which the parties must provide each other with the evidence that is relevant to the dispute including evidence that is unfavourable to the parties concerned”.¹¹² In common law countries such as the US and UK, parties are required to exchange significant amounts of information and they may file a claim without having any evidence.¹¹³ The term “eDiscovery” refers

¹¹¹ Robert H. Smit and Tyler B. Robinson, 'E-Disclosure in International Arbitration' (2008) 24(1) *Arbitration International* 105.

¹¹² Thomas Dupont and Thomas Sely, 'Ediscovery in France: some thoughts to avoid being caught between Scylla and Charybdis' (2014) 35(11) *European Competition Law Review* 561.

¹¹³ Federal Rules of Civil Procedure, Article 26(US). Part 31 of the Civil Procedure Rules (Disclosure and Inspection of Documents), (UK). Rubino-Sammartano Mauro, *International arbitration law and practice* (CITIC Publishing House 2003), p.670.

to “all situations where electronic data is sought, collected, analysed and used in a legal or regulatory framework”;¹¹⁴ hereinafter, the term refers to US-style discovery of ESI.

In the US, the Federal Rules of Civil Procedure have been amended recently to include the discoverability of ESI, hence it became the new legal basis for eDiscovery in the courts due to the rules concerned, in particular the search for ESI including deleted information, and the obligations in these jurisdictions to preserve relevant documents.¹¹⁵ Despite the fact that the Federal Rules of Civil Procedure do not apply to arbitration, and are mostly applied in court proceedings, the US Supreme Court stated that a party “in a proceeding in a foreign or international tribunal” (i.e. including arbitration), is allowed to file a request for taking evidence with a state court to apply the new rules for e-discovery.¹¹⁶ Therefore, the US-style discovery might be applied in international arbitration even if it is not stated explicitly in the Federal Rules of Civil Procedure.

According to Horn, the US-style discovery in international arbitration means “the approach of the compulsory comprehensive production of documents on request of the other party”.¹¹⁷ This approach has been opposed by some scholars arguing that ESI production should advance a search for the truth.¹¹⁸ Such tacit assumptions are not universally accepted in international arbitration, where many from the civil law tradition

¹¹⁴ Thomas Dupont and Thomas Sely, 'Ediscovery in France: some thoughts to avoid being caught between Scylla and Charybdis' (2014) 35(11) *European Competition Law Review* 561.

¹¹⁵ Jonathan L. Frank and Julie Bédard, 'Electronic Discovery in International Arbitration: Where Neither the IBA Rules Nor US Litigation Principles Are Enough' (2007) 62(4) *Dispute Resolution J* 62. Anke Meier, 'The Production of Electronically Stored Information in International Commercial Arbitration' *SchiedsVZ* (2008) 181.

¹¹⁶ *Intel Corp v Advanced Micro Devices Inc* 542 U.S. 241, 124 S. Ct. 2466 (2004); Anke Meier, 'The Production of Electronically Stored Information in International Commercial Arbitration' *SchiedsVZ* (2008) 181.

¹¹⁷ Norbert Horn, 'Arbitration and electronic communications: public policy' (2009) 12(5) *International Arbitration Law Review* 107.

¹¹⁸ Michael E. Schneider, “A Civil Law Perspective: ‘Forget E-Discovery’”, in *Electronic Disclosure in International Arbitration* (ICC, 2009).

hold a party responsible for finding all evidence needed to support his own case.¹¹⁹

However, according to Mian Sami ud-Din:

“The growing trend is the adoption of general guidance taken from the IBA Rules on the Taking of Evidence and in this regard the revised rules of 2010 attempt to assist the tribunal fully to arrive at the truth while also ensuring discovery only to the extent relevant to the matters in issue.”¹²⁰

Therefore, the question that might arise here is whether any parties will be able to challenge the enforcement of the arbitral award before DIFCC and DC, if for example an arbitral tribunal from a US background decided to apply the US-style discovery for ESI production on a party from the UAE who is unfamiliar with eDiscovery.

6.6.3 The Impact of the Two Perspectives on the Enforceability of Awards before Dubai and DIFCC

Indeed, in litigation the production of documents might vary based on the country's jurisdiction and legal system. For example, the UAE is a civil law country, hence it is the plaintiff responsibility to have the burden of proof for his case. In addition, it is the party's responsibility to obtain and produce all the supporting documents for his case. However, there are some exceptions for this rule; Article 18 of the Evidence Law in Civil and Commercial Proceedings gives the party the ability to request that the court compel his opponent to submit any useful written document or paper detained by him. Article 18 set a number of conditions to apply this rule, which are:

¹¹⁹ *ibid.* Gautam Bhattacharyya and Vicky Reynolds, "Key Aspects of Disclosure in International Commercial Arbitration" (2005) 21(3) *Insolvency Law & Practice* 82–83. International Bar Association, "Commentary on the revised text of the 2010 IBA Rules of Evidence in International Arbitration", available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence Last Accessed 08/05/2016. Mian ud-Din, 'International commercial arbitration: developments in the practice of taking evidence' (2013) 79(1) *Arbitration* 17.

¹²⁰ Mian ud-Din, 'International commercial arbitration: developments in the practice of taking evidence' (2013) 79(1) *Arbitration* 17.

“a - if the law allows him to ask for their submission or delivery.

b - If the document is joint between him and his opponent. A document is particularly considered joint when it is for the benefit of both parties to the litigation or evidencing their mutual obligations and rights.

c - If the opponent based his claim on it in any stage of the lawsuit.

2 - The request must state the description of the written document, its contents, the fact that helps in identifying the document, the evidence and circumstances corroborating its existence in the hands of the opponent and the reason for compelling him to produce it.”¹²¹

The same rule applies before DIFCC.¹²² Consequently, in litigation in the UAE the party is assumed to build his case with the available evidence. Therefore, a party is expected to determine that he has solid grounds for proceeding and to have made serious efforts to establish his case, and if any other documents are required then he would be able to request the court to compel his opponent to produce the required document according to the conditions stated in Article 18. Nevertheless, parties cannot be forced to submit information that could be damaging them and any communication between the lawyer and client cannot be taken as evidence without the latter’s approval.¹²³

The difference between the civil and common legal systems is obvious.¹²⁴ While in the UAE, the party is determined to have the evidence available, and he might not provide the court with evidence that might cause damage to his position, in the US the case is the

¹²¹ Article 18 Evidence Law in Civil and Commercial Proceedings.

¹²² Rupert Reed QC, Jonathan Chew and Harris Bor. Rules of the DIFC Courts 2014 (Wilberforce Chambers:2014). at p 239. Available at <file:///ha-024/pers-I/0006A361/Downloads/PUBLICATION-Rules-of-the-DIFC-Courts-20141.pdf> (Last Accessed 12/02/2016).

¹²³ Khaled Aljneibi, 'The scope of electronic transactions and electronic evidence in the courts of the United Arab Emirates' (2015) *Digital Evidence and Electronic Signature Law Review* 37.

¹²⁴ Rubino-Sammartano Mauro, *International arbitration law and practice* (CITIC Publishing House 2003), p.670.

opposite; both parties are required to provide each other with all documents, even those that might affect their case.

Schneider argues that despite cultural differences, international arbitration rules are recognised and there is a big difference between the civil procedure of any jurisdiction and international arbitration rules.¹²⁵ On the contrary, there might be similarities between civil procedures and traditional arbitration, especially in regard to document production. For example, Article 27(1) of the UNCITRAL Arbitration Rules states that “Each party shall have the burden of proving the facts relied on to support its claim or defence”. Therefore, it is likely that parties would not be familiar with the eDiscovery due to the applied civil procedure in litigation.

The arbitration rules in Dubai and DIFC are silent regarding the impact of document requests in respect ESI disclosure on the final awards. Therefore, the next part examines the impact of not regulating the ESI disclosure initially and the effect of eDiscovery on the enforcement of the arbitral award before DC and DIFCC. This study argues that arbitral awards based on the US-style discovery and in case that the parties failed to regulate the ESI disclosure might be set aside for the reason that the party could potentially be unfamiliar with the duty to preserve documents, the issue of undue burden of eDiscovery and the matter of the form of the ESI production, which may affect procedural fairness. Hence, the next part explains the importance of regulating ESI disclosure initially, in order to guarantee the enforcement of the award.

6.6.3.1 The Party is Unfamiliar with the Duty to Preserve

As explained earlier, DC and DIFCC requires both parties to be treated equally, and it violates due process if there is a violation of a party’s right to be heard, the right to present

¹²⁵ Michael E. Schneider, “A Civil Law Perspective: ‘Forget E-Discovery’”, in *Electronic Disclosure in International Arbitration* (ICC, 2009).

a case and submit a defence.¹²⁶ However, these rights might be violated if the US-style discovery for ESI production has been applied in arbitral procedures without the consent of parties. Consequently, the final award might be set aside for the reason that one party might be not familiar with the tradition of document retention, which violates due process and equal treatment.

In general, the parties in the US are under the “duty to preserve” once a complaint is filed.¹²⁷ Moreover, the duty might arise earlier. If a claimant is going to file a claim or if the respondent knows or reasonably anticipates that litigation is coming then there is a duty to preserve relevant documents at this stage and a party must give notice of the litigation pertaining to all persons under its control who potentially possess relevant information.¹²⁸ Therefore, if the parties did not agree to initially applying the eDiscovery, they would not be entering the production process on the basis of equality, even if one of the parties might not be able to produce or preserve a document that might affect his case.¹²⁹ For example, US companies, or those with significant US operations, accustomed to frequent litigation, are well aware of the reasonable expectation standard, thus they will generally have comprehensive document retention policies.¹³⁰

The tradition of document retention or the “duty to preserve” is vital to protect or destroy an evidence. For example, parties from UAE, whether under the jurisdiction of the

¹²⁶ Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Wolters Kluwer 2011), at 822. Article V(1)(b) of the New York Convention. Dubai Court of Cassation in Petition No.270/2008. Article V(1)(b) of the New York Convention. Dubai Court of Cassation in Petition No.270/2008. DIFC Arbitration Law Article 41(2)(a)(i).

¹²⁷ *Silvertri v General Motors* 271 F. 3d 583, 591 (4th Cir. 2001).

¹²⁸ John M. Barkett, 'E-Discovery for Arbitrators' (2007) 1 Disp.Resol.Int'l 129. Bill Stevens, 'E-discovery roadmap' (2013) 34(8) *Company Lawyer* 260.

¹²⁹ Aren Goldsmith, 'Requests for the production of electronic documents in international arbitration: some threshold issues' (2010)(3) *International Business Law Journal* 313.

¹³⁰ Amal Bouchenaki, 'The IBA Rules lay the ground for solutions to address electronic document production disputes' (2010) 13(5) *International Arbitration Law Review* 180.

Dubai¹³¹ or DIFC,¹³² lack experience to deal with eDiscovery; the duty to preserve relevant evidence might be inconceivable, or they may not require the opponent party to preserve relevant evidences on the right time. Nevertheless, it might be argued that parties shall be familiar with such approach as the retention of electronic documents as stated under Article 5 of the Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law. Article 5 does not explain the procedure of retention, rather it states the required conditions for a valid retention.¹³³ On the other hand, Article 5 states that the parties are under obligation to store electronic records if the law mandates them to be stored.¹³⁴

However, the required conditions under Article 5(1) are the ability to generate the information in its original form or in an accurate form, the ability to access the information at a later date, and the ability to determine the “origin, destination, date and time of its sending and receipt”.¹³⁵

The electronic records may be in the custody of the principal’s agent.¹³⁶ There is no obligation to retain information, which is automatically generated by a computer information system during the process of sending or receiving a communiqué.¹³⁷ This provision does not affect other statutes, which may have more stringent retention requirements, such as usage of a specific type of computer information system; adherence to specific procedures; or retention by a specified agent.¹³⁸

¹³¹ Article 18 Evidence Law in Civil and Commercial Proceedings.

¹³² Rupert Reed QC, Jonathan Chew and Harris Bor. Rules of the DIFC Courts 2014 (Wilberforce Chambers:2014). at p 239. Available at <file:///ha-024/pers-I/0006A361/Downloads/PUBLICATION-Rules-of-the-DIFC-Courts-20141.pdf> (Last Accessed 12/02/2016).

¹³³ Article 5(1), Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law.

¹³⁴ *ibid*, Article 5(2).

¹³⁵ *ibid*, Article 5(1).

¹³⁶ *ibid*, Article 5(3).

¹³⁷ *ibid*, Article 5(2).

¹³⁸ *ibid*, Article 5.

Consequently, this Article explains the conditions to retention the documents. It does not change the fact that parties in Dubai are not familiar with the retention of ESI, how and when to rely on it, due to the fact that it is not required in litigation as in the US. Therefore, parties still do not have the ability to rely on the retention of ESI before the courts and to be familiar with the procedures in litigation, which is the case of the US litigation.

However, in order to achieve the fairness of eDiscovery in international arbitration, there should be specific rules to regulate such matters and parties should be familiarised with the effect of such rules, and should both consent to their application. This will guarantee that those who are not familiar with eDiscovery may still benefit from its rules and be aware of the effect of applying them. Otherwise, the award shall be set aside on the grounds that the arbitral tribunal failed to guarantee the party's right to present his case, which challenges fairness and equal treatment, hence violates due process in the NYC.¹³⁹

6.6.3.2 *Undue Burden of eDiscovery*

Moreover, the second issue regard eDiscovery is the matter of undue burden of eDiscovery. The issue regarding eDiscovery is that it might be considered against public policy and to violate the principle of due principle, an approach that is applied in some countries. For example, under German law the arbitral tribunal is not allowed to compel a party to produce a document unless the situation is stated within the limits of German procedural law.¹⁴⁰ As Horn explained, "It would be impossible for a German state court to state a violation of public policy, if an arbitral tribunal would order the production of documents in line with art.142 ZPO".¹⁴¹ In other words, it might be considered to be contrary to public policy if the tribunal failed to stay within the limits of German

¹³⁹ Article V(1)(b).

¹⁴⁰ Mark Hilgard, "Electronic Discovery im Schidsverfahren" (2008) *SchiedsVZ* 122, 123.

¹⁴¹ Norbert Horn, 'Arbitration and electronic communications: public policy' (2009) 12(5) *International Arbitration Law Review* 107.

Procedural Law. Therefore, obliging one of the parties to produce the documents that are in his possession might be considered to be an undue burden of e-discovery, which amounts to a violation of due process and public policy.

