



UNIVERSITY OF GLOUCESTERSHIRE
Doctorate in Commercial Law (DCL)

**Electronic Arbitration as a Solution for Electronic Commerce
Dispute Resolution in the United Arab Emirates: Obstacles and
Enforceability Challenges**

By

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Abstract

This thesis first examines the legislative framework in the UAE and its key guiding principles from which arbitration laws are derived. Secondly, based on the above examination of the existing legislative framework and literature the study identifies the various aspects of the existing legislative framework that impact upon the enforceability of e-arbitration for e-commerce dispute resolution in the UAE. Finally, the thesis demonstrates how e-arbitration can be incorporated into e-commerce and arbitration procedures in the UAE.

Two methodologies, namely 'explorative qualitative research method' and 'semi-structure interview' are employed for the study. The findings from the examination of legislative framework and literature as well as the empirical field study show that the unprecedented developments in Information Communications Technology (ICT) had influenced and altered the traditional methods of societal interaction globally.

The mass adoption of the Internet platform for trading has not only sought to eliminate the physical distance between the businesses and consumers but presented new avenues for potentially higher sales, coverage, lower costs and all at high speed. The concept of electronic trading (E-Trade) has naturally developed new markets and opportunities, which nations within the Gulf Cooperation Council (GCC) such as the UAE are seeking to capture.

The findings also show that electronic arbitration (E-Arb) is eliminating the physical barriers between businesses, consumers and others choosing to arbitrate in cyberspace. This implies that E-Arb is perceived to be an additional component and extension of the growing E-Commerce market and services. Therefore, adopting and supporting E-Arb provides an ideal opportunity for the UAE as a global hub for commercial purposes. However, despite the enthusiasm for the greater utilisation of ICT in UAE society, the domestic legalisation do not fully recognise the distinctive feature of e-arbitration, which makes it difficult to link them with international laws.

The study also identifies concerns with the impact of E-Arb upon the traditional heritage and cultural practices in the UAE. Therefore, the study recommends that the existing UAE legislative framework is made compatible with international laws. It also recommends that there are comprehensive education and research programs in place to transform the traditional and cultural nuances of UAE society towards a greater understanding of developments in modern technology.

Dedication

I dedicate this thesis with deepest love and everlasting respect, to my Father and Mother; to my wife and children: Ahmed, Luoluo, Sara, Aljoory & Alhoor; and to my brothers & my sisters & relatives.

*Without their support and encouragement,
I could not have reached this stage.*

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Finally I would like to thank my friends for their constant and unwavering support and for providing me with the advice, encouragement and motivation to complete my Thesis.

Declaration

I declare that the work presented in this thesis is my own and original and is carried out in accordance with the regulation of the University of Gloucestershire except where indicated by specific reference in the text.

Signed: MOHAMMED AHMED ABDULLA AL HAMED

Date: 16/05/2016

Transliteration Table

Arabic Consonants

Initial, unexpressed medial and final:

ء ’	د d	ض ḍ	ك k
ب b	ذ dh	ط ṭ	ل l
ت t	ر r	ظ ḏ	م m
ث th	ز z	ع ‘	ن n
ج j	س s	غ gh	ه h
ح ḥ	ش sh	ف f	و w
خ kh	ص ṣ	ق q	ي y

Vowels, diphthongs, etc.

Short: اَ a اِ i اُ u

Long: اَـ ā اِـ ī اِـ ū

Diphthongs: اَوْ aw

 اَي ay

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List of Abbreviations and Acronyms

AAA -	American Arbitration Association
ABA -	American Bar Association
ADCCCA -	Abu Dhabi Centre for Commercial Conciliation and Arbitration
ADR -	Alternative Dispute Resolution
AH -	Anno Hegirae/After the Hijrah
AI -	Artificial Intelligent
AMC-	Arbitration and Mediation Centre
ARAMCO -	Arabian American Oil Company
ARB. -	Arbitration
ART -	Article
CFI -	Court of First Instance
CI -	Consumers International
CIARB -	Chartered Institute of Arbitrators
CIETAC -	China International and Economic Trade Arbitration Commission
CISG -	Contracts for the International Sale of Goods
CPL -	UAE Criminal Procedure Law
CSD -	Commission for the Settlement of Disputes of the GCC Supreme Council
DIAC -	Dubai International Arbitration Centre
DIFC -	Dubai International Financial Centre
ECL -	Electronic Commerce Law of the UAE
EDI -	Electronic Data Interchange
EU -	European Union
EURid -	European Registry of Domain Names
GBDec -	Global Business Dialogue on Electronic Commerce

GCAC -	GCC Commercial Arbitration Centre
GCC -	Gulf Cooperation Council
IBA -	International Bar Association
ICANN -	Internet Corporation for Assigned Names and Numbers
ICCA -	International Council for Commercial Arbitration
ICC -	International Chamber of Commerce
ICDR -	International Council for Dispute Resolution
ICJ -	International Court of Justice
ICSID -	International Centre for the Settlement of Investment Disputes
ICT -	Information Communication Technology
ILA -	International Law Association
ITU -	International Telecommunications Union
IPR -	Intellectual Property Rights
KSA -	Kingdom of Saudi Arabia
LCIA -	London Court of International Arbitration
MROs -	Maintenance, Repairs and Operations
NYC -	New York Convention
ODR -	Online Dispute Resolution
OECD -	Organization for Economic Cooperation and Development
OOO -	Online Ombuds Office
OPEC -	Organization of Petroleum Exporting Countries
PILA -	Private International Law Act
RAKOIL -	Ras Al-Khaimah Oil Company
RUDNDRP -	Rules for Uniform Domain Name Dispute Resolution Policy
SSI -	Semi-Structured Individual
SMEs -	small to medium enterprises
UAE CPC -	United Arab Emirates Civil Procedure Code

UDRP -	Uniform Dispute Resolution Policy
UN -	United Nations
UNCITRAL -	United Nations Commission on International Trade Law
UTCCR -	Unfair Terms in Consumer Contracts Regulations
VANs -	Value Added Networks
WIPO -	World Intellectual Property Organization
WTO -	World Trade Organization

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UNCITRAL Arbitration Rules.

CHAPTER ONE

INTRODUCTION TO STUDY

1.0 Introduction

The emergent phenomenon of 'Globalisation' during the course of the latter half of the twentieth century has revolutionised transnational commerce. The impact of this increase in International trade on the Gulf, Al Jazeera region can be termed as the 'Gulf Arab Commercial Spring'.

Although investment, industry, enterprise and trade are thriving in the Gulf with unparalleled growth in private international commercial transactions, there are some consequences, which are now being realised. This means that the increase in trans-border and transnational commercial trade also results in a proportional number of disputes. Therefore, there is an immediate requirement for trade to be assisted and eased by independent, unbiased and neutral mediums for dispute resolution.

With specific consideration to this study and context of the UAE, it can be stated that it has emerged as the regional business hub of not only the Gulf region but also of the entire Middle East. As a result of this status, arbitration in the UAE has also increased and commercial enterprises conducting businesses in the UAE are highly likely to enter into arbitration agreements. Siddiqui (2008: 53-57)

The trend of arbitration has grown exponentially within the UAE, to the extent that two of the four main arbitral institutions of the Middle East are based in Dubai, UAE. These include the International Arbitration Centre, the DIFC-London Centre of International Arbitration Centre based in the Dubai International Financial Centre, the Cairo Regional Centre for International Commercial Arbitration and the Qatar International Centre for Commercial Arbitration.

Recent developments in the Middle East within arbitration centres and local law indicate an increasing recognition of arbitration and arbitral awards. As a result, foreign investors, companies, businesses and counterparts are becoming more confident in choosing Middle East, and Emirati, seats of arbitration. The UAE is in the process of issuing a new Federal Arbitration Law, a draft has already been in development for some time and the draft is based on the UNCITRAL Model Law and also influenced by principles of Egyptian arbitration law. Sets of regional and international principles have been formulated to address disputes, which arise within a globalised world of international commerce.

1.1 Background

The review of literature suggests that there is an increasing global demand for more efficient, low cost and effective methods to resolve international and intra-national commercial disputes. This has resulted from the explosion in online communications technology in the last fifteen years.

The gradual elimination of borders in commercial markets has been assisted by the developments in Internet technology and capabilities. Thus the increasing electronic environment has led to a huge growth in modern transactions conducted online and notions such as e-commerce, e-contract and e-finance have become norms of business and commerce.

This phenomenon is not restricted to any one single region or state but has had a global impact. Within the Gulf, Al Jazeera region the UAE is perceived to be the foremost proponent of these new technological advances and thus forms the focal point of this study. However, conversely modern communication technologies and agreements made within the digital environment have opened up different kinds of legal disputes. These have consequently amplified the intricacy of conventional disputes and the inadequacy of traditional mechanisms to resolve such disputes. This is leading to various legal challenges that call for exceptional and distinctive legal regulations, as well as a critical investigation of current rules to assess their applicability in the digital age.

Hence, the basis for conducting this thesis is centred upon exploring the possible opportunities and challenges to arbitral procedures and methods with consideration to the increasing dependence upon e-commerce and within the specific context of the United Arab Emirates (UAE). Therefore, the initial questions that the researcher considered before initiating the thesis project were related to uncovering how arbitration was perceived in the UAE with regards e-Commerce. Furthermore, there was an obvious need to understand if the UAE legislature had developed enough to keep abreast of the changes in relation to e-Commerce.

In order to shed further light on the research, the researcher conducted a number of interviews with arbitrators, e-commerce experts and consumers in the UAE. According to the researcher's knowledge this is the first time that such interviews have been utilised in the literature especially with arbitrators in the UAE. Via the interviews this study has revealed that there is no legislation specific for electronic arbitration in the UAE. Furthermore, the interviewees who are all practising arbitrators in the UAE revealed that any specific

legislation to regulate electronic arbitration would maximise e-commerce due to the presence of a specific body of legal regulations for electronic arbitration, which could protect their consumer rights. Although an alternative perspective uncovered through the research process parlayed that conventional arbitration still has a significant role to play in e-commerce disputes, as people in the UAE do not have the requisite knowledge to understand electronic arbitral procedures.

1.2 Significance of the Research

E-commerce is among the fastest growing industries with global sales estimated to reach \$1.5 trillion. Advances in computing and mobile technology have all contributed to this growth. Such type of trading activity is beginning to gain momentum in the Gulf, The Gulf region with sales reaching \$3.5 billion in 2013. The UAE alone has contributed to more than 50% of this amount due to its modern technological infrastructure.¹ Such growth however, needs to be matched by the appropriate legal setup that caters for this type of economic activity.

Despite being a leader in adopting such type of trade, the UAE still lacks the adequate legal provisions governing e-commerce contracts. (Muhannad and Ahmed; 2014: 98)

However due to the fluidity of e-commerce transactions over national boundaries and with a multivariate number of actors involved, the possibilities for conflict due to breeches in certain laws and jurisdictions have increased. The examination of literature reveals that a majority of commentators perceive e-commerce to require a new set of legislations and legal frameworks that takes into account the nature of e-commerce. This is especially the case when it is considered that electronic trading activity entails non-conventional risks that standard regulations are not designed to handle.

Given the challenges mentioned, this study will address the scope and future for E-Arbitration in the UAE. This study is among the first attempts to shed light on this topic as previous studies have focused on the usage of E-Arb general around the world or focused specifically on a few countries (USA, Lebanon, Algeria and the EU generally). However, there are as of yet no studies addressing E-arbitration in the UAE. Despite their similarities, The Gulf nations tend to differ in their laws, regulations and legal codes. For example Saudi Arabia is perceived to be more conservative while Bahrain is viewed as far more liberal and

¹ See: <http://www.dubaichamber.com> for analytical data on investment and e-commerce in the UAE

flexible. Thus research focusing specifically upon the UAE will uncover new data and a new perspective that has yet to be addressed by a formal academic study.

1.3 Research Questions

The objectives of this research study have been explored through the central research questions, which are addressed through an examination of literature alongside the empirical field study interviews.

1. What is the legislative framework in the UAE and its key features (guiding principles and key elements) from which arbitration laws are derived?
2. What are the aspects of the existing legislative framework that affect the enforceability of e-arbitration for e-commerce dispute resolution in the UAE?
3. How can e-arbitration be incorporated into e-commerce and arbitration procedures in the UAE?

In undertaking the examination of literature it became apparent that there was a significant dearth in research and material on the topic and thus a requirement and justification for the conduct of this study. Electronic Arbitration (E-Arb) for E-Commerce has not been afforded much attention in the academic literature, thus this research project seeks to explore the legislative and social milieu of the UAE to garner a greater comprehension of the challenges and obstacles to E-Arb in the UAE context. (See Chapter 2)

The research therefore, outlines and addresses a number of issues of interest and concern to legislators, those involved in arbitration, e-commerce businesses and consumers. Thus the first objective of the thesis is to identify the legislative framework of the UAE and its key features (guiding principles and key elements) from which arbitration laws are derived. (Question 1) The thesis attempts to address this question firstly through a theoretical discussion in chapter six. Here the legal nature of arbitration and the theoretical considerations as discussed by various schools of legal thought regarding arbitration are evaluated. The argument presented identifies four main theories of arbitration that legalists and legal theorists have largely studied: contractual; jurisdictional; mixed/hybrid and the autonomous theory. The question is further explored in chapter seven through an analysis of

the public policy of the Gulf region and specifically the UAE. It is argued that in deriving arbitrational laws, it has often been the public policy, which has proven to a stumbling block for arbitration cases in the region. The chapter deliberates on substantive and procedural public policy. It also looks at some relevant and important cases in the region and discusses how evoking public policy has been used in some cases in the UAE to reject the enforcement of arbitral awards. In chapter eight the contemporary heritage of the UAE arbitral laws is traced to the definition of the arbitration as per the 1958 New York Convention and the UAE CPC. The chapter then concludes the question by comparing the modern notion of E-Arb with conventional arbitration agreements by utilizing the requirements for E-Arb agreements such as electronic writing and the electronic signature with conventional contracts and hand written statements.

The second question that this thesis is seeking to answer is with regards to identifying the various aspects of the existing legislative framework that impact upon the enforceability of e-arbitration for e-commerce dispute resolution in the UAE (Question 2). In order to address this core enquiry the thesis firstly establishes a comprehensive background and theoretical basis that outlines the history, development and future of e-commerce in chapters four and eight. In doing so, the chapters cover the definition, scope and foundations of e-commerce alongside the evolution of the Internet and it's associated technologies. Furthermore the pertinence of the different forms of e-commerce is introduced such as business-to-business (B2B) and business-to-consumer (B2C). This will demonstrate the complexity in forming new legislations for E-Arb in comparison to the conventional methods. Hence there is also an examination of new concepts hitherto alien to the conventional understanding such as consumer protection, payment systems, and intellectual property rights in e-commerce. Hence chapter five is specifically focused upon e-commerce in the UAE and its diffusion in the country. Here it is demonstrated that the importance and potential of e-commerce implies that the UAE is being forced into adopting legislative measures that will naturally encompass E-Arb in the near future. However, the findings of the examination of literature in chapter two demonstrate that at present the domestic laws in the UAE and the wider Gulf region do not fully recognise the distinctive feature of e-arbitration. Therefore, the awards derived from the E-Arb hearing are difficult to implement and make binding upon parties, as the legislation at present does not have the authority within domestic and international legislation. Thus e-arbitration for e-commerce disputes are usually referred to general commerce courts. This

delays the arbitration process as these courts are not specialised and the laws are not tailored to meet the nature of the product.

The third and final objective of this thesis is to understand how can e-arbitration can be incorporated into e-commerce and arbitration procedures in the UAE. (Question 3)

In order to fully comprehend this point the thesis utilises both a theoretical and practical approach. Chapter eight provides the requisite background to the question by discussing the procedures of electronic arbitration and the steps involved, such as how the tribunal is formed, the requirements of an arbitrator, selecting an arbitrator and the key procedural characteristics of mutual consent, due process and the binding decision. The importance of confidentiality and arbitrability alongside the ‘seat’ of electronic arbitration are also addressed in detail. The chapter then introduces three core developments that have emerged with E-Arb: The e-production of documents, e-hearings and e-submissions. It is argued that a thorough understanding of the technical knowledge and legislative consequences of these concepts is critical if E-Arb is to be incorporated into e-commerce and eventually be utilised alongside conventional arbitration. To highlight this point there is a detailed study towards the end of the chapter that demonstrates how Internet e-commerce boom has led to the need for new substantive rules and transnational legal structures, known as the *Lex Informatica*. Furthermore chapter eleven introduces the consequential output of E-Arb in the form of the electronic arbitration award and subsequently the challenges in enforcing it due to insufficient or undeveloped legislation. Thus the chapter addresses the requirements that have to be maintained when issuing an E-Arb award, the legal implications of an E-Arb award, the notifications due before the E-Arb award is announced, the actual legal authority it has and how it can be challenged. This then forms the theoretical basis for the question (3), which is supported by the findings of the empirical field study as conducted below.

In order to investigate the research questions and in particular question 3, the ‘exploratory empirical qualitative’ approach was deemed to be the most appropriate.

1.4 Organisation of the Thesis

The thesis begins by conducting an examination of literature in chapter two. The chapter begins by reviewing the early history of arbitration in the Gulf region and discovers that the contemporary arbitration practices are a recent innovation, whereby the early traditional

practices had either been discarded or undermined under the colonial influence of the British Empire. The chapter then moves on to discuss the literature specifically related to e-commerce in the wider Gulf region and identifies the research conducted into Online Dispute Resolution (ODR) by Alfuraih (2005) to be pioneering. The chapter then explores studies that discuss the social and cultural barriers to e-commerce within the Gulf region, before moving on to introduce a minimal number of studies focusing upon the role of legislature in facilitating electronic arbitration. The chapter concludes by arguing that the limited number of studies cited demonstrates the dearth in research on electronic arbitration, especially with regards to the UAE context.

The qualitative research methodology used to conduct this thesis is delineated in chapter three. The chapter begins by introducing the objectives of the study and the research design before discussing the research method and justifies its adoption as the most appropriate for this study as it allows for the collection of soft interpretative primary and secondary data. The collection of Primary data through 10 semi-structured interviews with four groups of professionals from the UAE is then explicated before discussing the collection of Secondary data through the examination of literature and the existing arbitration cases in the UAE and in other parts of the world. The chapter then moves on to discuss the ethical considerations taken to complete the study before concluding with a summary of the whole research process and the methods utilized.

Chapter four begins by outlining the historic development and future of e-commerce in the UAE. The chapter seeks to introduce the definition, scope and foundations of e-commerce before presenting a contextual analysis of the historic foundations for the growth of the Internet and its inevitable impact upon trade as e-commerce. The rise in the e-commercial concepts of business-to-business (B2B) and business-to-consumer (B2C) are then explored and the argument presented that this has revolutionised the speed and scope of trading globally. The concluding segment of the chapter proceeds to argue that the impending role for consumer protection has now become mandatory. The advancement and growth of virtual commercial technology has pervaded all sectors of the consumer business market. It is argued that e-commerce is developing its own phenomenon of competition, financial and payment systems, collection and intellectual property rights.

Chapter five seeks to build upon the previous chapter by firstly introducing an examination of literature that focuses specifically upon the diffusion of e-commerce in the UAE. It is demonstrated here that the UAE has the highest utilisation of the Internet and subsequently e-commerce in the entire Gulf and Al Jazeera region. The chapter then conducts an in-depth analysis and assessment of the UAE legislation concerned with e-commerce before ending with a section on the accepted and admissible types of documentation.

Chapter six delves is thus focused on evaluating in greater detail the legal nature of arbitration and the theoretical considerations in accordance to the various schools on legal thought with regards to arbitration. The chapter identifies the four main theories on arbitration that legalists and legal theorists have primarily concentrated upon. The chapter explores firstly the 'contractual', then the 'jurisdictional', the mixed/hybrid before ending the chapter on the 'autonomous theory'.

Major issues concerning public policy in the UAE and the greater Gulf and Al Jazeera region identified in the preceding chapter are analysed in Chapter seven. It is argued that this has proven to be a sensitive legal issue and a stumbling block for arbitration cases in the region. The chapter then deliberates on substantive and procedural public policy before focusing upon some significant cases arising in the Gulf and Al Jazeera region as examples. The chapter concludes by demonstrating the role of public policy in thwarting the enforcement of arbitral awards in some cases in the UAE.

In order to gain a comparative perspective on the phenomenon of electronic arbitration (E-Arb), chapter eight explores the implementation and history of E-Arb from a broad international angle. The chapter begins by defining, exploring and discussing the various advantageous and disadvantageous features of E-Arb. It is argued that the global explosion in the adoption and utilisation of Information Communication Technology (ICT) has acted as the conduit for e-commerce and thus electronic dispute resolution especially with regards to commercial transactions conducted online. The chapter then demonstrates that developments in ICT have also impacted on the actual practices of judiciaries across the world and led to new dispute resolution techniques. The chapter discusses notions of 'Electronic Negotiation', 'Electronic Mediation' and 'Electronic Reconciliation' before introducing the regulations on Online Dispute Resolution (ODR) from a global perspective. The chapter concludes by discussing the E-Arb Institutions in place with a specific focus upon the American Arbitration Association, the Virtual Magistrate, the World Intellectual Property

Organization and the Cyber Tribunal. The chapter then moves on to address the E-Arb agreement and its importance as a foundation for arbitration between concurring parties. The chapter will discuss the definition of the arbitration as per the 1958 New York Convention and also in the UAE CPC. The discussion then moves to exploring the similarities and features of conventional arbitration agreements before examining the arbitration agreements in Business-to-Consumer disputes. The chapter then introduces the requirements for E-Arb agreements and the issue of electronic writing and the electronic signature. The chapter then concludes with looking at the procedural and substantive implications of arbitration agreements. The final section of this chapter will discuss the procedures for electronic arbitration and the ensuing processes. The chapter begins by analysing the formation of the tribunal, the requirements of an arbitrator, the selection of arbitrators and the key procedural characteristics of mutual consent, due process and the binding decision. The argument then seeks to explore the pertinence of confidentiality and arbitrability to the E-Arb process and the ‘Seat’ or the fictional location in which the arbitration will take place. Then three of the most important tools developed for E-Arb are discussed: e-production of documents, e-hearings and e-submissions. The chapter concludes with a detailed study of the new substantive rules and transnational legal structures, known as the *Lex Informatica*.

Chapter nine is geared towards promulgating the central requirement identified by this thesis. The enforcement and maintenance of the electronic arbitration award in issuing an E-Arb award alongside the legal implications of an E-Arb award and the notification of the E-Arb award, its authority and the methods by which it can be challenged. The chapter then explores in detail the methods by which E-Arb awards can be enforced and mandated by law in the UAE in accordance to the 1958 New York Convention.

The concluding chapter ten parlays the significance and contributions of the thesis to E-Arb in the UAE and then presents the key findings deciphered from the examination of literature alongside the empirical field study. The chapter then presents a number of recommendations for the eventual adoption of E-Arb and argues that in order for the UAE to maintain and develop its position as a global business hub it must re-visit and focus upon the current legislation. The final points presented seek to summarise the core arguments of the thesis and the pertinence of the research conducted in effectively contributing to the literature in the field.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

The chapter begins by examining the current situation of electronic commerce in the Gulf in Section 2.1; before moving on to explore the process of arbitration generally in the Middle East and in the Gulf in section 2.2. The following section 2.3 focuses specifically upon arbitration in the UAE and the subsequent Section 2.4 is dedicated to focusing upon the literature dedicated solely to electronic arbitration. In the chapter summary in Section 2.5 it will be stated that although there is a dearth in literature on the subject pertaining to the UAE, it is an emerging area that requires a dedicated and focused approach as the UAE has developed to compete on the global scale and is recognised as a regional and global financial and ecommerce hub.

2.1 Electronic Commerce in the Gulf

There have been within the past eleven years a number of notable studies focused upon e-commerce in the Gulf region.

Sait et al. (2004) were among the first to investigate e-Commerce in the Gulf with their study on the '*Saudisituation*'. Sait et al. (2004) noted that at the time of their study the Kingdom of Saudi Arabia (KSA) was in the process of looking at ways to diversify its economy via the IT sector. The onus was therefore on introducing e-Commerce initiatives covering Business-to-Customer (B2C) and Business-to-Business (B2B) market systems.

Although their research was funded in 2001 by the King Abdul-Aziz City for Science and Technology and completed in 2003, it must be taken into account that during the two-year period of their study, these e-commerce initiatives were still in the process of being developed.

Sait et al. (2004) essentially sought to measure two different sets of variables:

- The infrastructure prerequisites for adopting e-Commerce systems such as internet access, broadband and transaction security;

- Analysing the social and market response factors such as acceptance of Internet in society and the inclination to online transactions.

Their survey questions (hosted on a King Fahd University for Petroleum and Minerals site) were based on the Theory of Planned Behaviour and Roger's Theory of Diffusion of Innovations. Input was gained via banner advertisements and they gained 4000 inputs over the two-year period. The respondents were 80% male and 40% between the ages of 16-25. It is suggested that this may reflect the demographic penetration of the Internet at the time and in fact Sait et al. note that this may be due to the fact that mainly males were using Internet cafes etc....this was a common occurrence at the time. They also highlight that this was a limitation as a large segment of Saudi society who may not have had access to the Internet were excluded. In addition the self-selection sampling process could have also contributed to an element of bias. However, they stressed that they were targeting those already online and interested in e-Commerce.

Sait et al. (2004) observe that the data trends they had collated would in time be subject to change as the KSA government invests more into the telecommunications infrastructure and the mass penetration of the Internet into public homes in not only urban centres but also in smaller cities in the country. Sait et al. then analysed the results to determine trends in usage as well as any inclinations or biases towards e-Commerce. They found that 65% of their respondents concurred that Internet use for shopping and banking would make life easier while 10% were unsure.

Moreover, they also found that individuals who used the Internet for longer periods of time strongly agreed with the contention that e-Commerce would make life much easier. They suggest that the government promote wide scale usage of the Internet via reducing costs and enhancing infrastructure. In regards to e-Commerce they also concluded that e-Commerce awareness campaigns be launched targeting both consumers and businesses, along with the development of a legislative framework to address Online security and privacy.

The research by Sait et al. (2004) was perhaps the first serious, thorough and dedicated investigation into e-Commerce penetration in the Gulf area, and the fact that there was also funding allocated to this for two years does indicate that the issue was given the utmost importance.

In addition to Sait et al. (2004) there have been a several important doctoral studies that have assessed the role of e-commerce in Saudi Arabia.¹

Recently concluded studies that focus upon this area include Aldwsry's (2012) and Al-Somali's (2011) research into E-Commerce adoption in Saudi Arabia and their comparison to the slow adoption of the Internet in developing countries.

Aldwsry (2012) concludes that the central issues facing all these nations were high costs of usage alongside slow or extremely poor network connectivity speeds.

Whilst Al-Somali (2011) also discusses the challenges to accessing online services due to the limited availability of fixed broadband access he cites an important cultural barrier. His research suggests that the as modern technology is designed and produced in developed countries it is culturally biased towards their social and cultural systems. This he argues creates cultural and social obstacles for developing countries when it comes to transferring technology into practice. Despite these obstacles to growth he cites UAE as a major proponent and example of adopting new technologies and where the e-commerce market is growing.

However, research undertaken by Alrawi and Sabry (2009) argues that despite the substantial growth in e-commerce and the implications this has for the international market, there have not been that many studies in regards to e-commerce and legislation in the Gulf, Al Jazeera region.

The point is highlighted by the citation of a single significant pioneering study by Almasoud (2008) that sought to explore the Saudi legal system and its compatibility with the international rules on e-commerce.

Although his study is explicitly focused on the Saudi legal system, he concluded that role of legislation with regards to e-Commerce in the Gulf, Al Jazeera region is characterised by its conservatism. Almasoud argues that there is a reluctance to keep abreast of the changes in technological advances and subsequent policy and jurisdictional requirements. He observes

¹ It is also of note that many of the doctoral studies into e-commerce in the Gulf have been conducted in UK universities: Aldwsry (University of East Anglia, 2012); Al-Somali (Aston University, 2011); Almasoud (University of Hull, 2008)

that Saudi legislators have presumed that e-contracts are in violation of Islamic law without undertaking the due process of research and deliberation. Hence Almasoud recommends that the KSA play a greater role in engagement with e-Commerce law and the international community as a whole. He also critically notes that any misgivings Saudi legislators may have, are largely based on misapprehension rather than objective realities.

This is particularly the case as several conferences on E-banking and Sharia law have been hosted in the Arab world. The aim of these has been to make important recommendations on facilitating E-banking in the Arab and Islamic nations.

The Third International Conference on New Approaches to e-Commerce (Cairo, 2010) suggested the creation of a Uniform Arab Agreement on e-transactions where:

- There is a set of legal and contractual rules laid down by competent bodies;
- These rules are applicable to international contracts.

Almasoud summarises the findings of the conference to entail trans-national agreement to be essential to e-commerce in the global economy and enforceable via international law. He then urges the Saudi legislators to participate in discussions on the notion of the e-Contract, as both UN and EU legislature recognises variances in contract laws within member states. He also stresses that legislators must understand the technicalities of e-Commerce before drafting legislation, as the legal system of the KSA is bereft of regulation exclusively focused on e-commerce. Thus Almasoud cautions against Saudi legislators becoming mere spectators to legislation effecting e-commerce. He observes that the slow progress after the enactment of a Draft Law on electronic contracting is not encouraging as without legal guidance related to e-commerce, Saudi citizens will be disadvantaged in their international dealings. Moreover, he argues the Draft Law is insufficient for the needs of the KSA as it is a copy of the UNCITRAL Model Law. Almasoud therefore, laments the time-consuming procedures of Saudi legislature, which he cites to be a direct obstacle to aligning KSA law with the international rules on e-commerce.