Indeed, there should be limits for the situations where the arbitral tribunal could be able to order the production of documents, whether it was paper or electronic. Moreover, if the arbitral tribunal crossed the limits stated in law, the award should be considered contrary to public policy.

US-style discovery does not provide the same obligation found in the Civil Procedure Code or DIFC rules on a party to produce such a document. In Dubai, under Article 209(2)(b) of the Civil Procedures Code, the arbitral tribunal shall suspend the arbitral proceedings and refer to the competence court “to order a party to submit any documents in its possession which are necessary for the issue of the arbitration award”. Therefore, Article 209(2)(b) gives the arbitral tribunal the right to order one of the parties to submit the court with the documents in his possession on condition that the required document is necessary to render the arbitration award.

Moreover, the Civil Procedure Code prevents parties being forced to submit information that could be damaging to them, and any communication between the lawyer and client cannot be taken as evidence without the client’s approval.¹⁴² The same rules are applied in the DIFC rules as the court prevents any production of evidence that is considered to be unreasonable burdensome to produce,¹⁴³ an approach that is not applied in US-style discovery.¹⁴⁴

¹⁴² Khaled Aljneibi, 'The scope of electronic transactions and electronic evidence in the courts of the United Arab Emirates' (2015) *Digital Evidence and Electronic Signature Law Review* 37.

¹⁴³ Rupert Reed QC, Jonathan Chew and Harris Bor. Rules of the DIFC Courts 2014 (Wilberforce Chambers:2014). at p 239. Available at <file:///ha-024/pers-I/0006A361/Downloads/PUBLICATION-Rules-of-the-DIFC-Courts-20141.pdf> (Last Accessed 12/02/2016).

¹⁴⁴ Thomas Dupont and Thomas Sely, 'Ediscovery in France: some thoughts to avoid being caught between Scylla and Charybdis' (2014) 35(11) *European Competition Law Review* 561.

Consequently, the undue burden of eDiscovery must not force parties to disclose any documents that might be damaging to them or any confidential documents between the party and his lawyer. In addition, there is lack of cases whereby the courts in Dubai might apply the same approach of German Courts and set the award aside if it is not according to the Civil Procedure Code.¹⁴⁵

6.6.3.3 *The Form of ESI Production*

This issue is related to the first perspective, which is the importance of regulating specific rules for ESI disclosure. The issue might occur if the parties failed to agree on ESI production rules or in case there are no particular rules for ESI production different from those for paper production.

The issue of ESI disclosure might arise between the parties during the procedures, even though the parties have not addressed it before. For example, one of the parties may request a copy of the emails from his opponent during the procedures. The main concern is if the parties failed to agree on particular rules to regulate ESI production, then the form of the ESI might raise issues of fairness and equal treatment. For example, if one party produced electronic documents in a format that is not supported by the other, or it might be expensive for the other party to buy the programme that supports the format, in order to be able to apply ESI disclosure without raising any fairness issue, parties should agree on specific rules to regulate ESI production, such as the rules applied by ICDR Guidelines.¹⁴⁶ The guidelines considered this issue and stated in Article 4 that a producing party may make electronic documents available “in the form... most convenient and

¹⁴⁵ The court in Dubai might consider the award invalid if it failed to comply with the Civil Procedure Code. However, this case was before acceding the NYC. See, *International Bechtel v. Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Case No. 503/2003, judgment dated 15 May 2005.

¹⁴⁶ Martin Gusy and Martin. Illmer, ‘The ICDR Guidelines for Arbitrators Concerning Exchanges of Information: a German/American Introduction in Light of International Practice’ (2008) 6 *Int'l Arb LR* 195, 201-2.

economical for it”, unless the tribunal determines otherwise. In other words, the tribunal may oblige the party to produce the electronic documents in a more convenient way for both parties.

Consequently, the issue of ESI production might arise at any stage of arbitral proceedings, and if the parties failed to agree on particular rules to demonstrate ESI production, the form that should be used to produce ESI documents might be an obstacle and it may set the award aside on the grounds of violating fairness and equal treatment. Schultz¹⁴⁷ explained that if the technology that is used cannot be equally accessed and mastered by both parties, and as a consequence one party is at a substantial disadvantage, then such a disadvantage may constitute a violation of equal treatment.

In this regard, if the arbitral tribunal or the parties failed to set the rules for the ESI production, the court may consider that this violates fairness and equal treatment, and thus set the award aside. Moreover, even if the parties agreed on this matter and the court considered that it violates the principle of equal treatment then it might set the award aside, as violence of equal treatment is considered as one of the restrictions on party autonomy.¹⁴⁸ As explained earlier, setting the award aside on the grounds of violence of equal treatment has been stated under the NYC provisions.¹⁴⁹

6.6.4 Summary

In conclusion, in regard to the first perspective, which is related to the requirement of setting particular rules for ESI disclosure. It has been found that DC and DIFCC may set the award aside if the parties failed to agree on a particular guidelines or rules to regulate

¹⁴⁷ Thomas Schultz, *Information technology and arbitration: a practitioner's guide* (Kluwer Law International 2006), p.116.

¹⁴⁸ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), p 317.

¹⁴⁹ New York Convention, Article V(1)(b).

the production of ESI, especially when the issue of the form of production arises. As explained earlier, leaving ESI production without particular regulations might raise the issue of unfairness and equal treatment, due to the fact that one party may not be able to buy the suitable programme or it might be hard to use for a regular person, causing extra costs in addition to the inability of one of the parties to access the document. Therefore, in order to prevent these issues, parties should agree on particular rules to regulate the matter of ESI discovery (i.e. ICDR Guidelines).¹⁵⁰

On the other hand, in regard to the second perspective, which is to apply the US-style discovery in international arbitration, the study found that applying exactly the same US-style discovery might be inappropriate, as it may affect the final award, consequently setting the award aside before the courts of Dubai and DIFC. Applying the US-style discovery might violate the principle of equal treatment, fairness and the party's right to present its case. The main issues regard this perspective are the party being unfamiliar with the duty to preserve documents and the issue of undue burden of eDiscovery.

However, so far none of the arbitration rules regulating ESI disclosure took exactly the same path applied in the US-style discovery (i.e. the IBA Rules). Moreover, it is recommended that parties in international arbitration do not adopt exactly the same rules as US-style discovery in their disputes, as such procedures might set the award aside on the grounds of irregularity of arbitration procedures.

Moreover, none of the institutional rules provides for compulsory discovery in general terms; most simply provide that the arbitral tribunal can direct parties to produce documents. In order to try to achieve a common ground between the civil law and common law approaches to document requests, the IBA Rules of Evidence provide a

¹⁵⁰Martin Gusy and Martin. Illmer, 'The ICDR Guidelines for Arbitrators Concerning Exchanges of Information: a German/American Introduction in Light of International Practice' (2008) 6 *Int'l Arb LR* 195, 201-2.

mechanism. Under article 3(2) of the IBA Rules, a request for document production shall be addressed to both the arbitral tribunal and the other parties.¹⁵¹

6.7 Conclusion

In the first part of this chapter, the aim was to state the essential elements that could raise issues in conducting procedures online, which could be examined by the DC and DIFCC and require the attention of the arbitral tribunal during the arbitral procedures.

This issue might be more complicated at the international level than it is in national arbitration, because different sources of law would be applied; for example, the law of the seat of arbitration, the law of the enforcement court and the rules of the convention (if applicable). Nevertheless, as the study is concerned with enforcement issues of the electronic award before DC and DIFCC under the NYC, the mandatory rules of the NYC, DIFC Arbitration Law, Civil Procedures Code and Draft Law were examined.

The NYC provisions that might affect the arbitral procedures are Articles V(1)(b), V(1)(c), V(1)(d) and V(2)(b). Articles V(1)(c) and V(1)(d) have been excluded from this study as neither raises issues concerning arbitral procedures conducted online. Article V(1)(b) requires the arbitral tribunal to allow each party to present his case, an element that includes both equal treatment and fair hearing. Article V(2)(b) allows the enforcement court to set the award aside if the arbitral tribunal follows any procedure contrary to public policy.

The Civil Procedures Code, DIFC Arbitration Law and Draft Law do not require the examination of rules other than those stated in the NYC with regard to the enforcement of foreign awards. Additionally, swearing the oath and the independence and impartiality

¹⁵¹ Detlev Kühner, 'The Revised IBA Rules on the Taking of Evidence in International Arbitration' (2010) 27(6) *Journal of International Arbitration* 667.

of the arbitrator might be considered contrary to public policy if the arbitral tribunal failed to act with them.

Consequently, the main elements to consider when conducting the arbitral procedures online are the violation of due process (the party's right to present his case), independence and impartiality of the arbitrator, and swearing of the oath before testimony. On the one hand, the study stated the shortcomings and limitations of the application of some elements in online arbitral proceedings; for example, the issue of taking testimonies under oath, the inability to ascertain that the witness is independent, with no one telling him what to say, and the difficulty in fulfilling the independence and impartiality of arbitrators in online arbitration. Furthermore, the party's right to present his case might raise some issues in online arbitration, such as the ability to access all documents.

On the other hand, the study stated that conducting the procedures online might be efficient and increase the enforceability of the arbitral award. By exploring the court's decisions where the award was set aside on the grounds of violating due process, it was found that some of these issues might be solved if parties relied on conducting the procedures online.

Accordingly, it is recommended that in order to avoid violation of due process, arbitral tribunal should ensure access to current technology, provide equal treatment in communication, secure access for parties to documents and guarantee that the mechanism used does not violate the principles of equal treatment and fair hearing. In regard to taking the oath, it is suggested that relying on a trusted third party at the place of the witness would be more efficient in taking the testimony, reducing challenges to the validity of such a testimony. Finally, independence and impartiality play a significant role in enforcing the final award, hence parties must ensure the independence and impartiality of the arbitral tribunal to avoid setting the award aside.

In the second part of the chapter, the concept of delocalization was examined. The study explained the meaning of delocalizing, which is keeping online arbitration floating without stating a particular seat. However, the main issues related to delocalization pertain to Article V(1)(d), which requires the court of enforcement to examine the arbitral procedures according to the seat of arbitration if the parties failed to agree on particular procedures. Even if all procedures are conducted online, the ability to determine the seat in online arbitration remains, as the seat is legal rather than geographic. Therefore, it is more convenient for the party's seat of arbitration to guarantee the fairness of procedures before the courts of the seat. In addition to avoiding the issue of determining the nationality of the award before the DC is whether the award is local or foreign, as the seat will determine the nationality of the arbitral award.

The third part of the chapter examined the effect of ESI disclosure, focusing on the issue from two perspectives: in regard to regulating specific rules for ESI production other than paper production; and in regard to applying US-style discovery in ESI disclosure. On the one hand, the study suggests that parties should agree on separate rules for ESI production in order to avoid any challenge to the award, such as one of the parties being unable to access the document due to high costs or the complexity of the form used. On the other hand, it suggests avoiding applying US-style discovery, as the award might be set aside on the grounds of unfairness and unequal treatment, which violates due process, because parties might be unfamiliar with the duty to preserve documents and the issue of undue burden.

Finally, the answer to the main question, whether the DC and DIFCC have control over the arbitral procedures conducted online, is yes. Furthermore, there is a limit to the courts' freedom to monitor the procedures exhaustively to detect those that may affect the fairness of arbitral procedures. However, monitoring arbitral procedures has various

impacts on conducting procedures online, as it might limit the use of the Internet. Indeed, giving the courts the role of monitoring the fairness of the arbitral procedure may raise the efficiency of the arbitral procedures, as it will ascertain that both parties had the chance to present their case, and that the arbitral tribunal is independent and impartial. On the other hand, the courts may limit and control the application of delocalization, as this requires the parties to set a seat of arbitration to guarantee a minimum standard of fairness. Moreover, monitoring of arbitral procedures by the court may limit the arbitral tribunal from the use of unjustified methods to settle the dispute, such as relying on the ESI disclosure method, whereby one of the parties may be unfamiliar with or rely on an ESI disclosure process that is expensive or difficult to use.

7 Chapter Seven: Challenges of Authentication and Certification of E-awards: The Enforceability of Electronic Signature

7.1 Introduction

The enforceability of the arbitral award is the final and the most important step in arbitration procedures. Upon completion, the winning party will seek to enforce the award, otherwise the whole process of arbitration is nullified and wasteful. The final award shall be recognised and enforced equally as a court judgment, but the importance of arbitration, as explained earlier, is that its enforceability is easier at the international level than court decisions, because of international treaties and conventions entrenching the enforcement and recognition of the arbitral award. The NYC is the most widespread and efficient arbitration convention facilitated by many jurisdictions. Article III of the NYC states that the arbitral award shall be considered as binding and enforceable in each contracting state that guarantees the enforcement and recognition of foreign arbitral awards in countries ratifying the Convention.

The NYC provides for the recognition of arbitral awards by excluding any review of the merits of foreign awards. On the other hand, it stipulates a number of provisos to be considered during enforcement, such as the duty of the party seeking enforcement to supply the court at the time of application with an authenticated original or duly certified copy of the award and arbitration agreement. This might raise some enforcement issues, as discussed in detail below. One of the most effective and efficient solutions to authenticate the electronic award in online arbitration is the electronic signature, which might be useful in enforcing the arbitral award. However, its application depends on whether the courts in the enforcement country validate and recognise such a process.

Consequently, the chapter begins by explaining the authentication and certification of arbitral award in accordance with the NYC rules. It goes on to explore the differences between authentication and certification, and to identify some issues that might arise such as the governing law, the competent authority and the required documents. These concerns might arise at the enforcement stage, since the NYC is silent toward them, which may mean that different interpretations are possible. These issues will be discussed with special reference to the approach of DC and DIFCC.

The second part seeks to clarify the meaning and requirements of the electronic signature, then explains the different types of legislative approach toward electronic signatures. In respect of the validity of electronic signatures under Dubai and DIFC legislation, the chapter explores and critically analyses the provisions of the ETCL in Dubai, to test the ability to rely on the electronic signature as a valid method to authenticate electronic awards before DC. The final section examines the validity of electronic signature before DIFCC.

7.2 Authentication or certification of the award under the NYC

The NYC states the required procedures and documents to enforce and recognise an arbitral award. Article IV provides that:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) The duly authenticated original award or a duly certified copy thereof;
 - (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Under article IV(1), the party seeking the enforcement and recognition of the arbitral award should provide the court of enforcement with authenticated or certified copies of the arbitral award in addition to the original agreement, which should be valid pursuant to the provisions of article II, which aims to reduce the formal requirements to enforce the award formerly required under the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) (Geneva Convention). Article 4 of the Geneva Convention did not require ‘double exequatur’ expressly, but it came to be mandated de facto. The ‘double exequatur’ requirement means the party who is seeking the enforcement of the award before the enforcement court should obtain recognition and enforcement of the award from the courts at the seat of the arbitration first. Under article 4, annex V.4 of the Geneva Convention, the party seeking enforcement of an arbitral award had not only to provide the award and the underlying arbitration agreement but also proof that the award had become final in the country where it was made. Because most national laws did not provide for a specific certificate of ‘finality’ other than getting an award declared enforceable in that country, this was ‘practically the only way to prove finality.’¹

The NYC does not define the term ‘authenticated’, but the International Council for Commercial Arbitration defines it as ‘the process by which the signatures on it [an award]

¹ Nicola Christine Port, Dirk Otto, Patricia Nacimiento and Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), p. 145.

are confirmed as genuine by a competent authority.’² According to Julian Lew and colleagues, authentication means that the tribunal signed the award and it is genuine.³ Consequently, the main aim of authenticating the award is to assure the enforcing court where the party is seeking enforcement that the signature on the award is genuine and has been signed by the arbitrators. In the case of Switzerland / 04 October 2010 / Bundesgericht / 4A_124/2010,⁴ it was agreed that the award submitted by the respondent, which was a duly certified copy but only signed by the tribunal chairman, did not affect its enforceability. The form requirements under article IV NYC were not to be interpreted restrictively, since it was the purpose of the NYC to facilitate the enforcement of arbitral awards.

However, if the original copy is not available, then the party should provide the court with a certified copy of the original award. With the same approach to authentication, the NYC does not define the term ‘certification’. Its role was explained by the ICCA at II.2.2 as being ‘to confirm that the copy of the award is identical to the original’. In addition, Julian Lew and colleagues defined certification as ‘an assurance that submitted documents are a true copy of the original’.⁵

Furthermore, the issue might arise whether the certified copy should be a copy of the authenticated original award, or just a copy of the original award. Some decisions⁶ and some scholars,⁷ suggest that the certification of the copy should be a copy of an

² ICCA’s *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), II.2.1.

³ Julian Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, 2003), 705.

⁴ Bundesgericht, 4 October 2010 (X AG v. Y AS) Yearbook XXXVI (2011) pp. 340-342 (Switzerland no. 42).

⁵ Julian Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, 2003), p. 705.

⁶ Austria: Oberster Gerichtshof, 3 September 2008 (O Limited et al. v. C Limited) Yearbook XXXIV (2009) pp. 409-417 (Austria no. 20); OGH, RdW 2003, 385. Bezirksgericht, Zurich, 14 February 2003 and Obergericht, Zurich, 17 July 2003 (Italian party v. Swiss company) Yearbook XXIX (2004) pp. 819-833 (Switzerland no. 37).

⁷ Frank-Bernd Weigand, *Practitioner's handbook on international commercial arbitration* (OUP Oxford, 2009), p. 67.

authenticated original award; otherwise, the certified copy does not guarantee that the original award is genuine. It is necessary for the copy to conform to the original. On the other hand, other courts have not required a certified copy of an authenticated award and have considered it sufficient to produce the certified copy of the original award.⁸ Arguably, this is the most appropriate approach, because it facilitates the general implementation of arbitration and the requirement of an authenticated original award was a later insertion.⁹

According to the NYC, the court has the choice to determine the applicable law to examine the validity of authentication or certification and the required documents.¹⁰ However, leaving the choice to the court to determine the applicable law may raise other issues with regard to the competent authority that is authorized to authenticate or certificate the award, and the required documents that are necessary to consider an authentication or certification valid.¹¹ Therefore, the next part examines these issues regarding the law governing authentication, competent authority and the required documents to authenticate or certificate an award.

⁸ Germany: BGH, NJW 2001, 1730 = XXIX Y.B. Com. Arb. 724, 726–727 (2004); OLG Rostock, BB 2000, Beil. 37, pp. 20, 22–23 = RPS 2000, 20 = XXV Y.B. Com. Arb. 717, 718 (2000).

⁹ The text of the draft Convention proposed by the working group originally only referred to ‘the original award or a duly certified copy thereof’. See E/CONF.26/L.43, p. 1.

<http://www.newyorkconvention.org/travaux+preparatoires/conference+1958+proposed+amendments> A Belgian proposal to modify this text was adopted so that when the original award was supplied, it had to be duly authenticated. See E/CONF.26/SR.17, p. 7.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N58/156/30/PDF/N5815630.pdf?OpenElement> See also van den Berg, The New York Convention: Summary of Court Decisions, in: Blessing (ed.), The New York Convention of 1958, ASA Special Series No. 9, JurisNet 1996, p. 257.

¹⁰ *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1, Annex, at 14. <http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&provision=224> See also van den Berg, The New York Convention: Summary of Court Decisions, in: Blessing (ed.), The New York Convention of 1958, ASA Special Series No. 9, JurisNet 1996, p.246.

¹¹ Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague/London/Boston, 1999),; Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international* (Schulthess Verlag Zürich, 2002).

7.2.1 *The issue of the governing law*

Since there is no specific law stated by the NYC to govern the authentication or certification validity of the award, different views have emerged among national courts to determine the applicable law. Some courts have applied the law where the award was rendered to examine the authentication validity, and the privileged party seeking enforcement was required to fulfil the requirements of authentication under the law where the award was issued.¹² Other courts have required that in order to consider the authentication to be valid, it should be governed by the law where enforcement and recognition is sought.¹³

The first approach was applied in a recent case before the Nicosia District Court, where a successful party sought the enforcement and recognition of an award issued by the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation in December 2011. However, the respondents filed an objection, arguing that the court to set the award aside on the basis that the winning party had not submitted an original or true copy in accordance with Cypriot Law. Moreover, the respondents argued that the award should be certified by a notary officer and printed according to the law of the state in which the decision was made; their argument was upheld, and the judgment determined that the award should be authenticated in the manner required by the law of the country in which the award was made.¹⁴

¹² Italy: CA Milano, VII Y.B. Com. Arb. 338, 339 (1982); India: *Renusagar Power Co. Ltd. v. General Electric Co.*, XVI Y.B. Com. Arb. 553, 570 (1991); *Econerg Ltd v. National Electricity Company AD*, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, No. 356/99 (Bulgaria).

¹³ Italy: Cass., XXI Y.B. Com. Arb. 607, 608 (1996); France: TGI Strasbourg, II Y.B. Com. Arb. 244 (1977); Spain: TS, VIII Y.B. Com. Arb. 408 (1983); Mexico: Tribunal Superior de Justicia, IV Y.B. Com. Arb. 301 (1979).

¹⁴Delphine Rooz and Antonio Musella, 'International arbitration and alternative dispute resolution' (2014) *International Business Law Journal*, 157.

In regard to the second approach to authenticate the award, the main advantage of relying on the law of the enforcement court is that the authentication will be easier to verify by the presiding court. According to some scholars, the main disadvantage in applying this approach is that it might lead to a ‘double legalization’ scenario, whereby documents authenticated according to the law where the enforcement and recognition court is sought should be authenticated according to the law where the award was made as well.¹⁵

Each approach to determine the applicable law has advantages and disadvantages. Applying the first approach requires the court to rely on the law of the place where the award has been rendered to authenticate the award, which makes it easier for the applicant to authenticate the award once, without the need to obtain authentication according to the law of the enforcement and recognition court each time he seeks enforcement. However, this approach has been criticised, as it does not fulfil the aims of the NYC, especially as this solution was presented during the deliberations and refused by the drafters.¹⁶

Some authors have suggested that the parties should not be restricted to a particular law and they shall be allowed to choose between the law of the enforcement court and the law where the award was made.¹⁷ This approach is obviously more flexible and in accord with the aim of the NYC to ease the recognition and enforcement of awards. Otherwise, there should be one approach for authentication, which would help to reduce the confusion of the winning party. For instance, consider the provisions of s 9(2) of the Australian Federal International Arbitration Act 1974 No. 136, 1974 (Compilation No. 11):

¹⁵ Italy: CA Brescia, VIII Y.B. Com. Arb. 383, 384 (1983). Weigand F, Practitioner's handbook on international commercial arbitration (OUP Oxford 2009).

¹⁶ United Nations Conference on International Commercial Arbitration Summary Record of the Seventeenth Meeting, 12 September 1958, E/CONF.26/SR.17, p. 7.

¹⁷ Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention 1958 in Practice* (Cameron May, 2007). para. 1675; van den Berg, The New York Convention: Summary of Court Decisions, in: Blessing (ed.), The New York Convention of 1958, ASA Special Series No. 9, JurisNet 1996, p. 252.

9 Evidence of awards and arbitration agreements

(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:

(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:

(a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or

(b) it has been otherwise authenticated or certified to the satisfaction of the court.

This grants flexibility by referring to the possibility that documents have ‘been otherwise authenticated or certified to the satisfaction of the court’. A ‘Note by the Secretariat’ also discussed this point, at paragraph 54 of the forty-first session in 2008.¹⁸

Responses showed that the authentication could be done by the Consul of the State where enforcement was sought, or where the award was made, a court of the State where the award was made or, officials authorized by the law of the State where

¹⁸ *Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) Note by the Secretariat (United Nations Commission on International Trade Law, Forty-first session, New York, 16 June-3 July 2008) A/CN.9/656.

the award was made. A few replies mentioned that the award might be authenticated by the arbitrator, an official of a permanent arbitral tribunal, or in the case of an award rendered in an ad hoc arbitration, by a notary public.

Hence, due to the lack of a specific authentication procedure under the NYC, parties should be allowed to authenticate the award either according to the court of enforcement or the court where the award was made, such an approach that might reflect the enforcement bias of the NYC.

7.2.2 *The competent authority*

Determining the applicable law to authenticate the award effectively determines the competent authority, which might vary from one country to another. For example, in some countries, the foreign ministry is the competent authority for authentication,¹⁹ while in other countries the public authority or a diplomatic or consular officer is authorised to authenticate.²⁰ In some cases, the members of arbitral institutions (e.g., the secretary general) may authenticate awards.²¹ In the United States of America, attorneys or notary public officers have the authority to authorise documents.

However, the procedure of confirming that a photocopy document is a true copy of the original also varies from one jurisdiction to another. It might be certified by the notary public, a justice of the peace, a judge, or diplomatic or consular authorities.²² The different manner of certifying the copy of the award can be a source of confusion for the holder of

¹⁹ Japan: Tokyo High Court, XX Y.B. Com. Arb. 742, 744 (1995).

²⁰ e.g., Australia: Transpac Capital Pte Ltd. v. Buntoro, [2008] NSWSC 671 = XXXIII Y.B. Com. Arb. 349 (2008); Switzerland: Bezirksgericht Zu`rich, XXIX Y.B. Com. Arb. 819, 824 (2004); US: Guang Dong Light Headgear Factory Co., Ltd. v. ACI Int'l Inc., 2005 U.S. Dist. LEXIS 8810 (D. Kan. 2005) = XXXI Y.B. Com. Arb. 1105, 1109–1110 (2006).

²¹ Austria: OGH, XXXIV Y.B. Com. Arb. 409, 413 (2009); OGH, RdW 2003, 385; OGH, IPRax 2000, 429 = ZfRV 1998/23; OGH, ZfRV 1996, 199.

²² In United States, a J.P, diplomatic or consular authority, attorneys, notary public and judge can certify a document; in Nigeria, a judge (commissioner on oath), diplomatic or consular authority and notary public certifies document; in England and Wales, solicitors and notary public certify documents.

an award, as he might need to do it according to the manner required by the law of the enforcing or issuing country.

7.2.3 The required documents

The application of article IV of the NYC categorises jurisdictions' required documents into three types: countries that follow the same approach of the NYC; countries that follow a more strict approach than that required under article IV; and countries that follow a less strict requirements.

7.2.3.1 Countries that applied the same approach as the NYC

The first category refers to the countries that require no more or less strict requirements than those stated under article IV, which is to produce either the authenticated original award or a certified copy and the authenticated original arbitration agreement or certified copy.

The United Kingdom is one of the countries that observes the exact requirements of the NYC. In accordance with s 102 of the Arbitration Act 1996, the party seeking the recognition and enforcement of a foreign award under the NYC before the English courts is required to produce either an authenticated original award or certified copy and an authenticated original arbitration agreement or a certified copy of the agreement. The party seeking enforcement can provide the court with an original copy or a certified copy of the authenticated original copy. Section 8(1) of the Civil Evidence Act 1995 provides as follows:

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved-

(a) By the production of that document, or

(b) Whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such manner as the Court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

This essentially means that under the English legal system, the party seeking the enforcement may produce the original copy to the court, or if that is not available, a copy of that document or of the material part of it.

Moreover, English courts have divided the enforcement procedures into two main stages.²³ In the first stage, the court requires the party who is seeking the enforcement to produce the required documents, either authenticated or the certified award and agreement. However, at this stage the court does not examine the validity of the arbitration agreement or any other grounds for refusal. In *Lombard-Knight v Rainstorm Pictures Inc.*,²⁴ the Court of Appeal (Civil Division) overturned a decision by Cooke J in an application that enforcement of an Award should be refused. At the hearing before Cooke J, and in court while waiting for the judge, the defendants, for the first time, indicated that they intended to argue that the Enforcement Order was irregular because *Rainstorm* had failed to comply with s. 102(1)(b) in that the two arbitration agreements had not been produced to the court in the form of either the originals or certified copies. The judge delivered a judgment, indicating that the initial order was irregular. Tomlinson LJ, in delivering the judgment in the Court of Appeal and overturning the decision, said, at [27]:

²³ Lord Justice Tomlinson, 'The enforcement of foreign arbitral awards: the CIARB London branch annual general meeting: keynote address, April 27, 2015' (2015) 81(4) *Arbitration* 398.

²⁴ [2014] 2 *Lloyd's Rep* 74, [2014] *BUS LR* 1196, [2014] *EWCA Civ* 356.