Other studies of interest to this area include Alfuraih's (2005) research into the broad area of e-commerce that encompassed an examination of e-commerce fraud detection, prevention techniques and the Online Dispute Resolution (ODR). He concluded that the existing protocols and legislations especially in the Gulf, Al Jazeera region were not suitable for e-

Commercial trade and arbitration. His proposed solution was the E-Commerce Transaction Protocol and an Automated Online Dispute Resolution, which would automatically resolve disputes in accordance to a proposed e-Commerce model that he presented. In general Alfuraih provides a useful taxonomy of e-Commerce disputes and utilises the KSA as a case study model to propose the viability of his taxonomy of e-Commerce disputes and his proposed e-commerce model.

Another study by Aldwsry (2012) discovered that security concerns were an issue and had a negative impact on e-Commerce usage among Saudi firms. He also found that mimetic pressures were a key determinant in e-commerce use in Saudi Arabia in order to 'keep-up appearances', as it were, with other rival enterprises. However, he presented no new solutions or proposals other than to suggest that attitudes had to change in order for progress to occur.

With specific regards to the UAE experience, there is a dearth in research and it is argued that this reflects the general malaise in the approach towards not only on arbitration but also e-commerce.

Studies that do focus on the UAE include Dehkordi et al. (2011) survey into factors that have influenced e-commerce acceptance in developing countries. They selected the UAE as one of their core nations for surveying and found that cultural issues as well as prior experience with e-commerce were key factors in shaping the acceptance of e-commerce in the UAE.

Although they note that attitude is a major factor with regards to national control, property rights, access rights and Internet infrastructure, the study only cites the notions of culture to be a major obstacle to growth.

Another study by Muhannad (2014) examined the customer perceptions of e-commerce in the UAE. He noted that e-Commerce in the UAE needs regulation and specific laws are needed to govern it, especially as the UAE is becoming a major e-Commerce nation in the region and due to the large amounts of foreign items and goods, which are being shipped into the UAE from Online vendors. Muhannad concludes that there is still scope for further studies into the problem of e-Commerce within the UAE.

With regards to the legislative side of e-Commerce in the UAE, Al-Hassan (2009) investigated the history of e-Commerce legislation in the UAE and the provided a descriptive account for legislation to cover consumer rights. However, Al-Hassan did not address issues related to measures that are required to attract customers to e-commerce.

The monograph on E-Commerce law in the UAE by Blythe (2010) observes that it requires fine-tuning and offers a number of important recommendations. As the UAE enacted its first federal E-Commerce law in 2006, Blythe examined the evolution of e-signature law and evaluated the UAE statute, whilst concluding that it could be improved. He observes that whilst the UAE has taken commendable steps towards attaining a sound e-Commerce law (the ECL of 2006) it still has not gone far enough and fails to include consumer protection for e-Commerce buyers.

Omar (2009) also discusses the ECL of the UAE and suggests that there is a case to be made for e-Commerce requiring a different legal regime. He argues that this should adapt to the nature of e-Commerce and accommodate the needs of the people involved in e-Transactions. He identifies the risks and security issues involved in online trading to demand regulations and control, which the UAE is begging to pioneer in comparison to the region. Thus he cites the Dubai issued law No.2 of 2002 on Electronic Transactions and Commerce, which was substantiated by the UAE Federal government, issued Federal Law No.1 of 2006 on Electronic Transactions and Commerce. Omar argues that as far as the Middle East and the Gulf, the UAE e-Commerce law is considered a model system and is used as a reference by neighbouring Gulf States when drafting their own electronic communications laws. However, he notes in conclusion that the ECL, whilst being enacted since 2006, does not utilise as a source the UNCITRAL Model Law on Electronic Communications. Although the ECL in its Article 3 specifies its objectives, the text of the law itself is not part of the practices or legislative traditions of the civil law states but rather is associated with common law countries. This suggests that the ECL was formatted by common law practitioners and was influenced by the British legal drafting style.

2.2 Arbitration in the Middle East and in the Gulf

It is argued that the identified literature on this issue in the Gulf, Al Jazeera region in particular is generally critical of the arbitral requirements due to an apparent disdain for these contemporary arbitration methods and protocols.

Hampton (2011) notes that the scepticism and distrust within the Gulf States for international commercial arbitration manifested strongly after the Aramco case and the arbitral awards that went against Abu Dhabi and Qatar.

Wakim (2008) notes that these international commercial arbitrations were thus perceived to be a 'concession to a foreign party'. While Kutty (2006) outlined that the oil concessions disputes of the 1970's and 1980's resulted in there being distrust of international arbitration on the part of Gulf States. In this way, arbitration was viewed negatively in the Middle East as it involved proceedings in a foreign land and was subject to foreign rules.

Furthermore, the study by Ahdab (1999), considered a magnum opus on arbitration, provides in great descriptive detail the law and basis for arbitration in the region. He observes that the onset of globalisation has led to the positive manifestation of shared management styles and principles in business and international trade. This has provided a broad space for negotiation between conflicting parties. So while mediation is popular within the Middle East due to it being prevalent within Arab culture and heritage, its non-binding and non-compulsory nature have paradoxically made it less popular than arbitration. This is now regarded as easier, more efficient and credible alternative to other traditional Arab systems.

Whilst Baharna's (1994) earlier study seems to have supported this contention. He explained that initial efforts at international arbitration in the Gulf suffered, as foreign arbitrators were insensitive to local laws while the Gulf States failed to fully appreciate the ramifications of arbitration clauses.

2.3 Arbitration in the UAE

Most of the studies that relate to arbitration tend to focus on the Gulf, Al Jazeera region as a whole and differentiates very little between individual nations.

The first serious and thorough investigation into arbitration in the UAE was a study conducted by Busit (1991). He addressed the problems and prospects of creating a modern arbitration system in the UAE. The context of his research is during the time when the UAE was witnessing not only unprecedented economic growth but also just initiating some preliminary investigations into establishing its own arbitral legislature. Busit highlighted at the time that the legal system of the UAE was unable to provide reliable resolutions of legal actions, which arose as a result of commercial and trade disputes. The inadequacies of the UAE judiciary would hamper economic development especially when it came to large and complex transactions wherein foreign parties were involved. He therefore suggested that arbitration had to be recognised as a fully autonomous legal institution and immune from

unnecessary court interference.

Although Busit's study was extremely critical of the UAE legislation and its current procedures, it must be noted that his research was undertaken before the Draft Federal Arbitration Law (of 2006) and even before Articles 203-218 of the Civil Procedures Code, which deals with arbitration (1992 and then amended in 2005). Thus he notes that one of the problems he faced with his study at the time was gaining access to data related to arbitration from courts and private institutions of the day. Furthermore it must be taken into account that his research benefitted from little previous data as his research was the first comprehensive study in the field. It also appears that later researchers and commentators have for some reason made little reference to Busit's work even though he has been a pioneer in the field of arbitration in the UAE. He stressed that there was a degree of secrecy regarding arbitration cases in the UAE at the time of his research, which he viewed as a pretext to conceal the decisions of various legalists, lawyers and arbitrators working in the UAE at the time. Interestingly, Busit even asserts that there was a type of 'knowledge monopoly' in that UAE nationals were largely uninvolved in the law of the land, whilst citizens of other Arab states (Egypt, Sudan and Syria) had assumed control of the legal system in the UAE. Busit notes that the enforcement of foreign arbitral awards had not been promoted in the UAE. In his critical observations, Busit writes that (what was then) the Draft Federal Civil Procedures Code did not make any attempts to limit court power in regards to arbitration and still maintained a rigid and dated approach of strict court control. He notes that courts did not waive their jurisdiction over referred arbitration cases but rather retained full control in ways, which further delayed the arbitration process.

Busit then identifies the Chamber of Commerce Arbitration system to be dominated by 'certain groups'. These he states constitute the arbitration committee of these institution and that as a result they have lost their credibility as neutral institutions to arbitrate over commercial disputes. However it must be remembered that at the time he formulated his critical thesis neither the Dubai International Arbitration Centre (DIAC)¹ that is currently the model arbitration centre of the Gulf and Middle East, nor the other UAE-based arbitration centres had been established.

In concluding he observes that should legislation be enacted (based upon the Model Law of UNCITRAL, which has subsequently occurred in the UAE) parties would have the freedom

¹DIAC was formed in 1994 and was established by the Dubai Chamber of Commerce.

to arbitrate outside of the scope of judicial interference in a hospitable legal environment. He further argues for the necessary procedural frameworks to establish fair proceedings, which are open to global trade and international commercial arbitration. This, he points out would open the UAE up to the world and help obtain foreign investment.

The significance of citing Busit's research in some detail is related to its landmark contribution to the arbitration studies in the legal context of the UAE. It suffices to state that Busit's research and in-depth analysis of the UAE arbitration system presents the contemporary practitioner with an opportunity to appreciate the practical suggestions and recommendations he suggested some twenty-five years ago.

From a contemporary perspective the only comparable effort to Busit's critical examination of the arbitration system of the UAE is Almutawa and Maniruzzaman (2014). After conducting exhausting examination of the recent arbitration practices since the institution of the DIAC and various arbitration centres in the UAE, there is promising future for international arbitration in the UAE. Although they cite a few exceptional cases that followed formalistic, a cultural attitude for denying the enforcement of arbitral awards.

Their analysis provides a critical appraisal of the recent legislative and institutional developments and international arbitration practice within the UAE. They emphasise that there is still some scepticism about the success of arbitral institutions in the UAE as they are still in their infancy, as say compared to those of The Hague, Geneva or London and because of the length of time it has taken for the UAE to draft a Federal Arbitration Act.

They note further that whilst Dubai has created an infrastructure for arbitration, which takes into consideration the needs of the international business community, the UAE faces many challenges in modernising its current arbitration rules despite its reputation and posturing as a global commercial centre.

However, they conclude by arguing that the UAE Draft Arbitration Law is a positive step towards the enforcement of arbitral awards and brings the UAE more in line with international standards. They suggest that if the UAE can create a culture among judges wherein enforcement of foreign arbitral awards is encouraged and not rejected solely on partial technicalities then the UAE could become the most credible arbitration centre within the entire Middle East for international commercial disputes.

In criticism of their study with regards to this examination of literature is that they failed to address in any detail or pay attention to the role of electronic arbitration in the UAE.

2.4. Electronic Arbitration

From a global perspective there exists much research into broader aspects of electronic arbitration. Richard Hill (1998) was perhaps the first to seriously look at the reality of electronic arbitration and the use of incorporating electronic methods into the arbitration process. Vahrenwald's (2000) study developed Hill's ideas and examined the possibility of incorporating e-arbitration and the procedural provisions to ensure the use of online technologies particularly in international arbitration.

However, it was Katsh et al. (2000) work into Online Dispute Resolution (ODR) systems including arbitration that the issue was analysed to the greatest degree. In their study they argued that at that time they could only focus upon mediation as they found obtaining data from cases extremely difficult. It was discovered that respondents were unwilling to consent to the decision-making authority of the arbitrator.

Alfuraih (2005: 127) notes that the Internet is a very suitable medium for "*documents-only arbitration... however Online consumer arbitration is not very common...*" He also argues that arbitration requires an actual human arbitrator yet e-Commerce disputes are of such insignificance at present that this poses a serious challenge to its credibility and thus viability. Therefore, he argues that arbitration is not the first choice for small and medium-value e-Commerce disputes, it's often times the last resort in an ODR process when both negotiation and mediation have failed. Thus he observes that arbitration cannot be automated due to the complexities involved in a case and the difficulties there would be in verifying all related documents Online.

Further studies identified to be related, to the broad study of electronic arbitration include Abdel Wahab's (2012) discussion and detailed synopsis on the future of e-arbitration and its uses. Cortes's (2011) examination of the merits of Online Dispute Resolution for EU consumers and Karim's (2012) investigation into how e-arbitration could be used to resolve disputes that arise from e-commerce contracts.

Although meagre there does exist a small body of academic and scholarly work and research in the Arabic language. For example, Nayif al-Mas'ad (1430 AH/2009) looked at online arbitration via the Internet in a MA thesis at the Imam University in Riyadh. His argument is centred on the novelty of the topic and argues that it has yet to receive much coverage in the Middle East or KSA. However, the thesis was severely underdeveloped and provided

descriptive definitions of key terms without any discussions on how online arbitration could fit into the current Saudi legal framework. The other notable research conducted directly on the topic was by Fayad and Kazzi (2015). They examined the possible impact of electronic arbitration in Lebanon and discussed how Lebanese legislature has to be amended in order to take e-arbitration into consideration. They argued that the Lebanese regulatory framework had placed obstacles in the way of successful implementation of e-arbitration in the country.

2.5 Summary

The purpose of this examination of literature was to synthesise, interpret and critically evaluate the most relevant research pertaining to electronic arbitration from both the Gulf, Al Jazeera region and the world.

In conclusion it can be stated that there is a general perception that the legislation surrounding the arbitration process in the Gulf Al Jazeera region has developed under foreign auspices and is subjected to foreign legal hegemony. These prevailing sentiments have inculcated a great degree of scepticism and mistrust in the arbitration process. This has been exacerbated by the knowledge that in the recent history of the region, foreign powers had flagrantly disregard pre-existing legal precepts, considering them to be under-developed, primitive and inadmissible, especially by a variety of British legalists during the early to mid twentieth century. Thus commentators have argued that there exist cultural and social barriers to the process, which will take time to overcome. It is argued by commentators that until there are concerted efforts by academics, legislators and policy makers to conduct a greater quantity and quality of research into the broader aspects of electronic arbitration, the system will not change. The examination of literature suggests that transition of the legal system will only becomes apparent through the enforcement of certain recommendations and policies. This will also present the UAE with the opportunity to become the regional leader in the development and adoption of the electronic arbitration process.

However, the review of literature also demonstrated there is at this time a great lacuna in the actual research upon how the UAE can translate its globally acclaimed-commerce market into an equally thriving arbitration hub. Hence the purpose of this study is to fill this void.

The next chapter therefore introduces the research methodology used to investigate the central questions and objectives of this research project.

CHAPTER THREE

RESEARCH METHODOLOGY

3.0 Introduction

This chapter aims to discuss the adoption of the ‘exploratory qualitative’ research methodology used to investigate the central thesis questions relating to this query.

Section 3.1 introduces the ‘exploratory’ aspect of the research method, which encompasses a brief analysis of the central research questions and the examination of the literature review. Section 3.2 describes the ‘exploratory empirical qualitative methodological approach. This is followed by the introduction to the research design in section 3.3, which encompasses the procedure used for the sampling the study participants through a ‘purposive’ sampling process. The data collection instruments to extract data from study participants are discussed in section 3.4 with a focus upon the utilisation of the Semi-Structured Individual Interviews (SSI) and the Document Analysis.

The analysis (Data Analysis) of the captured data as captured through the dialogical process is then delineated in section 3.5 The adoption of the deductive approach is explained in section 3.5.1, where by it is used in a two-stage ‘data analysis’ procedure. Section 3.6 discusses the compliance of this research project to the recommendations mandated by the British Educational Research Association (BERA, 2011) and the adherence to such issues as anonymity and confidentiality. The conclusion in section 3.7 presents a short summary of the chapter content.

3.1 Exploratory Study

Research has been defined as ‘*a systematic quest for knowledge*’ through a ‘... *controlled, empirical and critical investigation of hypothetical propositions about the presumed relations among natural phenomena*’ (Kerlinger, 1973: 2). Therefore, research has to expand knowledge, formulate new tools, strategies and policies, find new solutions to problems, verify and test existing facts and theories and bring new data to light which would hitherto be unknown. Saunders, Lewis and Thornhill (2009: 138-139) argue that there are three main types of research activity, which are most often identified in the literature:

- Exploratory: These studies are focused upon examining what has not been previously studied and attempts to identify new knowledge, insights, understandings and meanings by exploring areas and issues that have yet to be investigated.
- Descriptive: This type of research seeks to provide an accurate account of the characteristics of a particular individual, event or group in real-life situations (Polit and Hungler, 1999). The primary objective is to capture data without tainting it with personal bias and interpretations.
- Explanatory: The purpose of this type of research is to provide a personal analysis of the captured data. Zikmund et al. (2010) observe that this type of research focuses exclusively upon the cause-and-effect between relationships and seeks to explain the observed patterns and trends.

Whilst Malhotra (2005) classified research types into two main classifications:

- Exploratory: The objective of this approach is to provide insights into, and an understanding of, the problem confronting the researcher.
- Conclusive: This approach is suitable for researchers that are seeking to determine, evaluate and select the best course of action to take in a given situation as it arises.

This thesis has been undertaken as an exploratory study, as it seeks to “...ask questions... that may increase and broaden the extant knowledge of the field and allows for a fresh assessment of the phenomena in a new light”. (Robson, 2002, P.59) Adams and Schvaneveldt (Saunders et al, 2009) perceive the exploratory study to be like “...the activities of the traveller or explorer” (P.140). There is a broad approach to the study at the start, whereby its receptive to new data and perspectives, but over the course of time the focus becomes more concentrated.

Babbie (2007: 88) suggests that “...Exploratory research is an approach, which is utilised when a researcher examines a new interest or when the subject of study itself is relatively new...” Therefore, exploratory research usually incorporates a comprehensive review of

literature alongside some interviews so that a new phenomenon can be thoroughly explored from all perspectives. This can assist the researchers' requirement for a broader understanding into the subject matter and ascertain the viability for further detailed research or determine appropriate research methods to be used in subsequent studies. Due to this, exploratory research is broad in focus and rarely provides definite answers to specific research issues. The objective of exploratory research is to identify key issues and key variables.

The purpose of this thesis is therefore to explore the legislative framework governing e-arbitration in the UAE through the following central research questions:

1. What is the legislative framework in the UAE and its key features (guiding principles and key elements) from which arbitration laws are derived?
2. What are the aspects of the existing legislative framework that affect the enforceability of e-arbitration for e-commerce dispute resolution in the UAE?
3. How can e-arbitration be incorporated into e-commerce and arbitration procedures in the UAE?

3.2 Exploratory Empirical Qualitative Methodology

The procedural framework within which research is undertaken is known as the 'research methodology'. This defines an approach to a problem that can be put into practice in a research process. (Robson, 1997; Remenyi et al., 1998)

In discussing the use of the term 'methodology', it is stipulated that this describes the research logic employed by a researcher in a particular project, including basic knowledge related to the subject and research methods in question and the framework employed in a particular context. (Burns, 2000)

Whilst the use of the phrase 'research methods' refers to the practical techniques utilised when undertaking research (Malhotra, 1999)

Therefore, in parlaying the notion of 'Research Methodology' a link is being established between the method used to conduct the research and the theory that supports the idea.

A crucial central objective of this study is to understand how can e-arbitration can be

incorporated into e-commerce and arbitration procedures in the UAE (Question 3). Therefore it has been decided to directly engage with those professionals who are not only experienced arbitrators but also have an interest in the success or failure of E-Arb in the UAE.

Hence the research strategy (methodology) is based upon the qualitative methodology, which effectively caters for the simultaneous collection and analysis of data, development of theory and a continuous reformulation of the research question. (Merriam, 2002; Maxwell and Loomis, 2003)

According to Creswell (1998: 15) qualitative research is:

“...An inquiry process of understanding... based on distinct methodological traditions of inquiry that explore a social or human problem... The researcher builds a complex, holistic picture, analyses words, reports detailed views of informants and conducts the study in a natural setting...”

Therefore, the qualitative method recognises that the world is neither objective, nor quantifiable, as is the case with the quantitative method (Maxwell: 2003; Collis and Hussey, 2009). The quantitative research methodology adopts a positivist philosophy and seeks to conduct an entirely objective inquiry into a social or human problem, based on testing a hypothesis or theory composed of variables, measured with numbers and analysed with statistics to determine whether the hypothesis holds true. For the purposes of this exploratory thesis the quantitative method would not be sufficient in capturing the ‘soft’ data as can be derived from the dialogical interview process. Thus in garnering attitudes towards e-commerce and the future implementation of electronic arbitration in the UAE context the participants’ answers must provide a rich level of detail. These must entail a great level of personal introspection and cannot be reduced or quantified, as the onus is on gaining their holistic perspective. Through this approach, the participants would be able to describe experiences about electronic arbitration for e-commerce in the UAE and also allow the researcher to probe more into the participants’ viewpoints, which have been hitherto unheard within the literature. This qualitative research approach provided the researcher with an opportunity to assemble a detailed description of the reality of technological advancement and understanding, the arbitral process and e-commerce from the actual practising professional participants perspectives.

The selection of the qualitative research method can be questioned and criticised on at least

two fronts. The first is that the results of a study cannot be generalised to a larger population as participants are not selected arbitrarily and sample groups are quite small. However, a counter to this argument is that the main research questions aim to understand a specific field and subgroup of the population, not the general population. The subgroup is both unique and privy to a certain insight into the field, which is not shared by the general population. It is the case that this unique insight and field is the focus of this research, hence a small sample is appropriate. Here generalisation of findings to the wider population can be discounted, as it is not the main objective of the study.

The second significant criticism that can be levied at the research methodology is the possible use of the mixed methods approach wherein both quantitative and qualitative research is utilised. However, as this is an exploratory study and the first of its kind to focus upon the selected topic of electronic arbitration and e-commerce in the UAE, there exists very little prior research. Thus the use of the qualitative angle alone has been considered suitable as the study recognises that research is needed to propose a hypothesis rather than test an already established one (Auerbach & Silverstein 2003: 126).

3.3 Research Design

Kumar (2011: 96) observes that “...a *research design*’ is a procedural plan that is adopted by researchers to answer questions objectively, accurately, economically and with validity...[it] describes the procedures for conducting the study and how and when data was extracted.” Therefore, the purpose of the research design is to “provide the most complete scheme or programme of the research being undertaken” (Kerlinger, 1986: 279). It is in essence a detailed plan of how a research study is to be completed; operating variables for measurement, selecting a sample, collecting data and analysing the results of interest to the study, and testing the hypotheses (Thyer, 1993). In the most elementary sense, the design is the logical sequence that connects the empirical data, research questions and conclusions (Yin, 2002). Bryman & Bell (2007) stressed that research design should provide the overall structure and orientation of an investigation as well as a framework within which data can be collected and analysed.

Therefore, this section discusses the research design, delineating how the sample population

was selected, consideration with regards to the ethical issues involved in research and the collection of data, attained through a series of 10 semi-structured interviews alongside secondary data analysis.

3.3.1 Sampling

The primary targets of the fieldwork research were professional arbitrators in the UAE. They formulated the source from which the data was to be generated and collated. As this comprised a rather exclusive and specialised sample population, the study utilised ‘purposive’ sampling.

3.3.1.1 Purposive Sampling

Due to the exploratory nature of the study, the main objective of the fieldwork research is to extract soft, rich data from these experts on arbitration in the UAE. The focus of the study is upon a small sample population so that they ‘*are particularly informative*’ and provide the ‘*insiders perspective*’. (Saunders, 2009, P.233) The sampling strategy utilised to acquire data from the Semi Structured Interviews was non-probability purposive (judgemental) sampling. The Purposive (judgmental) sampling enabled the researcher to select participants that were directly related to the objectives and purpose of the research questions. This also allowed for the exploration of the interpretation found amongst a group of people with shared ideals and norms.

The participants interviewed for this study were identified and selected in the UAE through personal contacts and acquaintance with the personal through previous study programs and at various conferences in the UAE.

The researcher contacted several of the participants directly as a result of his contact with them (4), indirectly through acquaintances (3) and as result of meeting them at conferences (3).

On contacting the potential participants the researcher introduced his research and objective and provided them with the abstract of the study and outline of the methodology used to conduct the empirical study. They were then afforded the opportunity to review the

information for consideration. Contact details were also exchanged for further information and confirmation of interest.

The participants (10) replied via telephone and email to confirm their participation and a discussion then took place with a view to conducting the interviews, this also entailed the arrangement of possible venues and times. Three of the interviews conducted were at a University location in the UAE, two interviews were conducted in the Chamber of Business offices in Dubai, with two being conducted in the Chamber of Business in Abu Dhabi, the remaining three interviews were conducted in the working offices of the participants. The interviews were recorded electronically and the participants were asked to sign a declaration agreeing to the use of the interviews. Furthermore electronic audio copies of the interview were also sent to the participants in an electronic file format. The interviews were then transcribed and sent to the participants for their approval and agreement. Once they had verified the accuracy of the data the interviews were then subjected to analysis. On the completion of the analysis the participants were once more sent the final versions of the analysis for final authorisation so as to be used as evidential data for this thesis.

The reason for interviewing only ten participants was due to the difficulties encountered in gaining the cooperation of professionals and experts to the SSI process to discuss the matter of arbitration in the UAE in such a public and formal manner. In summary the interviewed participants consisted of three academics, three legislative arbitrators, two e-trading and e-commerce professionals and two business/consumer experts.

3.4. Data Collection Instruments

The instruments utilised for data collection were the Semi- Structured Interviews (SSI) alongside Secondary Data in the form of Document Analysis.

3.4.1 Semi-Structured Individual Interviews (SSI)

The use of Semi Structured Interviews (SSI) can provide valuable information, as the data is descriptive and verbal in essence. (Collis and Hussey, 2009)

Remenyi (2011: 2) observes that the objective of “...*The academic research interview is not to have an interesting dialogue with the informant but to collect evidence, which will be produced in the form of an interview transcript that will be useful in answering the research*

question...”Turley (2010: 293) suggests that in this way interviews can add something original to scholarship, which may otherwise stay undisclosed. Thus Hutter (2010: 438) stresses that interviews have been a central method of data collection for the purpose of considering how laws and legislation cause individuals and institutions to change their behaviour and practices.

Furthermore research suggests that qualitative researcher often utilise the SSI techniques encompassing a number of open-ended questions based on the topic areas the researcher wants to investigate. The open-ended nature of the questions allows both the interviewer and interviewee to explore any given area in greater detail. (Yin, 1993) Remenyi (2011: 18) argues that the SSI is primarily used in explanatory research to understand the relationships between variables that may have been revealed by some prior descriptive research.

Additionally, semi-structured interviews are used in exploratory studies to provide further information about the research area.

Thus the interviewer has the discretion to probe the interviewee to elaborate or to investigate any concerns that may have been raised by the interviewee. Moreover, if the interviewee has difficulty answering a question or provides only a brief response, the interviewer can use cues or prompts to encourage the interviewee to consider the question further.

However, an identified drawback to the SSI is that the researcher is reliant on the participants self-reporting, thus raising questions of verifiability. This can only be vouchsafed through actual observation of the participant or cross- examination of the participants’ colleagues.

Unfortunately due to the limited scope of this study and its exploratory nature, the perspectives provided are taken to represent the individuals’ views in their professional capacity and thus measured against data derived from the review of literature.

3.4.1.1 Interview Preparation

The term interview is composed of the prefix ‘inter’ and the noun ‘view’. With this in mind it is argued that the researcher and the informant co-create the responses to the questions and thus the data collected is not simply a list of facts (Remenyi, 2011: 2). The preparation for these SSI includes drawing up a ‘topic guide’, which is a list of topics the researcher/interviewer would like to discuss. It is also understood that the guide is not a schedule of questions and should not restrict the interview. Additionally, the

researcher/interviewer will have written prompts at hand to ensure that any questions that may arise out of the conversation are also addressed.

3.4.1.2 Interview Design

The interview questions were designed utilising the constructs and issues that have been identified from the review of literature. As the study is focused upon context of the UAE and involves native Emirates the questions had to be translated into Arabic, which is the main and official language of the UAE. Questions had to be translated into Arabic so that participants could adequately understand them in their mother tongue. Where necessary a professional certified translator was used to ensure that the meaning of each question was consistent.

Therefore, the identified list of questions that is to be asked in a dialogical open ended fashion are:

- What is the difference between E-Arb and conventional arbitration?
- Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?
- What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?
- What are the barriers to its implementation? What are the risks, if any?
- What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?
- What are your suggestions and recommendations?

3.4.2 Qualitative Secondary Sources: Document Analysis

The thesis also makes use of secondary sources such as web pages, books, magazine articles, and newspaper articles on the subject. The researcher conducted desk-based research when extracting qualitative secondary data and utilised various sources of secondary information such as the UAE Civil Procedure Code (CPC), the New York Convention of 1958, 2014 Internet Live Statistics, the Federal Act on Electronic Transactions and Commerce, the UAE

Federal Law on the Issuance of Evidence for Civil and Commercial Transactions, Arbitration laws from other neighbouring Middle Eastern countries, views of jurists, case studies of state case law of the UAE and a number of scholarly works which will have been noted in the review of literature.

3.5 Data Analysis

The analysis of data is a process, which includes inspecting, assessing, amending and modelling data with the main intent of highlighting useful information, contributing to decision-making and making suggestions. Data analysis comes after collation of information to be interpreted or applied. Data analysis provides researchers with facts and figures that allow them to interpret results. Malhotra (1999) suggested that research elements, namely the research problem, objectives, characteristics of data and the underlying properties of the statistical techniques should be considered when selecting the data analysis strategy. McMillan and Schumacher (2001: 395) argued that qualitative data analysis tends to be primarily additive process of organising data into categories and identifying relationships among categories. Therefore, the data analysis process in this thesis utilises the data captured through a dialogical process from the SSI.