I preface my remarks by observing, as is implicit in what I have already said, that neither the judge nor Rainstorm's counsel had any idea in advance of the hearing that a point on certification would arise. The judge was referred to no authority. Such argument as was proffered to the judge was improvised and unprepared. The judge therefore received no assistance, whereas we have had the benefit of carefully considered argument informed by copious citation of authority and relevant learning derived from the international context.

The Court of Appeal considered that the provisions of section 102 did not require independent certification for the arbitration agreement. Therefore, it was enough to submit the claim form, with the attached copy agreements and a supporting statement of truth in order to fulfil the requirements under section 102. In addition, the court stated that there is no need to verify whether the maker of the statement of truth had compared the copy and the original and found them to be the same. At the second stage, the court examines whether the award should be set aside as one of the grounds for refusal.

The US approach also conforms the NYC, Albeit 9 U.S. Code Chapter 2 – Arbitration did not explicitly implement article VI of the NYC. Pursuant to 9 U.S. Code § 207 – Award of arbitrators; confirmation; jurisdiction; proceeding, it requires that the NYC provision be applied for recognition and enforcement of foreign arbitral award. However, in *Matter of Chromalloy Aeroservices (Arab Republic)*,²⁵ the court held that the foreign award and agreement should be original or duly certified copies, as required by the NYC.

Under the general law principle in the US, the arbitral tribunal determines the authenticity of documents. Under rule 902(3) of the Federal Rules of Evidence, if the award itself was not authenticated, it can be accompanied by a document that states genuineness of the

²⁵ 939 F.Supp. 907, D.D.C., 1996.

signature and the official position of the executing or attesting person. In *U.S. v Deverso*²⁶ it was held there are two basic requirements for authentication of a foreign document. Dubina, CJ said, at 1255 – 1256

There is no requirement in Rule 902(3) that the document itself be signed. See *United States v. Squillacote*, 221 F.3d 542, 562 (4th Cir. 2000). “The rules are written in the alternative — foreign documents may be authenticated by a certification from the official executing the document *or* by an official attesting to the document.” *Id.*

There are two requirements for the authentication of a foreign document. “First, there must be some indication that the document is what it purports to be. Thus, the proffered document must be executed by a proper official in his official capacity, or the genuineness of the document must be attested to by a proper official in his official capacity.” *Id.*; *see also United States v. Doyle*, 130 F.3d 523, 545 (2d Cir. 1997) (noting that the rule is not concerned with establishing the truth of information contained in the proffered document but, instead, is concerned only with “assuring that evidence is what it purports to be”).

“Second, there must be some indication that the *official* vouching for the document is who he purports to be.” *Squillacote*, 221 F.3d at 562.

Hence, the UK and the US are among the countries that required the same documents, the award and arbitration agreement, to be produced before the enforcement court in order to enforce the final award.

²⁶ 518 F.3d 1250 518 F.3d 1250 (11th Cir. 2008), C.A.11 (Fla.) 2008.

7.2.3.2 *More strict requirements*

Some countries require the successful party who is seeking the recognition and enforcement to submit additional documents other than those stated under article IV of the NYC. According to a survey by Hong-Lin Yu,²⁷ it was found that there are eight jurisdictions (India, Indonesia, Latvia, Oman, Sudan, Syria, Taiwan and Yemen) that require further documents as evidence.²⁸

7.2.3.3 *Less strict requirements*

Conversely, some countries require fewer documents than those stated under article IV of the NYC. Hong-Lin Yu found that there are seven countries (Costa Rica, Hungary, Japan, New Zealand, Norway, Peru and Romania) that do not require the original arbitration agreement or a duly certified copy of it to be submitted in order to enforce the arbitral award. Only awards are required in Costa Rica,²⁹ Hungary,³⁰ Japan³¹ and Peru.³² However, in New Zealand, pursuant to section 35(1)(b) of Arbitration Amendment Act 2006, an arbitration agreement is only required if it is made in writing. The courts in Norway require the awards but may not require the arbitration agreement.³³ Article 171 of the Romanian Law states that the parties may not submit the arbitration agreement. However, it requires the party relying on the award to provide: (a) the copy of the foreign decision; (b) the proof of its final character; (c) the copy of the proof of the summons

²⁷ Hong-Lin Yu, 'Written arbitration agreements - what written arbitration agreements?' (2012) 32(1) *Civil Justice Quarterly* 68.

²⁸ The party who is seeking the enforcement might be obliged to follow different domestic evidential requirements to provide other documents along with the required original copy of the awards and arbitration agreements or certified copies of them. For example, the Syrian Arbitration Act under Article 54(b)(4) requires A copy of the minutes evidencing the delivery of the award pursuant to Article (43) hereof.

²⁹ Ley N° 8937, Ley sobre Arbitraje Comercial Internacional basada en la Ley Modelo de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional, (Law No. 8937, International Commercial Arbitration Law based on the Model Law of the United Nations Commission on International Trade Law) art.35.

³⁰ 1994. évi LXXI. törvény. a választottbíráskodásról (Act LXXI of 1994 on Arbitration), Hungary, s.60.

³¹ Law no. 138 of 2003, Arbitration Law, Japan, art.46(2).

³² Decreto Legislativo No 1071 Of 2008, (Arbitration Law) arts 68 and 76.

³³ Lov om voldgift, LOV-2004-05-14-25 (Arbitration Act of May 14, 2004), Norway, s.45.

having been served and of the notification act having been communicated to the party which was not present in the foreign hearing, or any other official act attesting that the party against which the decision was made knew of the summons and the notification act in due time; and (d) any other act to prove further that the foreign decision meets all the other conditions under article 167.³⁴

Moreover, there are other countries with less strict rules than those noted in the survey by Hong-Lin Yu, such as German courts, which consistently hold that petitioners seeking enforcement of a foreign award in Germany under the Convention need only supply the authenticated original arbitral award or a certified copy.³⁵ However, there is no issue arising from the requirement of fewer documentation to enforce the arbitral award, as the court may rely on the application of the most-favourable-law pursuant to article VII of the NYC, which allows courts to apply the law that supports the enforcement of the arbitral award.

7.2.4 Authentication before the Dubai and DIFCC

The UAE is signatory of the NYC under the Federal Decree No. 43 for the Year 2006, but there are no rules requiring fewer or more documents to enforce and recognise arbitral awards. The minimum requirements dictated by article IV of the NYC should be followed by its jurisdictions at the stage of recognition and enforcement proceedings. In *Maxtel International FZE v. Airmec Dubai LLC*,³⁶ the Dubai Court of First Instance held that:

The Court's supervisory role when looking to recognize and enforce a foreign arbitral award is strictly to ensure that it does not conflict with the Federal Decree

³⁴ Arbitration of Private International Law Book IV, Code of Civil Procedure arts 340–370 on Arbitration (as amended by Law No.59 of July 23, 1993), Romania.

³⁵ Germany: Oberlandesgericht, Munich, 12 October 2009 (Swedish Seller v. German Buyer) Yearbook Commercial Arbitration XXXV (2010) pp. 383-385 (Germany no. 134).

³⁶ Court of First Instance Commercial Action No. 268/2010, dated 12 January 2011.

under which the UAE acceded to the New York Convention on the recognition and enforcement of foreign arbitral awards and satisfied the requirements of Articles IV and V of the Decree in terms of being duly authenticated.

However, regarding the governing law of authentication of an arbitral award before DIFCC and DC, article 42(3) of the DIFC Arbitration Law and article 237(1) of Civil Procedure Code states that the authentication shall be made in accordance to the place of arbitration; therefore, the competent authority is determined based on the law of the seat of arbitration.

Last but not least, authentication procedures might vary from one country to another, and the party who is seeking the enforcement should be familiar with the required documents, the competent authority and the law governing authentication before seeking enforcement. Nevertheless, the DC and DIFCC have both stated clearly that the law governing authentication is the law of the seat of arbitration, which leaves the answer to the question of the competent authority depending on the applicable law. However, the legislation in Dubai and DIFC has not provided for the provision of different documents to those in the NYC, an approach that could be determined as the most appropriate one, as it does not leave any confusion, especially compared to jurisdictions requiring more documents.

Despite the different application of article IV of the NYC, the main aim of authentication is to guarantee that the signature in an arbitral award and in the arbitration agreement is genuine. Albert Jan van den Berg supported this idea and stated that ‘The authentication of a document is the formality by which the signature thereon is attested to be genuine.’³⁷

³⁷ Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf.

Between the various approaches and aim of providing for the authentication of relevant documents, the question arises as to whether the authentication of such documents can be achieved by way of documents in electronic format and electronic signatures. This alternative solution to the traditional approaches to authenticate the award might raise the effectiveness and efficiency of electronic awards. The question is whether an electronic signature is able to fulfil the aim of authentication and replace the traditional manuscript signature. Moreover, if the parties signed the arbitration agreement electronically, will the court consider the arbitration agreement original? The same issues arise for the award signed electronically. Therefore, the heart of the issue is whether the present position on digital evidence and electronic signatures are sufficiently acknowledged to replace the manuscript signature to allow the competent authority to authenticate the award and agreement.

The answer to these questions depends on the law of the enforcement court and whether it acknowledges electronic signatures, and if so, which form of electronic signature. Therefore, as the article is concerned with the Dubai and DIFC legislation we will examine the enforceability of electronic signatures before DC and DIFCC. It begins with a brief and broad overview of the use of electronic signatures.

7.3 The electronic signature

Online transactions take place over the internet remotely without the parties meeting, which makes it difficult to recognise the identity of the parties who agreed to the contract, hence raises the issue of the degree of trust.³⁸ Therefore, in online arbitration, parties need

³⁸ Stephen Mason and Timothy S. Reiniger, ““Trust” Between Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?”, *Computer and Telecommunications Law Review*, 2015, Volume 21, Issue 5, 135 – 148

a secure procedure in order to recognise the arbitrator and the parties' signature on the agreement.

Besides requiring authenticated or certified award and agreement, NYC and different national legal systems require the arbitration agreement and award to be signed by parties and arbitrators in order to enforce the arbitral award,³⁹ which might raise some issues regards the identity of the signature holder before the enforcing court (authentication), concerning whether the electronic signature might be the ideal solution to overcome the issue of identity of the arbitrator, parties and witnesses, and whether the courts of Dubai and DIFC support the electronic signature.

It might be arguable that electronic signature is a more reliable method than manual signature as it is generally more difficult to steal an electronic signature than to copy a traditional one. However, the truth is that both manual signature and electronic signature could be stolen and forged.⁴⁰ This was supported by Mason, who suggested that machine or system-made evidence should be neither automatically deemed more reliable than human testimony, nor given evidentiary presumptions.⁴¹ The chip and PIN for debit and credit card security, which has replaced reliance on manual signatures, it still raise several issues as many banks have tried on numerous occasions with various iterations of technology to provide for the certainty that an identified person is interacting with an automatic teller machine (ATM) when obtaining access to an account—yet thieves continue to manipulate banking systems (that is, ATMs and online banking) successfully, stealing considerable sums of money every year.⁴²

³⁹ Article II of the New York Convention.

⁴⁰ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), p. 169.

⁴¹ *ibid.*

⁴² Stephen Mason, 'Debit cards, ATMs and negligence of the bank and customer', *Butterworths Journal of International Banking and Financial Law*, Volume 27, Number 3, March 2012, 163 – 173.

Despite the issues that might arise regard using electronic signatures, relying on electronic signature to authenticate electronic awards is applied widely and has not be restricted due to its importance and efficiency. In a recent case in France, a party issued an electronic power of attorney by relying on a valid electronic signature in order to authorise an agent to act on its behalf all of its rights, such as to lodge appeals before all competent courts and to file a request with the official receiver for the recovery of goods sold with a retention of title clause. Accordingly, the court stated that the electronic power of attorney is valid and it fulfils the requirements of article 1316(1) of the French Civil Code, including the ability to identify the author of the electronic document and the ability to guarantee that the electronic document contents were not changed or amended. The court held that the party relied on an electronic method that complies with the rules relating to the online subscription of contracts, and used secure access codes, which kept the access and submission of documents secure, further relying on printable PDF forms to secure documents from editing after submission.⁴³

Hence, electronic signatures are starting to play a major role in electronic transactions and contracts, and they will increasingly be implemented in the field of online arbitration as a ubiquitous technological signature solution.

7.3.1 The validity test of the electronic signature

There are several of functions for the electronic signature which could be divided into primary and secondary evidential functions.⁴⁴ The primary evidential functions are expressing the consent of the signature holder and to make sure that the signatory is adopting the content of the message.⁴⁵ On the other hand, the secondary evidential

⁴³ 'France: special power of attorney issued online - electronic signature' (2015) Digital Evidence and Electronic Signature Law Review 67.

⁴⁴ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), pp 8-10.

⁴⁵ *ibid.*

functions are stating the identity of the holder of the signature and to state a particular characteristic or status of the signatory such as a government minister or company director.⁴⁶

There are two ways in which the law might set out to test the validity and effectiveness of a signature, yet each test differs from the other as one might be based on the signature form and the other on the function, or both of them.⁴⁷ If the definition is based on the form of the signature, this approach may include different types of signature, and the list might be extended in the future if any future signature fulfils the form requirements. On the other hand, the other approach is based on the functions that the signature should perform, and any signature that satisfies the required functions should be considered valid.⁴⁸

Further, there are various definitions for electronic signature, Smedinghoff defined electronic signature as “any letters, characters, or symbols manifested by electronic or similar means and executed or adopted by a party with an intent to authenticate a writing.”⁴⁹ This definition combines between the two approaches above. Under article 2(a) of the UNCITRAL Model Law on Electronic Signatures (2001), the electronic signature combines the two approaches, and it is very broad to include any existing or future “electronic signature.” It is defined as:

Data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to

⁴⁶ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), pp 8-10.

⁴⁷ Reed C, ‘What is a signature?’ *Journal of Information, Law & Technology*.

⁴⁸ *ibid*.

⁴⁹ Thomas Smedinghoff, “Electronic Contracts & Digital Signatures: An Overview of Law and Legislation” (1999) 564 *P.L.I. Pat.* 125, 162.

indicate the signatory's approval of the information contained in the data message.⁵⁰

The data message under the UNCITRAL means any:

Information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.⁵¹

The approach applied by the UNCITRAL is to consider any electronic signature valid and to have the same legal effect of the ink signature as soon as the electronic signature method can verify the sender identity and link this into the data message that has been electronically signed.