3.5.1 Deductive Approach

Yin (2003) observes that by using existing theories and literature in formulating research objectives, the theoretical propositions can support the organisation and conduct of the data analysis phase. Therefore, the core components of the research such as themes and issues can be identified through the literature and contrasted with the empirical findings.

The deductive approach used is modelled on the 'two-stage data analysis procedure developed by Saunders et al (2009, P.149)

- The first stage involves the categorisation (grouping) of meanings; this involves developing categories and associating specific bits of data to them as relationships.

- Developing Categories: Derived from the review of literature, these categories identify the themes. The study has identified six themes from the literature review around which the interview questions have been formulated.
 - Unitising data: At this stage the relevant ‘bits’ of data, (‘units’ of data) gathered from the SSI are grouped under the relevant category.
- The second stage entails the summarising (condensation) of meanings or purpose. After the collection of the data through the SSI process, a summary of the core points is identified and recorded. This stage therefore, summarises great amount of the dialogical narrative into a meaningful summary.
 - Structuring (ordering) of meanings using narrative: Coffey and Atkinson (1996) define the narrative to include a broad details of the experience in a logical format. Therefore, the data is arranged to provide a continuous flow or narrative of the experience. (Saunders et al, 2009, P.497) observe that narrative analysis, as the final stage of the analysis phase, allows the construction of a dialogue that demonstrates the:

“...Participants’ engagement, the actions that they took, the consequences of these and the relationship events that followed to be retained within the narrative flow of the account without losing the significance of the social or organisational context within which these events occurred...”

(Saunders et al, 2009, P.497)

3.6 Ethical Considerations

The research was conducted in accordance to the recommendations mandated by the ‘British Educational Research Association (BERA, 2011) “*...All educational research should be conducted within an ethic of respect for: The Person; Knowledge; Democratic Values; The Quality of Educational Research; Academic Freedom.*”

Within the research process ethics and the ethical implications of a study are of the utmost importance. (McMillan & Schumacher, 1993: 182) Research ethics refer to the

appropriateness of researchers' behaviour in relation to the rights of those who become the subject of your work and are affected by the work (Saunders et al., 2009: 600). Such ethics will play a constant part of a research process and refer to seeking access, data collection, data analysis and reporting.

3.6.1 Consent

Informed consent was sought from participants to take part in the study prior to conducting the interviews. Participants could remove consent by contacting the researcher at any stage.¹

3.6.2 Debriefing

Debriefing helps in elaborating the research study and its purpose to prospective participants, so in this study all the participants were provided with a verbal as well as a written debriefing prior to the commencement of interviews.

3.6.3 Confidentiality

All participants have been assured their confidentiality in disclosing only their stated perspectives that they have personally agreed to.

3.6.4 Right to Withdraw from Participation

Participants were notified that they had the full right to withdraw from study and that they were in no way obliged to be involved in the study. They were also notified that could end the interview or retract their interview at any stage. Participants had various means to personally contact the researcher to notify of any issues if they wished to withdraw.

¹ Please see Appendix 2 for example of the template letter to potential participants and the actual reply received from a participant to the study.

3.6.5 Harm

Research ethics are important also in that they serve to ensure research subjects and participants are protected from undue harm. When conducting any form of research people may experience personal humiliation and loss of interpersonal trust (McMillan & Schumacher, 1993:400). All forms of research have a degree of causing harm to participants, though due to confidentiality procedures as utilised in this study it is hoped that such harm would be minimised if not totally eliminated. Thus, transcripts were prudently scrutinised so that participants would not be harmed in anyway arising from any findings from the research related to issues of power and status. In this way, participants would neither fear any repercussions from colleagues, company or organisation nor feel uncomfortable to share related information.

3.6.6 Due Diligence

It is of utmost importance that researchers apply due diligence to uphold the general ethical principles of research. Due diligence required the researcher to carefully examine his personal expertise in the field of study and how he conducted himself with researcher participants. Due diligence also ensured that the researcher did not replicate this research.

3.6.7 Validity

Ritchie and Lewis (2003: 270) suggest that the validity of research is regarded as the precision or correctness of the research finding. Winter (2000) identified two different dimensions to the concept of validity: internal and external validity. Internal validity ensures that the researcher investigates what s/he claims to be investigating, while External validity concerned with the extent to which the research findings can be generalised.

With regards to this study, high validity was attained via the interviews, as the participants were able to discuss the topic in great depth and detail. The interviewees' were able to speak for themselves with little direction from interviewer, hereby strengthening the validity of the findings.

Furthermore, the questions posed in the interviews were directly linked to the research purpose, aims and objectives. Moreover, the interview data was also transcribed and analysed

with utmost accuracy. All the transcriptions were validated with the interviewees to ensure the accuracy of the data. Secondary data sources were also assessed in-depth to determine the validity of the information.

3.6.8 Reliability

Reliability refers to the extent to which the research findings can be replicated if another study is carried out with the same research methods (Ritchie and Lewis, 2003) “*The reliability of the findings depends on the likely recurrence of the original data and the way they are interpreted*” (Ritchie and Lewis, 2003: 271).

In order to enhance reliability of this study various steps were taken such as: transcription and recording of interviews so as to provide a reliable evidence base and avoid bias. Additionally questions were worded succinctly asked in a natural tone of voice. Questions were repeated where necessary to facilitate understanding on the part of the participant. Interventions on the part of the interviewer were minimised in order to not bias interviewee’s responses.

3.7 Summary of Research Process and Methods

The chapter was organised to present the overarching method by which this exploratory empirical study will be conducted. The first section began by examining the ‘exploratory’ research method, which encompassed a brief analysis of the central research question and the examination of the literature. The chapter then sought to justify the adoption of the exploratory qualitative methodological approach, before discussing the data collection instruments: Semi Structured Interviews (SSI) and Document Analysis to capture the data from a ‘purposive’ ‘non-probability sampling group. The chapter then concluded by explicating the ethical nature of the research design.

In the next chapter the study discusses the history and future of electronic commerce.

CHAPTER FOUR

ELECTRONIC COMMERCE: HISTORY, DEVELOPMENTS AND FUTURES

4.0 Introduction

¹The purpose of this chapter is to introduce the fundamental notion of e-Commerce and its current status from a broad perspective. The chapter is organised to introduce in section 4.1 a brief discussion on e-Commerce through a review of literature. This seeks to capture the most essential and salient arguments with regards to the contemporary development in Information Communications Technology (ICT) and subsequently the commercial trade that has arisen over this medium. Section 4.2 then tackles the issue of actually defining the notion of e-Commerce by citing a number of definitions found in the literature. In section 4.3 the wider aspects of e-Commerce are introduced by firstly demonstrating the place of an e-Commerce business through an architectural perspective. Section 4.4 then discusses the prospects and future of e-Commerce by analysing the current status of legislation protecting consumers with a specific reference to legislative articles from the UAE. The section also introduces the importance of having greater variety and competition in the e-Commerce market so that consumers are not subject to monopolies with limited choices. However, several issues of concern are identified as the potential for online/cybercrime increases due to an increased flow of sensitive data along with the abuse of Intellectual Property Rights. Thus it is argued in the conclusion 4.5, that there is a requirement for legislation and universal standards that protect not only the rights of the consumers but recognise the potential for the abuse of personal data.

4.1 E-Commerce - A Brief Discussion

Due to the unprecedented growth and development in Information Communications Technology (ICT) there has been an increased utilisation of online virtual technology to facilitate both personal and commercial relationships. (Mamduh Ibraheem, 2008: 11).

¹ See: Celis, L.E. (2012) PhD Thesis: *Information Economics in the Age of e-Commerce: Models and Mechanisms for Information-Rich Markets* Computer Science and Engineering; University of Washington

The pioneering and evolution of Internet based software and its accessibility to the mass public across the globe is considered to be the bridge between the technological and digital communication revolution. This has essentially removed barriers and distances between nations, businesses and their consumers and turned the world into a global village. (Ohmae, 1995:27)¹ The Internet has attracted many users in just a short space of time, far more than any other means of communication in history. The Internet took just four years before it had 50 million users, whereas the television took around 75 years before it had that many users and the telephone 13 years (Mann et al, 2000: 7).

Despite the increased adoption of the internet by users globally, it is still in its infancy and experts predict that the coming of a second generation of Internet that will exceed the first generation in terms of speed and technical capabilities. It will be supplemented with the developments in fibre optics and wireless technologies to cater for an extremely broad area of coverage.² The advent of the Internet has also created a new space for commercial and recreational activities. This includes, for example, services such as electronic banking and electronic finance, wherein all range of financial products can be accessed online and a host of financial transactions can be carried out including insurance services, mortgage services, digital money and electronic payments. (Fraser et al., 2000: 62) With regards to recreation and social activities services such as Facebook, LinkedIn etc. has completely transformed the social landscape. Users can now update their profiles and activities and keep their contacts both known and unknown informed about their lives around the clock (24-7-365).³ Buchanan (2011) argues in her thesis that increased use of the Internet has essentially led to both enthusiasm and anxiety. There is euphoric enthusiasm to the possibilities for freedom of communication with people whom it was not possible to communicate with. This also has repercussions for businesses that can now target previously unreachable or unknown customer bases. However, the flip side is the notion of anxiety that can manifest as fear, insecurity, privacy issues and identity theft amongst a list of factors. For example Rivera et al. (2004) studied the privacy concerns of online consumers' via an online survey of Internet users in five cities around the world: Bangalore (India), New York (US), Seoul (South

¹Ohmae, K. (1996) *The End of the Nation State: The Rise of Regional Economies*; Harper Collins, London

²See: <http://www.cs.wustl.edu/~jain/cis788-99/testbeds/index.html>

³ See: Buchanan, M (2011) PhD Thesis: *Privacy and Power in Social Space: Facebook* Division of Communications, Media and Arts; School of the Arts and Humanities

Korea), Sydney (Australia), and Singapore. The study focused on understanding the attitudes, perceptions and concerns of Asian online users regarding online privacy and the impact on Business-to-Customer-Commerce. (See section 4.3.3 for details on B2C) They found that although consumers expressed great concern over protection of their online privacy, this concern did not affect their participation in B2C e-commerce. However, they also found that consumers were uncomfortable about their lack of control regarding how online traders use their personal information, thus welcomed legal protection over their personal data.

Furthermore studies conducted by Dickey et al. (2000: 106) and Shaw (2000: 14) demonstrate that consumer polls reveal privacy to be an overwhelmingly critical factor in deciding whether to purchase over the Internet. Nonetheless, there have been major controversies between interests of businesses, the government, and consumers in addressing issues related privacy. These issues have been exacerbated of late with the Edward Snowden disclosures (2013)¹ about the mass global surveillance and information gathering of the public's Internet accounts and phone records. This exemplifies the point that as the cost of producing and manufacturing storage hardware decreases, the access to gigantic databases that can store consumer profiles, information on spending patterns and personal relationships increases. This information is then used by global and now local corporations to specifically target their products and services much more efficiently.

Shaw (2000: 14) suggests that to strike a balance between the openness and freedom of the Internet with the privacy concerns of the general public, it is important that an agreed-upon practice or standard be adopted globally. This will then act as a unified universal code to govern information-collection in electronic commerce. This emerging framework is based on the concept of notification and consent. Here, a business or company has to notify individuals about their information-collection practices and as soon as the company has attained consent, companies are then free to use such collected personal information for their business usages. This method can allow for greater flexibility in having multiple levels of privacy for the general public and consumers.

However, despite the concerns it must also be remembered that the attraction of the Internet is in its ability to remove barriers and distances between parties. Even with regards to

¹ see: <http://www.theguardian.com/world/2014/jul/18/-sp-edward-snowden-nsa-whistleblower-interview-transcript>

language the software available can allow people to communicate and translate efficiently without the requirement of external agents or intermediaries (Ibraheem, 2000: 13). By 1995, 16 million people were online, less than half of a percent of the world's population. However, by 2000 that figure grew to 5% (304 million) and this doubled by 2003, by 2005 the number of users online was more than a billion (15% of the world's population) and has grown slowly since then. Europe has the highest penetration at 70% while in some Scandinavian countries (Norway and Sweden), 90% of the population has access to the Internet. English, Spanish and Chinese are the languages of most of the world's users with Chinese seeing the largest growth with more than a 1000% since 2000. According to data from the International Telecommunications Union (ITU) at the end of 2011 there were 2.3 billion people who had access to the Internet.¹ According to recent research by We Are Social, by the end of 2016, 50% of the world's population will have access to the Internet.² Hence it is argued that this unparalleled level of Internet penetration, ICT infrastructure, legal infrastructure and the availability of skilled Information technology experts are key factors in driving the surge towards the promotion and eventual adoption of e-Commerce (Gibbs et al., 2002; Chan and Hawamdeh, 2002).

4.2 Defining E-Commerce

The term electronic commerce (e-commerce) has per the previous segment gained enormous currency and popularity with the increasing utilisation of Internet based technologies. Therefore, it is essential at the outset to provide a definitive comprehension of the term as it has been used in this study so that its usage with reference to the legislative framework is both succinct and clear.

The term e-commerce is comprised of two words:

Electronic: “...carried out or accessed by means of a computer or other electronic device, especially over a network: e.g.: the electronic edition of the newspaper; electronic

¹ Tina Aridas and Valentina Pasquali, Internet Users by Country, Global Finance:

<https://www.gfmag.com/global-data/non-economic-data/internet-users>

² Simon Kemp, Digital, Social and Mobile Worldwide 2015, 21 January 2015:

<http://wearesocial.net/tag/statistics/>

banking...”

(Oxford Online Dictionary)

Commerce:”*the activity of buying and selling...*”

(Oxford Online Dictionary)

Although the neologism ‘e-commerce’ is considered to be a modern term within the disciplines of economics and law, there exists within the literature a general definition provided by most commentators. Economists suggests that e-commerce entails the use of the Internet to buy, sell or support products and services (Gibbs et al. 2002; Tan and Teo, 2002; Bakos, 1997) Furthermore Qashqush, (2000: 5) provides an almost similar definition of e-Commerce as the “*a practice conducted between two parties, a buyer and a seller, or more, via the use of a computer via the Internet*”. The Global Journal of E-Commerce (1999:22) also defined it as a term, which “*...intends the practices of buying and selling, offering commodities and requesting them from their producers or sellers electronically, rather than the usual way.... often conducted via the internet*”.¹

These narrow definitions of e-Commerce entail the process to be simply about buying and selling products and services via the Internet.²

E-Commerce in the economic context is thus limited to trade and trading via modern means of electronic communication. Although some commentators concede that it as of yet it does not extend to the production and manufacturing of goods but the advent of 3-D printing technologies will also make this a possibility in the near future. (Isma'il, 2009: 30).

Therefore, it is argued that these limited perceptions and definitions do not account for the myriad aspects of e-commerce that are not only business specific but also context dependent. The factors concerned with the advertising of products and services, exchanging information, the creation of websites and virtual shops, means of electronic payment and electronic banking can also be considered a concern of the legislation. Thus legal concept of e-commerce also includes the production, manufacturing and selling of goods for profit maximisation, as e-commerce represents a modern method of trade, which does not differ in

¹*Majallah al-'Ālamiyyah al-Mutakhassisahh bi't-Tijārah al-Elektroniyyah wa't-Tasawwuq 'Abra'l-Internet* [Global Journal for E-Commerce and Online Shopping], no.1, October/November 1999, p.22.

² Rāfat Ridwān, *op.cit.*, p.14

essence from the traditional notion of trade. However, the marketing of goods and products, the procurement process including purchase transactions and the eventual distribution and tracking of these goods and products to customers is all performed via a new unprecedented medium that legislation has of yet not encountered.

Hence Chatterjee (2002)¹ argues that e-commerce is not simply a process that encompasses the initiation and maintenance of websites, whereby businesses can deal and trade directly with consumers, it entails many more components.

So from the legislative-juristic perspective the definition of e-commerce entails a greater holistic comprehension of the entire activity of trade and all that it may encompass.

Jentz and Miller (2002:59) observe that legislation should define e-commerce to mean all *“business transactions and activities carried out via electronic means of communication”*.² The Dubai Technology, E-Commerce and Media Free Zone Law share this definition of e-commerce, as all *“business, which is conducted by an electronic medium... predominantly the Internet”*.³

It is argued that these definitions recognise that e-commerce includes the entire process end-end from the prerogative of the business and consumer. It extends to include all administrative, commercial, production, financial and service activities. In addition advocates of this perspective hold that the concept of e-commerce also includes health, education and administrative work (Isma'il, 2009: 36). For this reason, the description of e-Commerce as being solely an electronic transaction between parties is imprecise and does not parlay its legislative content.

Therefore this thesis in defining the notion of e-commerce agrees with the definition provided by the World Trade Organisation (WTO):

*“...Contract making practices, the formation of trade links and the production, distribution, marketing and sale of products via communication networks...”*⁴

¹ Charles Chatterjee, *E-Commerce Law for Business Managers* (Canterbury: Financial World Publishing, 2002), p.3

² Roger Leroy Miller and Gaylord A. Jentz, *Law for E-Commerce: The Online Legal Environment* (2002), p.59

³ See: http://www.tecom.ae/law/law_1.htm

⁴ Refer to the studies of the WTO regarding e-Commerce on www.wto.org

This is commensurate with the nature of e-Commerce, which does not differ greatly from the traditional notion of trade except in its use of an electronic intermediary to complete the transaction. This has led to broadening the scope and possibilities of the digital environment, characterised by its ever encroaching ability to replicate the real physical world through a virtual medium at lower costs and in faster times.

Therefore, e-commerce encompasses the utilisation of ICT to enhance trade deals between mutually interested parties. (Watson et al., 1998) Although there are many definitions of e-commerce this study defines e-commerce to be:

“The participation in commercial activities, the forging and maintenance of relationships and business transactions through the means of electronic network communications in accordance to the legislative standards agreed upon by the mutual parties in contact.”

Thus implies that although e-commerce is a commercial transaction between a buyer and seller over the Internet, this only forms a partial aspect of the process as there are also legislative, juristic and terms and conditions of transaction, which must be agreed upon before any transaction can commence.

Also refer to the statement given by the Director-General of the WTO on 17 September 1998 entitled *A Framework for Global Electronic Commerce*, available at: www.wto.org/wto.org/speeches/osio.htm

4.3 The Scope of E-Commerce

The scope of electronic commerce has been highlighted in Figure 4.3: (Shaw, et al., 1997; Shaw, 2000: 7),

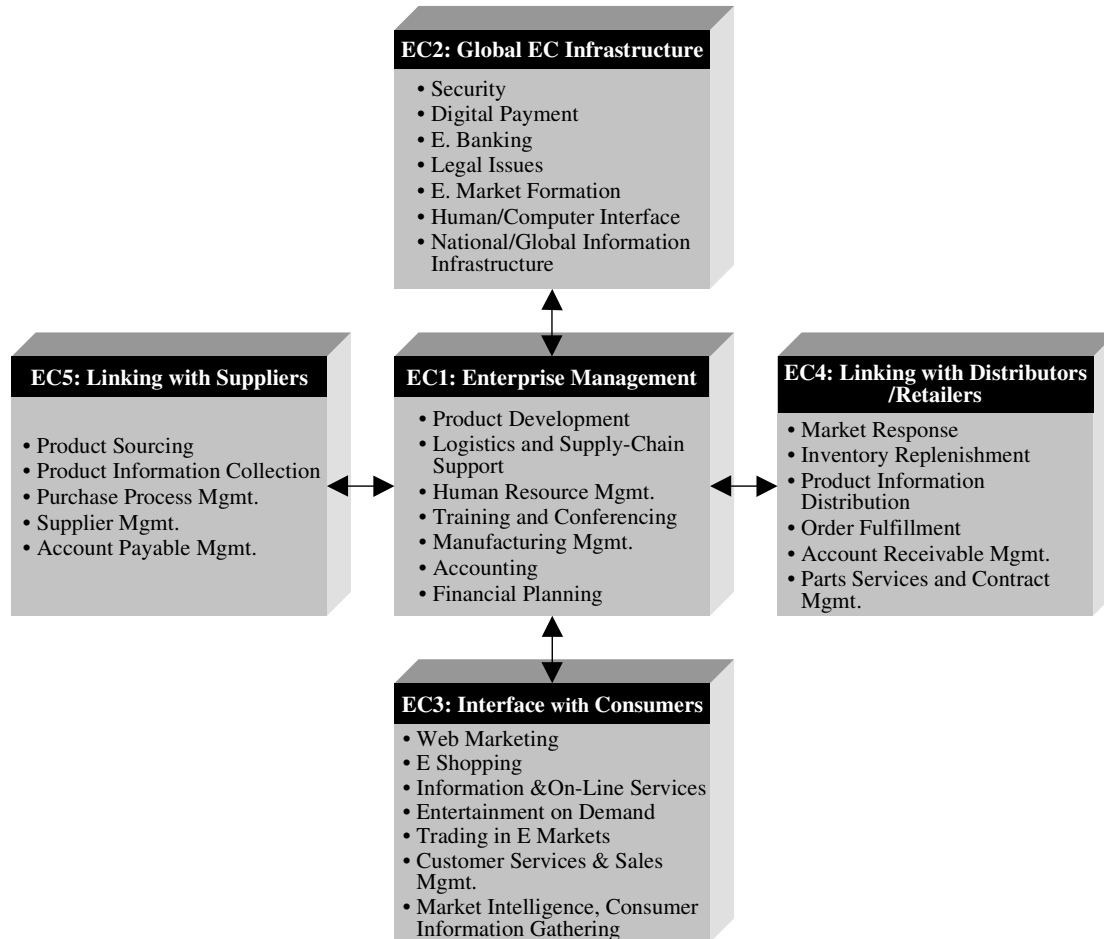


Figure 4.3: The Scope of Electronic Commerce (Shaw, 2000: 7)

The above diagram (Figure 4.3) demonstrates the main influence of Web based technologies in managing a company and the infrastructure for collecting, distributing, and sharing information. It serves as a new channel for making sales, promoting products, and delivering services. It also integrates the information organization for managing activities on all levels of the company and provides new electronic links for reaching out to the customers and supply-chain partners.

The management within the enterprise (EC1) links with suppliers (EC5), distributors (EC4) horizontally whilst interfacing with consumers vertically downwards (EC3). The e-commerce aspect is then demonstrated through EC1 linking with the global infrastructure in a vertically upward relationship (EC2) that encompasses such factors as payment systems, network

security, human-computer interface, and the information infrastructure.

Shaw (2000) further observes that e-commerce provides unique opportunities to integrate various types of communication networks for businesses:

- (a) Intranet: For process, knowledge, and internal communication management,
- (b) Extranet: For external coordination and information sharing with channel partners such as suppliers, distributors and dealers, and
- (c) Internet: For setting up electronic storefronts, providing customer services, and collecting market intelligence. In developing electronic commerce there is a constant need for new business models adequate for new digital products, new industrial virtual organizations and new industrial organizations (e.g., information intermediaries).

There is an important distinction to make at this juncture between e-commerce and the conduct of business electronically (e-business). The latter refers mainly to the implementation of the business via the use of Internet technologies in order to increase profits.

E-Commerce however, is an advanced stage of commerce, which utilises ICT to produce and distribute goods and services on a global level, with the explicit aim of creating a new electronic trade outlet. There is also the possibility to eliminate the intermediary stage between the producer and the consumer.

The concept of e-Commerce is not restricted to commodities and material goods as a significant element of e-Commerce includes the exchange of information and knowledge, and the delivery of services in real-time such as booking plane tickets, reserving hotels, bank transactions and the like. (Jagannathan et al., 2002; Huff et al., 2000).

This has led to the natural evolution in not only the notion of e-commerce but also as specialised types of e-commerce.

4.3.1 Forms of E-Commerce

Seebacher (2002) identified several types of e-commerce, with the most widely known being Business-to-Business (B2B) and Business-to-Consumer (B2C). The growing use of electronic networks by commercial traders has demonstrated that these networks have advantages and different objectives.

The wide dissemination of these networks indicates the presence of learned users who possess extensive expertise in this field. This is an attractive incentive to all business units, consumers and even governments, for this reason, e-Commerce includes commercial deals that can be made between individuals and companies. The nature of this is as follows:

E-Commerce deals could be incorporeal which means intangible such as the exchange of information or informatics products. Though these goods and services are delivered digitally to the buyer via download, such as computer programs, music, films and books. In this instance, customers appear in digital format (i.e. they are not physically present when making the purchase) and the commodities are digital as is the transaction process (Walden and Hornle, 2001: 75). In the other instance electronic business transactions may be considered partial when one of the main elements (customers, commodities or the business operation) is digital, and the other elements are material. An example of that is when a customer purchases a book from Amazon and asks them to send the book to his home via regular mail.

Table 4.3.1: identifies and summarises the activities and e-commerce operations of the varying types of e-commerce activities that exist at present:¹

¹ See Appendix 4 for a detailed analysis and description of each type of e-commercial activity

	Business-Business (B2B) E-Commerce	Business-Customer (B2C) E-Commerce	Customer-Customer (C2C) E-Commerce	Customer-Business (C2B) E-Commerce	Inter-Business (IB) E-Commerce	Governmental Business in E-Commerce
DESCRIPTION	Oldest type of e-commerce Internet utilised to conduct and increase trade through exchange of electronic documents, submit purchase orders to other businesses, agreements between exchanging parties in the form of electronic contracts for the supply of goods, services, invoices and payments electronically as well as delivery.	Customers can browse or visit online stores and catalogues through different online complexes and look through the commodities, products and available services as part of the online shopping experience.	Conducted between users via Internet based portals or established stores, bazaars or through personal spaces such as websites or email services.	Customers presenting products and services to companies through their own online portals such as websites	All internal organisational activities, which are usually hosted on an internal network that is connected to the Internet and thus accessible globally, regionally or locally	The establishment of the 'e-Government' Governments allowed for the exchange of documents, data and information such as the payments of taxes, fees and subscriptions, or to obtain private documents of a general nature of individuals seeking identity documents such as passports, driving licences etc to be conducted over the Internet.
TYPES	Two types of B2B EC markets. One is related to the management of material flows in production-oriented supply-chain networks The other is related to the procurement of maintenance, repair and operations (MRO) items, referred to as the <i>indirect items</i> .	Although the literature defines a single type of B2C market, with the advent and success of online stores such as Ali Baba, E-Bay etc new models are emerging but have yet to be defined appropriately.	As with B2C, the success of trading platforms, which allow consumers to interact with other consumers and sellers. New models are emerging but at present this category is defined by a single process	As with B2C and C2C the success of current emerging trading platforms are allowing for individual consumers to interact with businesses and other consumers to sell directly. Thus again new models are emerging but at present this category is defined by a single process	Only a single type of such e-commerce activity has yet been defined.	This type of e-commerce activity encompasses all e-government activities.

	Business-Business (B2B) E-Commerce	Business-Customer (B2C) E-Commerce	Customer-Customer (C2C) E-Commerce	Customer-Business (C2B) E-Commerce	Inter-Business (IB) E-Commerce	Governmental Business in E-Commerce
ADVANTAGES	For direct or the indirect procurement processes: electronic data interchange (EDI) has been used to forge automated linkages between the buyer and supplier to transmit orders, receipts, and payments all electronically.	Virtual trading markets can attract global audiences by presenting a wide variety of products and services at cheaper costs to physical outlets.	Direct seller to buyer relationship with virtually no middleman or agent player.	Direct seller to buyer relationship with virtually no middleman or agent player.	Access to data globally without any time or distance constraints. Allows for a fully operational business 24hrs-365 days/year	Allows for easy access to essential and useful government documents, forms and processes. Time and distance issues reduced.
DISADVANTAGES	Relies on the need for private lines or value-adding networks (VAN'S) and relies on specialist types of software	Consumer is in no bargaining position at all as the contract is offered on a 'take it, or leave it' basis.	Trust and Validity of products and sellers is still an ongoing issue. As security of Internet protocols and software develops, it is expected that this type of e-commerce will become the leading form of business transaction	Trust and Validity of products and sellers is still an ongoing issue. As security of Internet protocols and software develops, it is expected that this type of e-commerce will become the leading form of business transaction	Increased security threat from rouge actors and criminals through breach of firewalls and encryption techniques.	Security of information, identity theft and even technological capabilities of users may cause this type of e-commerce activity to be compromised.

Table 4.3.1: Types of E-Commerce Activities

Thus it can be suggested that e-commerce has already pervaded the core practises of general society and what must now be considered is how it will further develop and what impact it may have in the future.

4.4 The Prospects and Future of E-Commerce

Research by Ahmed (2013), Quelch and Klein (1996) and Poon and Swatman (1997) indicated that the internet will revolutionise the dynamics of international commerce and in particular lead to rapid international growth of small to medium-sized enterprise (SME's). While Hamil (1997) concludes that the Internet can offer SME's with a low-cost solution to accessing the global market thereby overcoming some of the barriers associated with international trade, which is usually experienced by small companies.

Commerce, in its new manifestation, allows a small company to compete with a large company and help overcome many of the obstacles that are faced by customers particularly in regards to security, confidentiality and the protection of financial transactions.