Electronic signature legislations have been implemented at both national and international levels. The importance of these legislations that they will give the electronic signature the same assurance, trust and legal recognition as the traditional signature. For example, in the European Union, the Electronic Signatures Directive (1999) aims to ensure the legal validity of the electronic signature in the EU member states.⁵² Moreover, the UNCITRAL has enacted a Model Law on Electronic Signatures that provides a legislative guide to countries when framing their national electronic signature law,⁵³ which is already applied by many countries, including Jordan, the UK and the US.⁵⁴

⁵⁰ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001).

⁵¹ Law UNCoIT, UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, 2001 (United Nations Publications 2002).

⁵² Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A124118> Last Accessed 17/03/2016.

⁵³ UNCITRAL, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, United Nations (1999).

⁵⁴ UNCITRAL, UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, United Nations (2002). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (last accessed 17/12/2014).

7.3.2 *Types of e-signature*

There are different types of electronic signature that the parties may use. The most famous types are digital signature, personal identification number (PIN), a digitised fingerprint or image of a handwritten signature, biometrics or merely a name typed at the end of an email and short message service (SMS). Each type provides a different level of security based on the technologies involved. Electronic signature based on the security level may be split into two categories, low technology and high technology. Low technology signatures may include printing a name in the end of the document or scanned manuscript signatures, while high technology signatures include biometric records, PIN number, and digital signatures.⁵⁵ Each type will be discussed in more detail in the next part to understand these types more clearly.

7.3.2.1 *Biodynamic technology*

New technologies allow a person to produce a digital version of the manuscript signature using a special pen and pad, then the signature is reproduced on the computer screen in order to take serious record measurements. The speed, rhythm, pattern, habit, stroke sequence, and dynamics of the signer might vary from one person to another, and these measurements can be used to identify and differentiate the genuine signature holder, then the subsequent file can be attached to any document in electronic format to provide a signature.

A manuscript signature could be scanned from a document and transformed into a digital format, then copied to any other document. This procedure might be used if the signature needs to be on numerous documents, as this procedure saves time. In addition, a simple mechanism is to type a name on a document or data message, which might be sufficient

⁵⁵ Aashish Srivastava and Michel Koekemoer, 'Legal Recognition of Electronic Signatures in South Africa: A Critical Overview, The' (2013) 21 *Afr.J.Int'l & Comp.L.* 427.

to identify it as a signature as it equivalent the function of a signature,⁵⁶ but this mechanism constitutes weak evidence, as anyone could print the name of a different person or organisation in order to make the recipient believe that the message originates from a person or entity other than the actual one.

7.3.2.2 *“I accept” or “I agree” icon*

Customers when using the internet to buy goods or services or to install any software on a computer are usually required to click the “I accept” or “I agree” icon to indicate their assent to purchase the items listed in the order form, thus this essentially comprises a signature in terms of its function.⁵⁷ Relying on the “I accept” or “I agree” icon may be less secure compared to the manuscript signature, but it still has the same effect of satisfying the function of the signature and its reliability does not affect its validity.

7.3.2.3 *Digital signature*

A digital signature generally comprises a key pair (a private key and a public key) and a certificate, which is usually issued by a third party such as a certification authority. The signer will use the private key, as the signed document or data message associated with the digital signature will not be able to be edited. In addition, the recipient can use the public key in order to authenticate the signature, without being able to edit the data message or the document.⁵⁸ In other words, digital signature allows the other party to authenticate the digitally signed document and data message.

By signing the message with a digital signature, the private key associates a value with the message using an algorithm, then when the recipient receives the message, he will

⁵⁶ *Hall v Cognos Ltd* Unreported Industrial Tribunal Case No.1803325/97.

⁵⁷ *Moore v Microsoft Corp* 741 N.Y.S. 2d 91 (April 5, 2002) in this case it was held that by clicking “I agree” the terms of the End User License Agreement were valid and binding.

⁵⁸ Fritz Grupe, Stephen G. Kerr, William Kuechler and Nilesh Patel, 'Understanding digital signatures' (2003) 73(6) *CPA Journal* 70.

have to use the public key to check whether the value created by the algorithm is correct by decoding or decrypting the message, usually utilising a public key infrastructure. The public key infrastructure comprises enabling software, hardware and procedures providing the necessary key management, directory and revocation services. The computer should do the whole operation, and the only thing that the human being is required to do is to cause the computer to associate the digital signature with the message.

7.3.2.4 Personal identification number (PIN)

The PIN associated with a credit card or bank has the same function and purpose of the signature: that is, to authenticate the user. The PIN might be useful for users who would like to be identified and authenticated electronically without relying on other tools or devices. The PIN might be less secure if compared to the digital signature, especially as the user shares the PIN with the application provider, but as mentioned above, the reliability of the signature does not affect its validity.

7.3.3 Legislative approaches to electronic signature

This part examines the different legislation approaches to regulate the matter of authenticating online awards and agreements, and assess which one is the most appropriate and effective approach. Electronic signature legislation takes three different approaches,⁵⁹ which have been determined based on the legal status of the electronic signature and its development in the future. The three approaches may be identified as minimalist, prescriptive and “two-tier.” In general, the minimalist approach means that the legislation may consider any technology used as a valid electronic signature that

⁵⁹ Minyan Wang, 'Do the regulations on electronic signatures facilitate international electronic commerce? A critical review' (2007) 23(1) *Computer Law & Security Review* 32. Paul R. Schapper, Mercedes Rivolta and Joao Veiga Malta, 'Risk and law in authentication' (2006) 3 *Digital Evidence & Elec.Signature L.Rev.* 12.

satisfies the legal function of a signature.⁶⁰ Prescriptive approach means that the national legislature provides the electronic signature technology (which is usually the digital signature) that should be used in order to satisfy the legal function of a signature. Finally, the two-tier approach represents convergence and synthesis of the previous two approaches, by which parties may agree on any electronic signature technologies that fulfil the required standards in law, “in particular digital signatures issued by a government licensed or sanctioned certification signature if the parties are using specific service provider.”⁶¹

7.3.3.1 Minimalist approach

The minimalist approach has been adopted mostly by the common law countries such as the UK, USA, Canada, New Zealand and Australia. According to this approach, the country makes any electronic signature technology that is used valid, without stating any rights or obligations on the parties. In other words, any electronic signature technology could be used in these countries, as parties are free to choose the technology that might be appropriate for their transactions.

In this approach, the legislation removes any legal obstacles from online commerce that might prevent the recognition and enforcement of any electronic signature technology. Moreover, countries avoid new regulations as they seek to establish technology-neutral status.⁶² Indeed, this approach prevents considering the electronic signature invalid for just being in electronic form, and gives a wider definition to what constitutes an electronic signature.

⁶⁰ Many common law countries have adopted a minimalist approach legislation. These include the US, the UK, Canada and New Zealand.

⁶¹ Aashish Srivastava and Michel Koekemoer, 'Legal Recognition of Electronic Signatures in South Africa: A Critical Overview, The' (2013) 21 *Afr.J.Int'l & Comp.L.* 427.

⁶² Christina Spyrelli, 'Electronic signatures: a transatlantic bridge? An EU and US legal approach towards electronic authentication' (2002) *Journal of Information, Law & Technology* 2.

7.3.3.2 *The prescriptive approach*

This approach was adopted by the civil law countries such as Germany, Argentina, Malaysia and Italy. Countries that adopt this approach determine only one technology that is considered valid, usually the digital signature based on the public key infrastructure.⁶³ Countries that enacted legislation and regulations under the prescriptive approach adopt asymmetric cryptography as the approved means of creating a digital signature: they impose certain operational and financial requirements on certificate authorities; they prescribe the duties of key holders; and they define circumstances under which reliance on an electronic signature is justified. The approach “allows legislatures and regulatory agencies to play a direct role in setting standards for and influencing the direction of new technologies.”⁶⁴

7.3.3.3 *Two-pronged approach*

Some countries that adopted the prescriptive approach found that it is not mutually exclusive, so they amended their legislation and regulations to a two-pronged approach, such as Italy and Germany. It should be noted that the first country to adopt this approach was Singapore in 1998, and it since found support in the European Union.⁶⁵

The main advantage of this approach is that the countries that have adopted it provide regulations that are compatible for any future electronic signature technology, without specifying any particular one. This approach combines between the previous two approaches, as the country may set the requirements for electronic authentication methods

⁶³ O. A. Orifowomo and J. O. Agbana ESQ, ‘Manual signature and electronic signature: significance of forging a functional equivalence in electronic transactions’ (2013)(10) *International Company and Commercial Law Review* 357.

⁶⁴ Chris Kuner and others, ‘An analysis of international electronic and digital signature implementation initiatives’ (2000) A Study prepared for the ILPF by The Brussels office of Morrison & Foerster LLP and the Washington, DC office of Steptoe & Johnston LLP.

⁶⁵ http://r0.unctad.org/ecommerce/event_docs/bangkok/hayat.pdf [last accessed 22/12/2014] Boss AH, ‘Searching for security in the law of electronic commerce’ (1998) 23 *Nova L Rev* 585.

with a certain minimum legal power (minimalist approach) and by attributing greater legal effect to certain widely used techniques (digital signature approach). This consolidated approach generally takes the form of enacting laws that prescribe standards for operation of public key infrastructures, and concomitantly takes a broad view of what constitutes a valid electronic signature for legal purposes.

Countries have developed their legislation and models for equivalency between electronic and manual signatures. The new provisions of the models and legislative enactments require electronic and manual records and information, rendered either online or in manual form, to be treated the same, with the same legal effect, validity and enforceability. The new provisions also aim to place alternative e-signature technologies on an even footing and to encompass current signatures and documents and potential future technologies.

Noticeably, parties may agree on the electronic signature format that might be convenient for them and their transaction, guided by relevant local legislation. The electronic signature legal admissibility might be guaranteed, but it is the court's competence to evaluate the evidentiary weight on a case-by-case basis. In conclusion, the recognition and admissibility of the electronic signature depends on two main aspects: whether the applicable law recognises and enforces the electronic signature; and whether the electronic signature fulfils the requirements of the applicable law, such as the capability for identification, attribution and proof of assent or intent of the signer.⁶⁶

In the absence of any case law, it is not clear whether the authentication of an electronic signature can be sufficient and fulfil the requirements under article IV(1)(a), but the aim of the authentication of an electronic signature is to establish that the award is genuine

⁶⁶ Stephen Mason, 'Electronic signatures in practice', (2006) *J High Tech L* 148.

and original. There is no reason to prevent an electronic generated copy, with assurances of authorship and integrity, being considered a duly certified copy within the meaning of NYC article IV. It is also possible for the authentication of the electronic award to be proved by printing out the award in readable format for examination. The burden of proof that the award has been authenticated relies on the party seeking the enforcement, which could be proved by evidence that the document had been digitally signed by the person (arbitrator) who is purported to have signed it.⁶⁷

Implementing the electronic signature internationally has a great impact on online arbitration as it saves extra costs and time on parties. Particularly, the parties in online transactions might end the whole transaction over the internet without meeting at all, which makes it important for parties to have a technologically appropriate electronic signature for identity purposes. Therefore, electronic signatures play a major role in online arbitration, and help to identify parties, arbitrators and witnesses with reduced cost. The two-pronged approach might be preferable for online arbitration, because it provides flexibility and certainty in relation to electronic signatures, by giving the parties the ability to choose the appropriate technology in relation to the cost and security that is suitable to their needs.

7.4 Electronic signatures before DC

In 2002, Dubai issued a law in regard to electronic commerce, the Dubai Electronic Transactions and Commerce Law, in response the UAE issued the ETCL in 2006. The new law reflects the Federal government's efforts to regulate electronic transactions and raise users' confidence.⁶⁸ The UAE has subsequently made further amendments to the

⁶⁷ Gabrielle Kaufmann-Kohler and Thomas Schultz, 'The use of Information Technology in arbitration' (2005)(5. Dezember) Jusletter.

⁶⁸ Samer M. Qudah, 'Legal Insight on the Dubai Electronic Transactions and Commerce Law No. 2 of 2002' (2002) 17 *Arab Law Quarterly* 283.

existing legislation to increase conformity with the ETCL. For example, Federal Law No. 36 of 2006 amended the Law of Evidence in Civil and Commercial Transactions promulgated by Federal Law No. 10 of 1992 to state that an electronic signature complying with the provisions of the ETCL is considered equivalent to the traditional signature. In addition, the new amendments gave electronic writing, communication, records and documents that comply with the provisions of the ETCL the same affect and force as accorded to official and traditional writing and communication under the aforementioned Law of Evidence. The ETCL itself defined the electronic signature in Article 1 as:

A signature composed of letters, numbers, symbols, sound or electronic processing system attached or logically connected to an electronic message imprinted with intent of ratification or adoption of that message.

The ETCL adopted the two-pronged approach, as it sets out several requirements to consider the electronic signature valid with special reference to the digital signature. According to the law, the electronic signature is considered valid if it meets specific conditions, which are the ability to provide a reliable method of identification of the person who is using it and an evidence that the signatory genuinely intended consent.⁶⁹ Moreover, the party is entitled to rely on the protected electronic signature if it fulfils the meaning according to article 18 and it is reasonable to rely on it; the required factors under article 18 are examined below. The main question regarding the ETCL is whether it is able to provide efficient and cost-effective authentication procedures that are reliable.

⁶⁹ Article 8(1), Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law.

7.4.1 *The limits of relying on e-signature in e-awards*

Regarding the ability to benefit from electronic signatures in online arbitration, especially authenticating the electronic signature. Generally, the law shall allow relying on electronic signatures in most circumstances. However, the ETCL provides for several limitations in its application, chiefly concerning matters of civil status including marriage, divorce and wills, title deeds of real estate, bonds in circulation, transactions concerning the sale and purchase of real estates (disposition and rental for periods in excess of ten years and the registration of any other rights related to it), any document required by Law before Notary Public, and any other documents or transactions to be excluded by a special legal term.⁷⁰

It is possible to rely on an electronic signature in order to authenticate an award and arbitration agreement providing the notary public is not required to authenticate such an award. As explained above, in DC and DIFCC the competent authority to authenticate the award is determined by the law of the seat of arbitration. In addition, there is no problem regarding reliance on a protected electronic signature to authenticate the award, as discussed above (the main aim of the authentication is to confirm that the signature on the award is genuine by a competent authority).

However, there are shortcomings in regard relying on the electronic signatures. The main issue that might arise is regard the ability to determine whether the signatory was the one who signed the agreement or not. In this regard Mason explains that “when a private key to a digital signature is used, a recipient will not know whether it was the owner that actually used the private key”.⁷¹ For instance, in the Portuguese case of (Evora) Ac. RE 13-12-2005 (R.982/2005), despite that the email was sent and attached with a digital

⁷⁰ *ibid*, Article 2(2).

⁷¹ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), p 121.

signature, the court held it is insufficient to determine that the sender caused the digital signature to be affixed to the message.

However, in order to add more reliability to the electronic signature the password should be well protected which will raise the security of the private key. Also, the security of the private key could be raised by setting security to high which means that the signatory will be required to enter the password each time. Another approach to raise the security is to improve the quality of the password. Moreover, the combination of a password with and the biometric measurement of a fingerprint could be utilized to protect the digital signature.⁷²

Despite the shortcomings in the digital signature it still considered as ideal approach to authenticate the arbitration agreement and award. The next part examines whether the ETCL is able to provide a reliable authentication procedure and whether it accepts electronic signature as a valid authentication procedure.

The next part examines whether the ETCL is able to provide a reliable authentication procedure and whether it accepts electronic signature as a valid authentication procedure.

7.4.2 Electronic signature requirements

In offline transactions or communications it is easier for parties to identify and recognise each other, as they both rely on customary approaches on the credentials such as drivers' licenses or passports.⁷³ The problem is different for online transactions. Relying on a party's identity card is only sufficient in case that the person who is checking the card is able to perform the biometric checks necessary to establish the connection between the

⁷² Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), p 290.

⁷³ D. Scott Anderson, 'What trust is in these times? Examining the foundation of online trust', 54 *Emory L.J.* (2005) 1441, pp. 1444-1450. Nicholas Bohm and Stephen Mason, 'Identity and its verification' (2010) 26(1) *Computer Law & Security Review* 43.

card and the purported true holder.⁷⁴ Moreover, there is the matter of the many names that are not unique that might arise in both online and offline transactions.⁷⁵

The importance of relying on a trusted third party is to certify the connection between a person and their public key, is recognised under article 1 of the ETCL which defines the third party as the Authentication Services Provider, also known as Certification Authority:

Any person or duly accredited party issues electronic authentication certificates or any services or tasks related to it and to electronic signatures regulated by the provisions of the present Law.

One of the main roles that the authorised third party provides is to validate parties with each other, especially those that have not done any previous transactions together, in order to identify each party involved in the transmission of transactional data. Therefore, one of the major functions that the law gives the Certificate Authority is to confirm the link between the signature and a particular person by issuing a certificate to approve the link and attest to some fact about the subject of the certificate.⁷⁶

The formal term under ETCL for a Certificate is 'Electronic Authentication Certificate,' defined as 'A certificate issued by authentication services provider in which he indicates the identity of the person or the party acquiring a specified signature tool.' The ETCL clearly states that the electronic signature supported by a certificate issued by an accredited Certificate Authority would ordinarily comply with statutory requirements as proof.⁷⁷

⁷⁴ Nicholas Bohm and Stephen Mason, 'Identity and its verification' (2010) 26(1) Computer Law & Security Review 43.

⁷⁵ *ibid.*

⁷⁶ A. Michael Froomkin, 'The essential role of trusted third parties in electronic commerce', 75 Or. L. Rev. (1996) 49.

⁷⁷ Article 17(2), Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law.

Regarding the application of protected electronic signature, the law states that the responsibility to confirm whether the certificate is valid, suspended or revoked lies with the party relying on it. Article 18(2) provides the relying person is responsible for consequences of failing to verify the certificate.⁷⁸ Article 18(2) states:

“When electronic signature is enhanced with electronic authentication certificate, the party relying on that signature shall be responsible for the consequences of his failure to adopt necessary reasonable steps to verify the validity and applicability of such certificate, and whether it is suspended or cancelled, and observance of any restrictions concerning the electronic authentication certificate.”

The factors to be considered by the relying person to decide whether using the electronic signatures is reliable, include the type of transaction, the value or importance of the transaction, whether the relying party took the required steps to verify whether the electronic signature was supported by a certificate, and the dealing or trade usage between the two parties. The ETCL under article 18(3) states other factors that should be determined in order to be able to rely on an electronic signature, including the nature and value of the transaction, and whether the relying party took the required steps to verify that the electronic signature is enhanced by electronic authentication certificate or is supposed to be so, and to verify whether the electronic signature is void.

A protected electronic signature is verified by authentication procedures, whether the parties have agreed or if it is designated by law. The method of authentication examines whether an electronic signature fulfils a number of requirements, such as being unique to that person and the ability to confirm the identity of that person. In addition, the electronic signature should be under the person’s control at the time of signing. Finally, it ought to

⁷⁸ *ibid*, Article 18(4).

be possible to link the electronic signature to the data message confirming the party's consent.⁷⁹

The protected electronic signature is considered to be reasonable and accepted unless established otherwise.⁸⁰ Moreover, the protected electronic signature is considered to be reliable, related to the purported person and reflecting that person's consent to the data message, unless there is evidence to the contrary.⁸¹

7.4.3 Certification authorities under the ETCL

The ETCL widely regulates matters related to the licensing of the Certification Authority, including such issues relating to liability, and the powers to suspend and revoke certificates as required. Under the ETCL, the Minister of Economy and Planning has the authority to appoint the Controller of Certification Services, and the latter is required to regulate the licensing and operational activities of Certification Authorities. The duties of the Certification Authorities under the ETCL are to provide subscribers or other relevant parties with any representations it makes, to ensure that all the information representation in the Certificate is accurate and complete, to provide access to the relying third party with certain information such as the identity of the Certification Authority, to ensure that the subscriber has control over the private key at certain times, and other information that might be reasonably accessible. Moreover, the Certification Authority is obliged to employ a trustworthy computer information system, procedures and personnel.⁸² It should be noticed that in Dubai, Certificate Authorities are required to have a license.

A person applying for a certificate is required to provide the Certificate Authority with identification documentation before making the application, then if the Certificate

⁷⁹ Article 17(1), Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law.

⁸⁰ *ibid*, Article 17(2).

⁸¹ *ibid*, Article 10(3).

⁸² *ibid*, Article 18(1).

Authority is satisfied that the applicant has provided correct identity and all the required information is correct, then applicant has to pay the fees.

According to article 21(1)(c), the information that should be provided by the Certification authority in the Certificate is the identity of the subscriber, specifying that the subscriber has control over the private key at the time of issuance of the Certificate, stating any limitations regarding the purpose or value of the Certificate, expressing any liability toward the Certificate by any relevant person and providing that the private key was effective at the time of issuance.

The ETCL is not restricted to one technology. The ETCL defined the Protected Authentication Procedures as:

Procedures aiming to ascertain that an electronic message is initiated by or to a certain person, and to discover any error or modification in contents, sending or saving an electronic message or an electronic record within a fixed period, this shall include any procedure uses mathematical methods, symbols, words, identification letters, codes, procedures of reply or acknowledgment of receipt and other means of information security procedures.

In this definition, the aim is to give effect to any future technology that might evolve, and not to a particular technology that might exclude other forms.

In order to add more security and reliability to the electronic signature, the ETCL requires that the subscriber inform the Certification Authority and relying third parties when the private key is compromised, or there is a likelihood that the security might be compromised. Further, it obliges the subscriber to employ reasonable care to ensure that all material representations made to the Certification Authority when applying for

issuance of the Certificate, and all information contained in the Certificate, are accurate.⁸³

Failing which, the subscriber is considered to be responsible for any damages occurred by relying third party.⁸⁴

The ETCL aims to provide parties with secure and reliable use of electronic signatures. Therefore, it created the compulsory system of licensing of Certificate Authorities, which is implemented by the Authenticated Services Controller, appointed by the UAE Cabinet. The role of the Certificate Authority is of vital importance, as it ascertains the participant identity, and establishes whether the electronic signature used belongs to the participant at the time of signature. In addition, the ETCL provides the Controller the ability to observe whether the Certificate Authority is capable of carrying out its duties and if it is qualified to carry out its work. Otherwise, the Controller has the right to suspend or revoke the Certificate Authority's license.

The ETCL also provides for a number of crimes punishable by fines, imprisonment, or both, including to fraudulently publish a Certificate, breach a duty of confidentiality, use electronic apparatus in order to carry out another crime and give false or unauthorized information to a Certificate Authority. The ETCL set imposes several penalties on the party who "creates, publishes, provides or submits any electronic authentication certificate, which includes or refers to incorrect data with his knowledge of this."⁸⁵ However, the ETCL provide that the Certificate Authority is responsible for any damages caused, unless it clearly excludes its responsibility, or it proves that it was not negligent, or its action were carried out by mistake.⁸⁶ The Certificate Authority is considered responsible for any damages caused to a third party relying on a qualified certificate

⁸³ *ibid*, Article 19(1).

⁸⁴ *ibid*, Article 19(2).

⁸⁵ *ibid*, Article 26.

⁸⁶ *ibid*, Article 21(4).

issued by them, unless it is able to prove that it has not acted negligently.⁸⁷ Further, the ETCL provides for penalties for the Certificate Authority, such as fines and imprisonment, and it holds it responsible for damages. However, the Certificate Authority may reduce their liability toward a third party by setting a limit for the financial transactions or by limiting the use of the certificates to particular transactions.

7.4.4 Enforceability of foreign certifications

Parties may rely on foreign certificate authorities to authenticate electronic signatures. The question that might arise here is whether an electronic signature certificate provided by a foreign certification service could be valid before DC, and what conditions are necessary to validate foreign electronic certificates. In general, the DC validate and recognise foreign and domestic certificates and electronic signatures equally,⁸⁸ but there are certain conditions imposed on the Certificate Authority to recognise foreign issued certificates and electronic signatures. The law in Dubai requires that the foreign Certification Authority have equivalent or higher standards of reliability compared to those required for certification in Dubai, which also applies in respect to electronic signatures.⁸⁹

Parties are allowed to agree on a particular Certification Authority, or a particular category of Certification Authority to be used and a particular class of Certification.⁹⁰ Further, any agreement between parties regarding a particular certificate and electronic signature is enforceable and effective in the Emirate of Dubai.

The law requires the foreign electronic signature to fulfil the essential factors set out in article 21(2) in order to be valid and effective before the courts of Dubai. Article 21(2)

⁸⁷ *ibid*, Article 26.

⁸⁸ *ibid*, Article 23(1).

⁸⁹ *ibid*, Article 23.

⁹⁰ *ibid*, Article 23(6)(a).

requires several factors such as the certificate shall indicate that the person had control over the signature tool at the relevant time and the degree of discrepancy between the law applicable to the conduct of the Certification Authority and the law of the UAE.

7.4.5 Discussion and recommendations

The ETCL aims to improve the authenticity and integrity of electronic transactions by validating electronic signatures and documents as acceptable substitutes for manuscript signatures. Therefore, parties may rely on electronic documents signed by electronic signature, which fulfils the statutory requirements for manuscript signatures.

First, the ETCL should state explicitly that the electronic signature shall satisfy the use of manual signature. Moreover, it should state the legal effects of protected electronic signature, electronic signature equivalent, and handwritten signature. Despite that the ETCL states in article 8 that the protected electronic signature should be sufficient if there are specific results required upon the signature on the document, this article is still vague and may lead to confusion regarding the validity and enforceability of the electronic signature. Hence, the law should clearly state that the protected electronic signature is equivalent to a handwritten signature to avoid misunderstanding of the use of electronic signature.

Regarding the protected electronic signature, it is suggested that the ETCL should have described it more clearly. The main issue in respect to article 18(1) of the law is that it includes some terms that might be confusing, such as ‘reliable is acceptable.’ Although the parameters of the term ‘reliable being acceptable’ are explained in article 18(3), it is still ambiguous. Article 18(3) explains the factors that should be examined to determine the ability to rely on the electronic signature, which reads as follow:

“To determine whether it is possible for a person to rely on an electronic signature or electronic authentication certificate, the following factors must be considered:

a - Nature of the concerned transaction intended to be enhanced by the electronic signature.

b - Value or importance of the concerned transaction if acknowledged by the party relying on the electronic signature.

c - If the person relying on the electronic signature or electronic authentication certificate, has adopted appropriate steps to determine the extent of reliability of electronic signature or electronic authentication certificate.

d - If the party relying on the electronic signature has adopted appropriate steps to verify that the electronic signature is enhanced by electronic authentication certificate or supposed to be so.

e - If the party relying on the electronic signature or electronic authentication certificate, has known or should have known that the electronic signature or electronic authentication certificate was violated or cancelled.

f - Agreement or previous dealing between the originator and the party relying on the electronic signature or electronic authentication certificate or any other commercial custom common in this matter.

g - Any other related factor.”

There is some ambiguity that has yet to be resolved in order to avoid the scenario in which the reliable party may escape his obligations. The same term has been used in article 13(3) of the Electronic Communications and Transactions Act 25 of 2002 in South Africa.

Hence, it will be useful to compare the Electronic Communications and Transactions Act 25 of 2002 in South Africa. Article 13(3) reads as follow:

- (a) a method is used to identify the person and to indicate the person's approval of the information communicated: and
- (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

Aashish Srivastava and Michel Koekemoer stated that the language used in the act is vague, and it helps parties to evade their obligations:

Such language in the Electronic Communications and Transactions Act 25 of 2002 gives an opportunity to a party to a transaction that required a signature to attempt to escape its obligations by denying that any of the parties' signatures were valid on the ground that the method of signature employed was not as reliable as appropriate.⁹¹

Moreover, the reliability test might be use by one of the parties in a way to avoid the agreement. As explained by John D. Gregory,⁹² the relying party might know the person who signed the document, although he might try to avoid his liabilities by arguing that the method of the electronic signature was unreliable enough for the transaction, in order to invalid the signature and the whole transaction. The core issue regarding these factors

⁹¹ Aashish Srivastava and Michel Koekemoer, 'Legal Recognition of Electronic Signatures in South Africa: A Critical Overview, The' (2013) 21 Afr.J.Int'l & Comp.L. 427.