It is not possible to predict the future of e-Commerce and its potential without identifying issues connected to the formation of e-Commerce as there are a number of important issues inherent within the launch of e-Commerce that require a standardised criteria. Trade is built upon trust so for the online trading to begin on both an individual and institutional level there has to be trust from all parties at least equal to the level experienced with traditional trading (along with a phone line, fax and normal mail options). Each party to an electronic transaction has to guarantee the following:¹

- The buyer and the seller are involved in the transaction and not a third party
- The seller has the right to sell the commodity, or service.
- The buyer must ensure the availability of financial resources to pay for the value of the item.
- Coping and payment mechanisms must be available, legitimate and safe.
- The item or service being sold must have the characteristics as advertised and requested.
- There should be the possibility of delivery of the product or service to the buyer
- Both parties should gain/ benefit from the transaction (s)

All of these issues cover a number of fundamental e-commerce features such as: consumer protection, ensuring diversity and competition in the market, financial systems, payment systems, collection and intellectual property rights.

These are now explored in more depth and detail.

¹ As-Sayyid 'Atiyyah 'AbdulWāhid, 'at-Tijārah al-Elektroniyyah Mushkilātuhā wa Mustaqbaluhā fī Daw' Tawseeyāt' ['E-Commerce: Its Problems and Future in Light of Expansions']. Global Commerce Conference, May 1998, College of Rights, Halwān University, 1999, p.121.

4.4.1 Consumer Protection

The review of literature alongside the survey results in section 4.1 demonstrated that the consumers in their roles as individuals or business and institutional entities perceive trust to be a central issue in the transactions conducted via e-Commerce.

Shaw (2000: 14) discusses how privacy is a critical issue in e-Commerce and that consumers demand secure systems if they are to make payments. Therefore, protecting consumer privacy is vital and mechanisms have to be created and imposed which prevent the illegal usage of information, which may result from business dealings. Regulations regarding confidentiality also have to be imposed and applied to the usage of this data so that it cannot be utilised by non-consenting third parties.¹

One of the most important obstacles in the use of e-commerce from the consumer side is in the difficulty with identifying the source of the products and to determine the product are as advertised in terms of quality, compatibility or adequacy for its intended use.

Shaw (2000: 15)

The situation here becomes more complicated especially when it is related to physical products. This issue becomes critically clear particularly for those new traders within the market who have not yet obtained a reputable position within the common market. One of the solutions to this in the short and medium term is for such traders to fall under the umbrella of other larger institutions of trade labels in order to earn the consumer's confidence within the market.

When the procurement process has been completed, consumers need to be assured that the purchased products will reach them in good condition. However, the most contentious aspect of the e-Commerce infrastructure concerns the issue of delivery of items and products.

Transportation and national customs issues may hinder the physical delivery of items, whilst connectivity problems, national legislations and even payment issues could hamper soft products such as entertainment and media services.²

The researcher views that the UAE legislature in the form of the CPC has acknowledged consumer protection via many articles in the CPC.

¹ Ramadān Siddeeq, *ad-Darā'ib 'ala't-Tijārah al-Elektroniyyah* [E-Commerce Taxes]. Cairo: Dār un-Nahdhah, 2001, p.47.

² Najeeb 'Abdullāh ash-Shāmiṣī, *Ahammiyyat wa Hajm it-Tijārah al-Elektroniyyah fi'l-Iqtisād al-Watanī* [The Importance and Size of E-Commerce in the National Economy]:

http://www.gn4me.com/etsalat/-etsalat/article.jsp?art_id=8006

(For a full list of the core Articles as per the CPC designed to provide this consumer protection please see Appendix 1)

4.4.2 Guaranteeing Variety and Competition Within the Market

The market must take into consideration the notions of variation and competition. However, there are a range of potential difficulties and obstacles, which have to be avoided in order to maintain choice for both buyers and sellers.

The principle of the open electronic market is not without ambiguity, as Institutions wish to control as many features as possible in order to minimise their costs and competition.

Institutions that have assumed a position in the market due to their brand and trade names are seeking more avenues to shut out new traders and competition. Yet the balance needed to gain customer confidence through a greater variety of sellers has to be emphasised and this presents new actors with an opportunity to establish themselves in the market with lower start up costs as compared to the traditional physical methods of hard infrastructure.¹

However, commentators argue that large investments are necessary for profitable operations that consist of direct costs for equipment, new systems, expertise, marketing and regulatory fees, especially for small and medium-sized enterprises.²

Thus it has be remembered that although ICT has allowed for an increased flow of information that can be accessed by both buyer and seller, the e-Commerce process is expensive and time consuming and may not be accessible for all. However, with the opportunity to start up at such low costs and to trade directly there is conversely an opportunity for SME's to begin the process and then rely on the quality of service, in the form of trust to create their own reputability and loyalties online. Sites like Alibaba.com demonstrate the potential benefits of selling in online bazaars where the potential to reach a wider audience is increased due to the strength of the umbrella organization and its potential market value and credibility.³

¹See:Salim, M. (2002) PhD Thesis: Impact of E-commerce on Business Values in Service Organisations; Department of Business Administration Faculty of Management Studies and Research Aligarh Muslim University; Aligarh (India)

²See:http://www.ecorner.com.au/epages/ecorner.sf/en_AU/?ObjectPath=/Shops/ecorner/Categories#.VyN8g9Bi5SU Initiated brief contact with owners of this website to gage costs and requirments

³ See: Case Study on Alibab.com: <http://dl.ifip.org/db/conf/i3e/i3e2009/QingX09.pdf>

4.4.3 Financial and Payment Systems

The e-Commerce digital financial instruments such as electronic cash, (encrypted) credit information, prepaid smart cards, or electronic checks have replaced the traditional methods of payments such as cash, cheques, and credit card. Banks, an intermediary, or legal tenders often back these digital financial instruments. Currently the most common means of payment is submission of credit card information through a secured Web transmission. (Shaw, 2000: 15) The possible problems that may arise due to network security issues are protected by encryption and other security measures that increase the security of payments, which is one of the core methods of transactions for consumers as its the most cost effective way to make payments.

Furthermore financial products and services (banking, insurance and investment) through e-Commerce are universally accessible. However, it can possibly be very difficult for the beneficiaries of these services to ensure that the financiers are legitimate bodies or to evaluate any possible levels of risk within the electronic market. It is possible to imagine that a customer buys a product from a national institution (subject to national regulations) yet discover that the product is in fact from another agency, which is subject to different laws of control. Financial regulations also differ from country to country therefore creating barriers for financial institutions to develop international e-Commerce markets. (Isma'il, 2009: 72).

4.4.4 Collection

It is argued by some commentators that e-Commerce has had a negative effect upon the government's ability to collect taxes.¹ There has been a decline in tax revenues due to the increasing exploitation of electronic means of commerce. International e-Commerce has contributed to an environment in which tax avoidance opportunities have increased due to a growing number of corporations facilitating tax evasion via online services. However, despite these concerns the issue has to be handled with care due to enormous impact it would have on international commercial transactions.²

¹ See OECD report on taxation and governments: <http://www.oecd.org/tax/consumption/5594899.pdf>

² See report by Hal R. Varian at Berkley University: <http://people.ischool.berkeley.edu/~hal/Papers/etax.html>

4.4.5 Intellectual Property Rights (IPR)

Corporations, Institutions and individuals have become more aware of the issue of intellectual property rights and the need to protect their brands and business information. Contemporary legislations have clarified that protecting intellectual property rights has to involve the recording of these ideas and their written documentation in a physical state such as publications, audios, digital recordings etc. However, with the advent of e-commerce the biggest challenge the governments are encountering is the redrafting of legislation. (Railas, 2013: 89)

The increased number of soft products such as books, music, electronic arts and media now readily available over the Internet has become subject to much controversy in relation to its IPR. Artists and Musicians in particular have been at the forefront of championing the protection of their work, whilst others have sought to create a free and open network with open distribution and sharing of content.¹

4.5 Summary

This chapter sought to explore broadly the notion of e-Commerce from a historical and legislative perspective. The chapter began by parlaying the rapid developments in ICT and the Internet revolution, which have increased global connectivity, communications and the facilitation of commerce over the electronic highway. The immediate effects of this technological revolution have been the establishment of businesses specifically centred on e-Commerce and the adoption of e-Commerce by existing businesses and corporations. The chapter then provides a definition of e-Commerce in relation to the context of this study. After considering a number of definitions that define e-Commerce to simply be a commercial transactions conducted over the Internet, the study identifies this to be inadequate in terms of taking account of the legislative considerations. Thus the study has defined e-Commerce to be:

“The participation in commercial activities, the forging and maintenance of relationships and business transactions through the means of electronic network communications in accordance to the legislative standards agreed upon by the mutual parties in contact.”

¹See the report by the Pew Institute on IPR: <http://www.pewinternet.org/2004/12/05/artists-musicians-and-the-internet/>

In establishing the definition, the study presents a solid understanding of the concept. The following section therefore focuses upon the scope of e-Commerce in terms of its organizational and structural influence. It was demonstrated that the Enterprise Management (E-Commerce Business) worked horizontally to connect with its suppliers and distributors, whilst working vertically down to cater for its customers and vertically upwards to connect with the global marketplace via the electronic network. This mass adoption of e-Commerce and increased business activity over the electronic networks has created new types of e-commerce activities between varying actors. These relationships include Business-to-Business (B2B), wherein both the suppliers and a buyers are already established businesses and are thus trading and providing services to each another; Business-to-Customer (B2C) transactions where established businesses trade directly with their customers and the Customer-to-Customer (C2C) transactions such as eBay and Gumtree. The significance of emphasising these various types of e-Commerce and highlighting the unprecedented growth and adoption of e-commerce is to demonstrate as Hong (2004: 378) notes, that there is a desperate requirement for legislation that protects the consumer, whether it's a business or an individual. Hence the final section explicates the current legislative status that seeks to protect customers and consumers in e-Commerce transactions. The discussion identifies various legislative articles from the UAE that protect consumers in normal traditional transactions. It also argues for greater variety and competition in the e-Commerce market so that consumers are not subject to monopolies with limited choices. However, the developments in the online payment methods are cited to be an example of how to attain customer satisfaction and trust. As the methods have proven to be safe and secure through encrypted technology. Nevertheless there are some significant problems according to the review of literature with regards to the growing threat of tax evasion, identify fraud and the floundering of Intellectual Property Rights.

The next chapter focuses exclusively upon e-Commerce in the UAE context.

CHAPTER FIVE

ELECTRONIC COMMERCE IN THE UAE

5.0 Introduction

The United Arab Emirates (UAE) comprised of seven principalities with an estimated population of around 9.5 million (2016),¹ is the Middle East’s largest shopping and trade centre with retail revenues of around \$51 billion in 2011 and expected to double by 2020. (Ahmed, 2013) Muhannad and Ahmed (2014: 98) observe that the Internet retailing concept has also gained significant recognition in the UAE thereby furthering retailing opportunities in the country.² The UAE also has one of the highest numbers of Internet users in the region with around 8.9 million users. According to a 2014 survey by Internet Live Stats, Internet access and usage in the UAE accounts for around 93% of the population.

	Internet Users	1 Year Growth %	1 Year User Growth	Total Population Size	1 Year Population Change %	Penetration of Population with Internet %	Country's Share of World Population	Country's Share of World Internet Users
UAE	8,807,226	10	774,914	9,445,624	1.06	93.24	0.13	0.30

Figure 5.0: 2014 Internet Live Stats, elaborated data from International Telecommunications Union, United Nations Population Division, the World Bank and the Internet and Mobile Association of India. July 1 2014 Estimate

The Telecom Monitoring Authority observes that 16% of the population in the UAE already shopped online in 2012, and by 2013 the online business in the UAE was valued at \$280 million, which Singh (2014) predicts to reach \$10 billion by 2018.

Whilst Muhannad and Ahmed (2014: 96) estimate that e-commerce in the UAE is at \$2.5 billion and expected to accelerate and create new businesses and job opportunities.

¹Estimate figure taken from <http://www.tradingeconomics.com/ united-arab-emirates/population> Last official census from 2010 revealed a figure of around 8.2 million

²Also see report by Logistics Executives: <http://www.logisticsexecutive.com/wp-content/uploads/2015/01/As-the-Middle-East-e-commerce-market-grows-what-are-the-opportunities-for-logistics-providers.pdf>

The aim of this chapter is to explore the current state of e-Commerce in the UAE. Section 5.1 begins with a review of literature that will aim to demonstrate that the UAE enjoys a high percentage of Internet usage, which has aided the development of e-commerce within the nation. Conversely though it has also exposed major flaws with the exclusive dependence upon electronic technology. Thus section 5.2 focuses upon the legislation as it exists in the UAE and what is required in order for it to meet the challenges of contemporary e-Commerce transactions. In section 5.3 the chapter introduces and discusses the notion of e-Commerce contracts in the UAE Legislation by focusing upon the conventional Contract in contrast to the e-Contract, which is perceived as an International Contract. Section 5.4 demonstrates the current acceptance and validity of the E-Contract and e-signatures by contrasting it to the authority afforded to conventional paper documents, written documents and signatures.

5.1 Review of Literature

Muhannad and Ahmed (2014: 96) note that the number of online retailers has grown in the Gulf region with the UAE making up the biggest share of the region's e-commerce market. The business environment in the UAE is very competitive with increasing online Internet presence from national and multi-national companies who promote their products and services. According to Siddiqui (2008: 53-57) there are certain factors which contribute to online shopping behaviours and attitudes in the UAE such as: personal character, demographics (25-44 age group and young women in particular), product characteristics, quality of website (content, information, presentation, searching mechanisms, navigation, security and media richness), attitude towards online shopping, customer satisfaction.

According to Blythe (2011) UAE's e-commerce industry however needs regulation and specific laws to govern it especially as large volumes of goods are being shipped into the country from online vendors abroad. Al-Alawi (2007: 471) in her study stressed that the UAE is trying to move away from a dependence on petrol and as a result is seeking to expand e-commerce as they realise its importance for the country's economy. Al-Alawi also noted that there is little literature on e-commerce in the Middle East, yet there have been a few important studies. Sait et al. (2004) was one of the first studies to seriously investigate e-Commerce in the Gulf with their study on the Saudi situation.

Sait et al. (2004) noted that at the time of their study the KSA was in the process of looking at ways to diversify its economy with an interest in the IT sector and the introduction of e-Commerce initiatives covering Business-to-Customer (B2C) and Business-to-Business (B2B) market systems, which were still being developed at the time of their study. Also, they found that individuals who used the Internet for longer periods strongly agreed that e-Commerce would make life much easier. They suggest that the government promote wide scale usage of the Internet via reducing costs and enhancing infrastructure. In regards to e-Commerce they also concluded that e-Commerce awareness campaigns be launched targeting both consumers and businesses, along with the development of a legislative framework to address Online security and privacy.