⁹² John D. Gregory, 'Must e-Signatures be reliable?', 10 Digital Evidence and Electronic Signature Law Review (2013), 67.

is that they might vary from one party to another, besides which the essential elements to consider the electronic signature is protected or not are not identified.⁹³

Another issue regard the reliability test has been raised by a number of authors.⁹⁴ Relying on the reliability test has been criticised as a result of its lack of equal treatment of electronic signature with manual signature. John D. Gregory criticised the reliability test, and he argued that it is sufficient to rely on the party's experience to decide whether the signature is reliable or not. He also argued that such an approach does not add any value to the signature, although it only transfers the question of reliability from the parties to the judge.⁹⁵

In general, the ETCL provides a framework that increases the use of electronic signatures and ensures the installation of practical electronic certification systems. It also considers the speed at which technological improvements and systems are occurring. By recognising foreign certificates, the ETCL allows the application of international electronic signature in Dubai. However, the law does not state exactly the factors required from foreign Certificate Authorities to validate its electronic certificate. Article 23(2) states that in order to consider the foreign electronic certificate valid then it should fulfil the required standards in article 20, but article 20 does not state any requirements. It reads:

For the purposes of this Law, the Council of Ministers shall designate an authority to control over authentication services and particularly for the purposes of

⁹³ Emad Abdel Rahim Dahiyat,, 'The legal recognition of electronic signatures in Jordan: some remarks on the Electronic Transactions Law', (2011) *Arab Law Quarterly* 297.

⁹⁴ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), pp 103-104pp 257-258 and John D. Gregory, 'Must e-Signatures be reliable?', 10 *Digital Evidence and Electronic Signature Law Review* (2013), 67 – 70.

⁹⁵ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), pp 103-104pp 257-258 and John D. Gregory, 'Must e-Signatures be reliable?', 10 *Digital Evidence and Electronic Signature Law Review* (2013), 67 – 70.

licensing, authentication and controlling the activities of authentication services providers and its supervision.

The most appropriate approach is to state the required standards on the same article, which will leave no confusion for parties, especially as article 20 establishes the authority of the Council of Ministers and its main services, and it does not state any standards to be applied.

In conclusion, the ETCL has come a long way and successfully kept up to date with technology and with any kind of law on identity and security. The effectiveness of a digital signature will depend on the individual's risk management procedures. The law can only go so far in protecting technological security, and it is up to parties to ensure that it is enforced, adhered to and protected.

7.4.6 The ability to rely on electronic signature to authenticate electronic awards

As noted above, the law in Dubai supports the validity of electronic signature, and it provides a reliable method to authenticate the electronic signature by relying on a trusted third party. However, the law excludes the documents that should be notarized from the application of the electronic signature, an exclusion that might affect relying on the electronic signature if the applicable law requires the award to be authenticated by the notary public. Nevertheless, relying on the electronic signature to authenticate the electronic award is valid. The main advantage of relying on electronic signature in online arbitration is that it helps parties to identify each other by relying on a trusted third party. Moreover, relying on electronic signature has other benefits and helps to conduct the whole of procedures online, such as taking the testimony of witness or expert.

Moreover, under the ETCL the foreign electronic signature and certificate are explicitly considered valid and equivalent to the domestic electronic signature, which might be considered as a great approach especially to international commercial arbitration.

The ETCL does not provide for any requirement for the certification authority to have sufficient financial and pecuniary assets. Arguably, the law should require the certification centre to have the financial capability to compensate the losses of users for any damages occurred because of the failure of the certificate centre, such as if the information contained in the key certificates is vague and inaccurate.⁹⁶

Determining who is responsible for any damaged caused due to unlawful use of a digital signature is a critical issue in the field of electronic signatures. The question of liability might be a critical issue in regard authenticating of an electronic award. The final award that is electronically signed and authorised by the certificate authority is directly enforceable before the enforcing court. Hence, any unlawful use of the electronic signature might cause damages and affect the legal rights of the parties due to having unauthorised access to the electronic signature of the arbitrator.

Moreover, under the ETCL, the foreign digital signature and certificate are explicitly considered valid and equivalent to the domestic electronic signature, which might be considered as a great help, especially in relation to international commercial arbitration.

The application of the digital signature under the ETCL supports the aim of main authentication required by the NYC, which is to guarantee that the signature is genuine and related to the holder of the signature at the time of signing the document. As explained

⁹⁶ Olga I. Kudryavtseva, 'The use of electronic digital signatures in banking relationships in the Russian Federation', *5 Digital Evidence and Electronic Signature Law Review* (2008), 51 – 57

earlier, the Certificate Authority has the ability to fulfil these requirements and could replace the competent authority to authenticate.

7.5 Electronic signature under the DIFC

Contrary to Dubai, the DIFC has not applied a separate law to regulate the electronic signature. However, it has posted the proposed Electronic Transaction Law for public comment; this proposed law aims to create a secure legal environment for companies in DIFC to undertake electronic transactions.⁹⁷ The proposed law is based on the Uniform Electronic Transactions Act 1999 (UETA) drafted by a committee of the National Conference of Commissioners on Uniform State Laws in the US and adopted by most states in the US. The UETA contains provisions derived from, among others, the UNCITRAL Model Law on Electronic Signatures and Canadian law. However, to-date it has not been enforced.

According to the current rules of the DIFC, the electronic signature might still be enforceable, as article 6(3) & 6(4) of the Rules of the DIFCC state:

6(3) Where these Rules require a document to be signed, that requirement shall be satisfied if the signature is printed by computer or other mechanical means.

6(4) Where a replica signature is printed electronically or by other mechanical means on any document, the name of the person whose signature is printed must also be printed so that the person may be identified.

⁹⁷ <https://www.difc.ae/news/difc-posts-electronic-transactions-law-public-consultation>.

However, relying on the articles above to enforce and validate the electronic signature is not sufficient because it emphasises the signature in printed form, and does not appear to include signatures in electronic format, including digital signatures. The law should consider regulation of digital signatures, electronic certification and certificate authorities in order to be able to apply and validate digital signatures at the national and international levels and increase its reliability within parties.

As mentioned earlier, the importance of having a trusted third party to provide a certification for parties is the core of the public key, otherwise there will be no one able to certify the connection between a person and the public key. Moreover, the trusted third party role is to ensure the authenticity of the public key by providing parties with a certificate, which binds a name string to a public key. Therefore, the trusted third party whom required to produce the certificate is vital as the certificate helps to identify the signatory, the subscriber's public key, identify the certification authority and it is signed with the certification authority's private key.⁹⁸

7.6 Conclusion

The NYC Article IV requires the party seeking enforcement to support the application with authenticated or certificated copies of the award and arbitration agreement. There are several issues relating to this article, such as the issue of the governing law, the required documents according to different courts' approaches, and the competent authority.

It has been established that the law governing the authentication or certification is of vital importance, as it decides the required documents and the competent authority. Hence, the competent authority might vary from one country to another, as it might be the notary

⁹⁸ Stephen Mason, *Electronic signatures in law* (Cambridge University Press, 2012), p. 266.

public, foreign ministry or registered lawyers. The required documents might also vary, according to the law of the enforcement country, as some countries have more stringent approaches than the NYC while others are more relaxed, requiring the award only. The most expeditious approach is to apply the requirements stated under the NYC provisions. The applicable approach in Dubai and DIFC is the same as stated in the NYC, although the courts require the authentication to be done according to the law of the seat of arbitration.

The ability to rely on the electronic signature as a method of authentication in electronic awards and agreements was evaluated. The chapter began by defining the electronic signature and its main requirements, then continued by explaining the different types of electronic signature and legislative approach . Accordingly, relying on electronic signatures to authenticate electronic awards and agreements is considered valid as it fulfils the requirements of Article IV of the NYC, greatly benefiting all parties in terms of saving time and costs, and facilitating the occurrence of all procedures online, with neither parties nor arbitrators meeting. Overall, it is more convenient to recognise and rely on protected electronic signatures to identify parties.

The third part critically analysed the Electronic Transaction and Commerce Law in Dubai and the ability to enforce electronic signatures before DC. The protected electronic signature is strong confirmation of both the identity and integrity of the document, which make it easier and reasonable to identify the producer of the document and to whom it relates. The digital signature security comes from the certification process that is applied. The digital signature process compares the user's private key with a certified public key to assure authenticity. The Certificate Authority is a third party that is responsible for controlling and providing this service and issuing a certificate to confirm that the private key relates to the same user and was used by him at the time of the signature.

Moreover, relying on a protected electronic signature fulfils the requirements of Article IV, which is that the signature on the award is confirmed as genuine by a competent authority. In this case, the competent authority is the Certificate Authority, which examines the identity of the electronic signature holder, and confirms whether the electronic signature belongs to the person who used it, guaranteeing that it was controlled by the right person at the creation or usage at time of signing, and it examines whether the electronic record that is linked to the electronic signature was changed or amended. Relying on the protected electronic signature to authenticate an electronic arbitral award can be valid and effective.

The NYC does not prohibit parties from enforcing an electronic arbitral award that is signed electronically; on the contrary, it supports the approach to apply pro-enforcement bias, which means that the court may apply less strict rules than those required in the NYC in order to enforce the final award.

In order to guarantee the enforceability of the electronic signature before DC, several recommendations were made. First, is stating explicitly that an electronic signature can replace the manual signature. Secondly, the term “reliable”, which may cause confusion between the parties, should be explained clearly in the law. Finally, the law should state clearly the required standards to consider \ foreign electronic signature valid.

The final part focused on the enforceability of electronic signatures before DIFCC. However, given the lack of legislation over the regulation of the electronic signature, it is recommended that the DIFC take the same approach as Dubai, and enforce legislation that regulates the enforceability of electronic signatures and Certificate Authorities in DIFC, as the current situation may lead to invalid and unenforceable electronic signature.

8 Chapter Eight: Conclusion

8.1 Findings and recommendations

The study has examined the challenges to using IT in arbitration and how the sole use of such technology might affect the enforcement of arbitral awards, according to the provisions of the NYC, before the DC and DIFCC. It has also evaluated the legal systems prevailing under the DC and DIFCC, as to whether they are ready to validate the use of modern technology in arbitration and enforcing the final award. It proposes some legal reforms to solve such problems and improve the reliability of DC and DIFCC as modern courts in enforcing awards concluded by online arbitration. The importance of this examination lies in the fact that there are major issues in regard to the use of IT in arbitration that could adversely affect the enforcement of the final award.

The study explored the main obstacles to using IT in arbitration that might affect the enforceability of the final award: the validity of electronic arbitration agreements, the enforceability of consumer arbitration agreements concluded online, issues concerning conducting the procedures online, and electronic authentication of the final award. Each has been examined in a separate chapter and the issues and possible solutions explained.

The first issue is the validity of the electronic arbitration agreement. It was explained that the electronic arbitration agreement does not fulfil the writing requirement pursuant to Article II of the NYC. Several solutions are suggested, such as relying on the electronic signature, interpreting Article II broadly to include using modern technology, and applying the principle of the most-favourable-law (as stated in the Convention). The efficiency and validity of these solutions depend on the enforcement court and the applicable law.

By examining these solutions in the context of DIFCC and DC practice, shortcomings were found regarding application of the first solution, as the electronic signature is not always reliable. No cases were found in regard to the second solution, interpreting Article II broadly, which makes its adoption unreliable. The third solution might be appropriate and more likely to enforce electronic arbitration agreements before DIFCC. Arbitration Law in the DIFCC explicitly supports modern technology, stating clearly in Article 12(5) that an arbitration agreement may be concluded by an electronic communication, defined in the same article as “any communication that the parties make by means of data messages”.

However, the situation before DC is different, as the applicable law does not explicitly support modern technology in its arbitration rules. Hence, an arbitration agreement conducted via electronic communication might not be enforced before DC. Several solutions were suggested to overcome this problem by validating the electronic arbitration agreement, for example by relying on the provisions of the ETCL to enforce it via email, click-wrap and browser-wrap. As the arbitration rules under the Civil Procedures Code do not support modern technology, the court may examine whether the electronic arbitration agreement fulfils the writing requirement under the rules of the ETCL. The study examined the most common methods to conclude online contracts and found that email, click-wrap and browse-wrap would fulfil the writing requirement pursuant to Article II of the NYC, although shrink-wrap is insufficient as it is unable to provide a printable document for the contract.

The second solution is to prove that the acceptance was communicated from the sender’s machine. However, the main issue in relying on this solution is that it is unclear whether the court would apply it in cases where the sender uses a different machine but his own account. The third solution is to rely on the manual signature. The last is to enforce the

award before DIFCC, in which case DC will have to enforce the DIFCC order without examining the merits of the decision. However, the last solution might be the most appropriate, as the enforcing party will guarantee the validity of the arbitration agreement according to the DIFC Arbitration Law that supports the electronic arbitration agreement. Moreover, DC will not have the authority to examine the merits of the DIFCC order, which will ensure the enforcement of the award.

The solutions suggested by the author may help to ensure the enforcement of the electronic arbitration agreement and increase the reliability of DC enforcement of modern arbitration agreements. However, in enacting the new federal arbitration legislation, DC may rely on the most-favourable-principle to enforce the electronic arbitration agreement, as the new federal law explicitly supports the use of modern technology to conclude arbitration agreements. Nevertheless, in order to solve this issue at the international level and increase reliability in the use of electronic arbitration agreements, the NYC itself should be amended. Despite the different challenges to amendments, such as the acceptance of all the state parties, this is still considered to be the best solution, as it will bind the courts to enforce the arbitration agreement concluded via modern technology and there will be no room for interpretation. Moreover, this solution will be applied internationally and increase the reliability of the enforcing arbitration concluded via modern technology, instead of leaving the matter to the local enforcement court.

The second obstacle facing online arbitration is the enforceability of arbitration agreements in consumer disputes. As the UAE has declared no reservations in enforcing the NYC, consumer disputes are included within commercial disputes, so awards against consumers could be enforced by relying on the NYC. Consumer disputes should be protected from referral to arbitration unless their consent was examined to determine the real intention to arbitrate. As explained previously, in e-commerce consumers might

accidentally agree to an arbitration agreement included within the terms and conditions of the contract, which are generally non-negotiable and issued on a take-it-or-leave-it basis. However, consumers should be protected, and their intention to agree to an arbitration agreement should be examined before enforcing the final award. Nevertheless, consumer disputes should be considered part of the public policy or non-arbitrable in order to enable the enforcement court to set the award aside according to Article V(2) of the NYC.

The main issue in the UAE, including the DC and DIFCC, is that consumer disputes are arbitrable. In other words, the final award in consumer disputes might be enforced before DC and DIFCC due to the lack of protection for consumers. However, they might be part of the issue of public policy despite the lack of provisions that state this clearly. By examining whether consumer disputes are part of the public policy in DC and DIFCC, it was found that DC used the concept of public policy widely to allow include consumer arbitration within matters that are part of public policy. Nevertheless, the study continued to examine whether there are rules to protect consumers under the provisions of the DIFCC and DC (i.e. whether pre-dispute arbitration agreements are enforceable before the DC and DIFCC).

Under the provisions of the DIFCC, Article 12(2)(b) states clearly that the arbitration agreement in consumer and employment disputes is enforceable in three situations only: if the parties agree to arbitrate after the dispute arises; if the consumer or employee was the one who initiated the arbitration proceedings; and if the DIFCC court decides whether the arbitration agreement is enforceable or not.

It was found that consumers are essentially well protected under the DIFC Arbitration Law against being enforced to arbitration; however, the author suggests that the Court shall not have the authority to enforce the arbitration agreement, and the first two exceptions are sufficient and are the only ones to be applied. In Dubai the matter is

different. The Civil Procedures Code does not state any requirements to enforce the pre-dispute arbitration agreement in consumer disputes. Therefore, consumers may be forced to arbitrate and the final award might be enforced before DC. In order to protect consumers in Dubai, the author suggests several solutions.

The first solution to protect consumers from unjustified arbitration is to rely on the uncertainty of the arbitration agreement. This solution was applied by Turkish courts,⁹⁹ which stated that the arbitration agreement is an exceptional approach, and it should be stated clearly among the terms and conditions that the parties intend to refer a particular matter to arbitration. Therefore, this solution might be applied by DC in cases wherein parties fail to state a clear and definitive arbitration clause. However, DC clearly stated that arbitration is an alternative path to settle disputes, therefore parties should explicitly agree on arbitration, which means that this solution might be applied to set the award aside.

The second solution is the doctrine of unconscionability of arbitration agreement, derived from the US courts. According to this doctrine, the court should invalidate the arbitration agreement if it is inherently more favourable to one party than the other. In respect to applying this solution in Dubai, it was found that the doctrine relies on examining the effectiveness and equivalence aspects; there is a similar requirement under the Civil Code, which states that where there is an inequality of bargaining power, or the agreement allows the stronger party to choose the forum, the court may invalidate the arbitration agreement. However, the shortcoming of this solution is that the court's ability to invalidate the arbitration agreement is strict on the ad hoc contracts, and if businesses negotiate one term of the contract then the contract is no longer ad hoc, and the court will not be able to invalidate the arbitration agreement.

⁹⁹ Case No. 2013/16901, Turkish 11th Civil Division Court.

The third solution is to examine the arbitration agreement according to the unfairness test that is applied in the UK, according to which disputes with values less than £5,000 shall not be examined and should be immediately considered non-arbitrable. However, in disputes concerning values exceeding this amount the court examines the arbitration agreement based on the unfairness test, which applies different aspects including good faith and significant imbalance. Both aspects are stated in the UAE Civil Code: significant imbalance under Article 248 and the element of good faith under Article 246(1). Therefore, the courts may examine the enforceability of arbitration agreement according to the unfairness test.

Despite the solutions suggested above, the law in DC and DIFC does not state explicitly that consumers are part of the public policy, which allows the court to examine the validity of the arbitration agreement. It is suggested that the legislation in DC and DIFCC state clearly that consumer disputes are part of public policy, which allows the courts to examine the enforceability of the arbitration agreement, and hence to examine the arbitration agreement and be able to set the award aside according to Article V(2)(b) of the NYC.

The third obstacle examined in this study relates to the effect of the DC and DIFCC in controlling and monitoring the arbitral proceedings according to the provisions of the NYC. Conducting the procedures online might affect the enforceability of the final award according to the provisions of both the NYC and the national law, especially when the procedures affect the fairness procedures.

The matter of controlling the arbitration proceedings was examined from three aspects. The first is related to the effect of using IT in arbitration proceedings and the shortcomings of using technology on the enforcement of the final award. The second examined the

doctrine of delocalisation and its effect on the enforcement of the arbitral award. The third aspect examined the matter of ESI and its effect on the final award.

In respect to the first aspect, the study started by exploring the applicable law on arbitral proceedings, and it was found that DC and DIFCC examine the proceedings of an arbitral award according to whether it related to public policy and the NYC provisions. The current approach is not affected by the enforcement of the Draft Law, which states the same grounds as the NYC.

The essential elements examined in this study are violation of due process, swearing of the oath and the independence and impartiality of the arbitrator. The study attempted to explain the application of each element based on cases before DC and DIFCC, but as there were insufficient cases, cases from other courts were examined. Procedural difficulties and shortcomings arising from conducting the whole procedures online were found, so applying this approach may lead to challenging the enforceability of the arbitral award.

DC and DIFCC aim to strictly apply the due process requirements of Article V(1)(b), which chiefly concern the rights of parties to present their cases, equal treatment and fair hearing. In addition, they examine whether the arbitral proceedings are contrary to public policy, with special reference to the independence and impartiality of the arbitrator. However, in respect to swearing the oath, it is obvious that, contrary to the old approach applied by DC, the new approach does not consider swearing the oath as part of the public policy, in order to avoid intervening in the merits and the arbitral procedures of the award.

Parties who are willing to conduct the procedures online and to enforce the award before DC and DIFCC should consider the three essential elements stated above in order to secure enforcement of the final award.

The second aspect examined is the doctrine of delocalisation, which is based on the idea that there is no need to determine the seat of arbitration, hence keeping the arbitration procedures floating. The author argued that this doctrine is not efficient, and the calls from different scholars to apply it to online arbitration are unjustified, because determining the seat in online arbitration is not complicated. Also, it was argued that leaving the arbitration proceedings floating may set the final award aside on the basis that it may affect the fairness of the arbitral award, as the arbitral tribunal will be freed from the mandatory rules and public policy of the place of arbitration. Moreover, delocalization means that the award, whether local or foreign, is subject to determining the applicable law.

The last aspect examined regarding the conducting of arbitral proceedings online was the matter of ESI, which might arise in both online and offline arbitration. The study examined ESI from two perspectives: agreeing on the rules for producing ESI, and applying US legislation to the production of ESI.

In respect of the first perspective, the author suggested that the parties should agree on the rules regulating ESI production in order to guarantee enforcement of the arbitral award before DIFCC and DC. Issues that might arise if parties failed to regulate ESI production include inability to access the document due to high costs or the complexity of the form used, which could violate the fairness of the arbitral procedures and consequently set the award aside.

In respect of the second perspective, relying on the US eDiscovery style, the author argued that this method could set the award aside on the grounds that it violates due process for two reasons: the parties being unfamiliar with the duty to preserve documents, and the issue of undue burden.

The study examined several issues regarding conducting procedures online and accordingly recommended several solutions that the arbitral tribunal should apply in order to avoid setting the award aside before the DC and DIFCC. Moreover, the study suggested that conducting the procedures online might be to the benefit of all parties if utilised appropriately.

The fourth obstacle examined in this study was related to the matter of authentication. Under Article IV of the NYC, to obtain recognition and enforcement of the final award, the winning party should support the application with an authenticated and certified award before the enforcement court. Matters related to the governing law, competent authority and the required documents were examined. However, it was concluded that both DIFCC and DC require authentication to be submitted according to the law of the seat of arbitration, hence the competent authority will be determined according to the law of the seat.

Requiring the award to be authenticated may raise difficulties when using IT in arbitration. The main concern regarding the electronic authenticating of the final award is the validity of this approach. However, the study explored the validity and efficiency of relying on the electronic signature to authenticate the final award. It was concluded that the validity of authentication depends on whether the legal system before the enforcement court would validate the electronic signature or not.

In the case of Dubai, the applicable law in relation to electronic signature is the ETCL. The law in Dubai has been improved and is modern, and the ETCL is a major step towards establishing a reliable method in the field of electronic signatures. However, there are some areas in the law that need reform in order to increase the reliability and certainty of the validity of an electronic signature, and the author made suggestions to increase the efficiency and reliability of electronic signature in Dubai.

The first point is that the ETCL should state explicitly that the electronic signature is sufficient to replace the manual signature; therefore Article 8 of the ETCL should be clearer and reformed accordingly. The second point is that Article 18, which is related to the protected electronic signature, should be modified to remove any confusion in the meaning of protected electronic signature and its requirements, with special reference to the term “reliable is acceptable”. Despite Article 18(3)’s explanation, rather than clarifying the concept it makes it more vague by stating that it includes different factors such as the nature and value of the transaction and any other related factors. The practical implication of Article 18(3) is that the interpretation of these factors may vary from one party to another. The ETCL should therefore apply the approach of the EU Directive and explicitly state the essential requirements to validate the electronic signature. Furthermore, the law should state clearly the factors required to validate the certificates of foreign Certificate Authorities. Article 23(2) requires the certificate to meet the standards in Article 20; however, this article does not state any standards, adding to the confusion.

In DIFCC there is no particular law to regulate electronic signatures, but it may still be enforceable under Articles 6(3) & 6(4) of the Rules of the DIFCC. However, these articles alone are not sufficient, and parties aiming to rely on electronic signature in DIFCC might face several challenges such as the requirements for electronic signatures, electronic certification and certificate authorities.

The study examined the ability to authenticate the final award and arbitration agreement using an electronic signature. However, there are several shortcomings in both DC and DIFC laws, which should be clarified in order to guarantee the enforcement of the final award authenticated via electronic signature.

In conclusion, both DC and DIFCC are generally agreeable to the enforcement of awards conducted via online arbitration. However, the enforceability is ultimately determined by the courts' approaches and interpretation of the provisions, so in order to add clarity and reliability the laws of both need reform in some areas. For example, in Dubai the law should state clearly that the electronic arbitration agreement is valid and enforceable, the electronic signature has the same legal effects of the manual signature, and consumers have protection from reference to arbitration and their disputes are part of the public policy issue. In DIFCC legislation, the electronic signature should be embodied in a special law in order to increase its validity and enforceability.

8.2 Limitations and areas for further research

Online arbitration is an extensive area that provides scope for rich discussion and analysis. This study examined the enforceability of the final award under the NYC, due to its importance and wide applicability, focusing on the enforceability of such awards before DC and DIFCC. However, this matter might vary according to the applicable law and the development of technology, so future work should examine other courts' attitudes towards online arbitration, increasing the reliability of online arbitration at the international level.

A serious limitation in this study is the lack of relevant cases before DC and DIFCC. In some parts of the study, in order to overcome this issue, the author had to examine interpretations of the NYC provisions in different courts, for better understanding of the provisions of the Convention. The study examined the matter of consumer disputes, although it was necessary to curtail the extensive potential of this research area here; future studies could expand it. For example, in the EU there is a new directive to regulate

this matter.¹⁰⁰ Hence, future work could examine the possibility of providing consumers in DC and DIFCC with the same dispute resolution method, helping to increase efficiency in resolving consumer disputes in DC and DIFCC, especially as online consumers are not well protected from arbitration.

It is beyond the scope of this study to examine the enforceability of the electronic arbitral award if the state a party to the dispute. However, it might be interesting to discuss this matter in future studies.

Many studies explore the efficiency of online courts, that is their ability to use technology within the court system. This area of research is developing and there are several matters that could be examined within the DIFCC and DC legal systems, including access to justice and technology, how costs can be determined and recovered, the reliability of the technology underpinning the online court, areas of dispute not suitable for online resolution, and the determination of some matters by case officers.

This study examined online arbitration from the perspective of enforcement by DC and DIFCC, but examining it from the perspective of DC and DIFCC as the seats of arbitration is a different matter. Although beyond the scope of this study, both DC and DIFCC are leading centres in the field of arbitration and researchers should examine whether their laws are germane to the facilitation of online arbitration.

The potential benefit from online arbitration under different types of dispute, such as B2C, construction, B2B, energy and oil and gas, could be considered by future investigators.

This work was intended to suggest solutions to raise the efficiency and effectiveness of online arbitration by suggesting law reform and amendments, rather than suggesting IT

¹⁰⁰ Directive 2013/11 on alternative dispute resolution for consumer disputes [2013] OJ L165/63, Regulation 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

solutions. Future work within this area of law should discuss this particular matter and suggest solutions based on utilising IT tools that might help to improve online arbitration. The use of IT on other dispute resolutions could also be considered in terms of increasing efficiency and effectiveness. Online negotiation and online mediation are both potential methods to settle disputes with greater efficiency of time and cost.

This study did not specifically examine the enforceability of arbitral awards in other countries, but as using IT in arbitration is international, future studies could examine this matter, with results that may vary according to the applicable law.

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Appendix

Publications:

1) Qouteshat, O. The Enforceability of Unfair Arbitration Agreement in Consumer Disputes before Dubai Courts. *Arab Law Quarterly*; 31 (2017), 1-29.

Abstract:

Online transactions in the GCC region and particularly Dubai has undergone phenomenal rise in recent times. However, reform is required to improve the legislation as it relates to consumers' right. Upon successful completion of online transactions, consumers often end up agreeing to unclear arbitration clauses among other terms and conditions, thereby bearing extra costs and expenses. They may also waive their right to litigate, which is a primary consideration and should be secured. This article seeks to examine current legislation and court approaches in Dubai, relating to consumer rights. Essentially, possible solutions directed at protecting consumers from referring to arbitration.

2) Qouteshat, O. Challenges of authentication and certification of e-awards in Dubai and before the Dubai International Financial Centre courts: the electronic signature. *Digital Evidence and Electronic Signature Law Review*; 13(2016), 97-112.

Abstract:

This article evaluates whether an electronic signature is sufficient to fulfil the authentication requirement stated under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (NYC) article IV(1)(a) before the Dubai and Dubai International Financial Centre (DIFC) courts. Dubai is one of the few countries with two jurisdictions in one country. The party who is seeking the enforcement of the award in Dubai may enforce it before the Dubai or the DIFC courts, so the purpose of the comparison is to discuss whether the winning party may benefit from the DIFC. To achieve the objective of the study, this paper evaluates the ability to exclusively rely on secured electronic signatures to fulfil the requirement stated under article IV(1)(a), and the to generally consider the validity of the electronic signature in the Dubai and DIFC courts.