There have also been further studies conducted by doctoral researchers examining the situation of e-commerce in Saudi Arabia. Al-Somali (2011) assessed E-Commerce adoption in Saudi Arabia and also addressed the slow adoption of the Internet in developing countries and problems with high costs and network connectivity. Almasoud (2008) argued for the alignment of the Saudi legal system with the international rules related to e-commerce, whilst Aldwsry's (2012) investigation sought to reveal the reasons for this non-conformity. He concluded that relationships affect business dealings, whereby Saudi Arabia had an unsaid policy of 'uncertainty avoidance', which impacted upon the e-Commerce adoption in the nation. He posits that this could be due to the very conservative nature of the society and the rules that restrict freedom and hinder change from what can be perceived as 'outside forces'. Alsaif (2013: 222) supports the contentions presented by these theses by highlighting certain social factors that have had an influence such as lack of trust, insufficient awareness of e-government and insufficient user IT skills, which have hindered e-government usage in Saudi Arabia. He asserts that the cultural dimension of low individuality and high collectivism was evident in Saudi Arabia. With specific reference to the UAE Al-Alawi (2007) identified 38 challenges to e-commerce in the UAE, the top ten being (in order of importance):

- Convincing decision makers;
- Lack of e-Commerce Strategies;
- Organisational Culture;
- Ensuring customer satisfaction;
- International Recognition;
- Transparency;

- Acquiring loyal customers;
- Competing in the electronic market;
- Lack of awareness on e-Commerce opportunities;
- Lack of infrastructure.

The findings from her studies are supported by further research by Jewels et al. (2009) who find that there are difficulties for e-commerce users in the UAE due to logistical issues. These include the delivery and distribution of goods, including regular mail. Furthermore, there are also language issues as the most prominent e-commerce sites are not in the Arabic language. Although Jewels et al. (2009: 7) cite the Madar¹ research conducted in 2007 to demonstrate that Dubai had an overall score similar to the United Kingdom, which ranked fourth in the EU in terms of the on-line availability of basic public services. However, their findings suggested that there was low confidence in conducting e-commerce online as it was deemed to be too risky. However, Jewels et al. argue that UAE society is collectivist, even one account of Internet fraud will be quickly disseminated and this one story may soon become regarded as the norm for Internet usage and transactions. Conversely, successful stories and positive examples of regular use of e-commerce channels are not given such broad publicity or shared with others. These concerns were further confirmed by an annual survey performed by Symantec,² which observed that 75% of UAE Internet users avoid on-line shopping because they believe it to be ‘unsafe’.

These findings have also been confirmed in Aldwsry (2012) study on Saudi Arabia, whereby he had identified the cultural issues related to the business and legal environment to be influenced by a collectivist perception.

Hence, there is a desire for face-to-face (F2F) interactions without recourse to doing everything via the Internet. Schmitz (2010: 180) also notes that *‘there are social interaction drawbacks with electronic communications. Instead of visiting neighbours or chatting with locals in the community at a local coffee shop, people sit alone in front of computers sharing their thoughts through chat rooms, blogs and social networking sites like Facebook, Twitter,*

¹ A study based on a benchmark test standardised by the European Commission

² See report on study: <http://www.itp.net/512867-survey-reveals-uae-internet-users-avoid-online-shopping>

Pinterest, Tumblr etc.’ Thus, increased connectivity can also diminish the intimacy, nonverbal messages and other social cues created through face-to-face (F2F) interactions.¹

5.2 E-Commerce in the UAE Legislation

The 2006 Federal Act No. 1 on e-Transactions and e-Commerce and the 2006 Consumer Protection Act No. 24 cover the regulation of e-commerce in the UAE. These are further supported in principles put forth by the 1985 Federal Civil Transactions Act No. 5 amended by the 1987 Federal Act No. 1.

The rule of the UAE CPC law was put in place to regulate transactions and e-Commerce. However UAE legislature did not regulate the applicability of the law in its 2006 law on consumer protection No. 24 and the 2006 ECL No. 1 the objectives of which are included under Article 3 (1) on protection of the rights of electronic trade users which includes consumers. What is apparent from this article is that the legislature gives a broad remit for the application of UAE law. Moreover, Article 28 stipulates:

The law of the United Arab Emirates shall be applied if it is impossible to prove the existence of an applicable law or to determine its effect.

However, if there UAE law cannot account for a particular case or circumstance then Article 23 stipulates:

The principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict of laws.

This is further reinforced through Article 2 (1) of the 2006 Federal Act on Electronic Transactions and Commerce, which stipulates:

¹ In an informal interview conducted with Maataz, a management associate in e-commerce trader at the Islamic Bank of Abu Dhabi, August , 2015, revealed that the general perception in the UAE is that e-commerce has pervaded into the private life spheres of everyday life and is now increasingly perceived to be a serious threat to the traditional and cultural lifestyles of the people.

“Matters for which no specific provision is laid down in this Law shall be governed by the international commercial laws affecting Electronic Transactions and Commerce and the general principles of civil and commercial practice”

It could be argued therefore, the rules of the CPC have been marginalised as the law was put in place to regulate transactions and e-Commerce in accordance with the objectives outlined in Article 3. This does not determine the applicable law, rather the law was initiated for regulatory reasons not to neglect general principles of contract and this is evident when looking at the objectives of Article 3 to:

- Protect the rights of persons doing business electronically and determine their obligations.
- Encourage and facilitate Electronic Transactions and Communications by means of reliable electronic records.
- Facilitate and eliminate barriers to e-Commerce and other e-Transactions resulting from uncertainties over writing and signature requirements, and promote the development of the legal and business infrastructure necessary to implement secure e-Commerce.
- Facilitate the electronic filing of documents with governmental and non-governmental agencies and departments, and promote efficient delivery of the services of such agencies by means of reliable electronic communications.
- Minimise the incidence of forged electronic communications, alteration of communications and fraud in e-Commerce and other e-Transactions.
- Establish uniform rules, regulations and standards for the authentication and validity of electronic communications.
- Promote public confidence in the validity, integrity and reliability of electronic transactions, communications and records.
- Promote the growth of e-Commerce and other transactions in the national and international level through the use of e-Signatures.

Thus it is evident that the Federal Law No. 1 on E-Transactions and Commerce is centred on promoting electronic transactions. It offers a law that governs electronic signature verification to make sure of the validity and authenticity of the documents and this ensures that the rights of both parties involved in electronic business are protected. The Act has largely achieved

these aims by outlining rules for verifying electronic signatures, however it has been suggested that the Act focuses on formalities rather than substance (Aljneibi, 2014). Most of the Articles of the Act deal with the authenticity of electronic documents and the confirmation of electronic signatures yet paying little attention to substantive rules.

The law also seeks to improve electronic transactions conducted at both the national and international level. Although it can impact the local, national legislation it is not clear how this would be enforced or influence legislation or rulings at the International level. E-Commerce at an international level has to be controlled whenever conflicts of law arise and at the time of the transaction. However, the law has not addressed this issue or what should be the applicable law for international transactions involving a UAE party.

Blythe (2010: 165) notes further that ECL is inapplicable in the following situations: marriage and divorce; wills; real property deeds; transfer of real property; negotiable instruments; and required notarization (ECL art. 2(2)). As a result, electronic documents cannot be used in those situations. If the ECL cannot address a specific matter the matter is under the jurisdiction of international business law and '*general principles of civil and commercial practice*' (ECL art. 2(1)). Omar (2009) notes that the ECL excludes 'negotiable instruments', which is a generic term for a wide range of legal instruments. It covers securities such as shares, bonds and all instruments that are transferable and entitles the bearer or beneficiary to claim the delivery of the goods, or the payment of the sum of money such as consignment notes, bills of lading, warehouse receipts, bills of exchange etc. Omar argues therefore that this exclusion means that all of these instruments are excluded from the application of the ECL and that it would have been more adequate had the ECL limited this exclusion to the transactions conducted under the rules of regulated stock exchanges and did not opt for sweeping exclusions of negotiable instruments. He observes that in the modern world the majority of transactions on securities are conducted Online and owners of shares and other securities can give instructions for the sale or purchase of securities to their brokers via email. Such exclusion Omar argues leads to the exclusion of financial services from the scope of application of the e-Commerce law and does not sit well with the UAE's ambition to be the region's main financial centre.

Aljneibi (2014) highlights the same concerns about the exclusion pointing out firstly that the UNITRAL Model Law on Electronic Commerce does not exclude these instruments and secondly that the designers of the UAE law should have broadened the scope of the law of electronic commercial application. Though the main objective of the UAE ECL is to

safeguard the parties when performing their business electronically, and to improve commercial electronic communications, the exclusions limit the application of the law. Excluding negotiable instruments is tantamount to omitting a range of financial services and various sectors as a result miss out on the benefits of the law.

Hence, if the UAE is to position itself as a global financial centre it has to adapt its legal environment in line with the financial services sector. Such instruments were also not excluded by the UNCITRAL Model Law.

However, Blythe (2010: 168) argues to the contrary and states that negotiable instruments should be excluded, as they would allow the electronic form to be used in all of the documents mentioned in the ECL. These have a legal validity and are related to marriage, divorce, will, deeds, real estate registration rights, sale, purchase and lease documents, notarized documents etc. Blythe contends that this would *'declare to the world in no uncertainty that the UAE sees no limits to the utilisation of the electronic form and would hasten the adoption of the electronic form by its citizens and residents'*. Blythe also stresses that no country in the Middle East is yet to reduce exclusions of such e-commerce law provisions.

Blythe (2010) provides some critical recommendations for the UAE ECL and apart from the exclusions, which he argues should all be deleted, except for negotiable instruments, he also makes some other suggestions for amendment of the provision. He argues that the ECL fails to include consumer protections for E-commerce buyers and that here the UAE can look to Tunisia for an example of a nation with good consumer protections for E-commerce buyers.

- Buyers have a last chance to examine the order before it is entered into;
- Buyers have a 10-day window of opportunity to withdraw from the agreement after it has been made;
- Buyers have the right to a refund if the goods are late or if they do not conform to the specifications;
- The risk remains on the seller during the 10-day trial period after the goods have been received.

As the ECL offers nothing with regards to consumer protection, Aljneibi (2014: 38) argues that it has to rely on other UAE laws, particularly those mentioned in the CPC.

Blythe (2010) suggests that in order to offer this consumer protection, new laws must recognise a list of computer crimes he has identified:

- Unauthorized Tampering with Computer Information;
- Unauthorized Use of a Computer Service;
- Unauthorized Interference in the Operation of a Computer;
- Unauthorized dissemination of Computer Access Codes or Passwords;
- Injection of a Virus into a Computer.

Blythe contends that the Singapore Computer Misuse Act can be used as a model. He argues that while Article 24 of the ECL contains E-government provisions, but they are permissive, not mandatory.

Furthermore as the UAE is a high-income developing country with the monetary resources needed to purchase the latest ICT systems for their governmental departments, e-Government provisions should be made mandatory in such a context. If so, costs of government services could be reduced and made more appropriate for citizens. In Hong-Kong for example a substantial number of e-Government services can be performed online from visa interviews to wedding scheduling in front of public officials.

Blythe (2010:169) recommends the addition of provisions, which are relevant to this research and E-commerce disputes:

- Information Technology Courts should be established as a court-of-first-instance for e-Commerce disputes, which consist of three experts. The chairperson specialised in E-commerce law, an ICT expert and a business management expert. Each expert is required to have the relevant qualifications and experience. Blythe cites The E-commerce law of the Kingdom of Nepal as an example.
- Long-arm jurisdiction be added to the ECL: So that for e-transactions transpiring between UAE citizens and residents or parties from outside the borders of UAE, the UAE should be able to exert 'long arm' jurisdiction against any party who is a resident or citizen of a foreign country, if that party has established 'minimum

contact' with the UAE. Whereby for example 'minimum contacts' could and is not limited to include cyber-sellers outside of the UAE making a sale to a party living within UAE.

In this case, the ECL should be applicable to the foreign person or entity outside of UAE because that person or firm has had an effect upon UAE through the transmission of an electronic message that was received in UAE. The foreign party should not be allowed to evade the jurisdiction of the UAE courts merely because they are not physically present in the country and this takes into account the international nature of E-commerce.

5.3 E-Commerce Contracts in UAE Legislation

UAE legislation has in place a number of key legal stipulations regarding commercial contracts, which are not too different from international conventions. The Rome Convention defines the consumer contract as "*a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession.*"¹ Mazziotti (2008: 122) notes that these provisions of the Rome Convention entrust single consumers and consumer associations, with the privilege of being able to make a claim against the violation of mandatory contract requirements, by facilitating the effective fruition of consumer rights before courts and under the law of the country in which they reside. Laborde (2010: 166-167) notes that consumer contracts are subject to special rules if the seller has an active attitude towards the consumer, i.e. when a seller targets and makes an offer of products or services to that consumer.

Zahrah (2001: 25) argues that there is a legal precept, which holds that concluding contracts via electronic means is a contract between absent parties, as it is conducted via distance. Distance contracts presents a number of legal problems such as issues related to the identity, suitability and description of the contract and determining the moment and place of the contract. Riefa (2009) notes in her research on 'reforming electronic consumer contracts in Europe' that the difficulties which are associated with the parties to e-contracts are that such parties are contracting at a distance, and in many cases can remain anonymous or use a

¹See: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593> for comprehensive coverage of these regulations

pseudonym.

Commentators therefore argue that e-contracts are distinct from other contracts in that they are distance-contracts and according to the most accurate legal perspectives are regarded as an international contract. Especially when both the supplier and the consumers are operating electronically, the company processes data downloaded via the Internet and each party is in a different country. (Zahrah, 2001: 25)

Thus it is pertinent that an understanding is gained between the conventional and e-contract in UAE legislation.

5.3.1 The E-Contract and the Conventional Contract in UAE Legislation

A direct comparison that can be made between e-contracts and conventional contracts based on the legal requirement is that both be in written form.

Article 7 of the 2006 Federal Act on Electronic Transactions and Commerce stipulates:

If a rule of law requires a statement, document, record, transaction or evidence to be in writing or provides for certain consequences if it is not, an Electronic Document or Record satisfies the requirement if the provisions of subsection (1) of Article (5) of this Law are complied with.

Enacting e-commerce contracts via the Internet is considered to be a form of distance-contract. The UAE law includes the possibility of enacting a contract at any time and place via modern means of communication be it via telephony or any other similar mode of communication. As a result therefore, the Internet is included as it is a contemporary mode of communication conducted over the telephone cabling system.

For this reason, Article 143 of the UAE CPC stipulates (translation by Whelan and Hall, 1987):

A contract made by telephone or by any similar means shall be regarded, so far as concerns place, as if it had been made between the contracting parties otherwise than in a single

session [majlis] with them both present at the time of the contract, and with regard to time, it shall be regarded as having been made between those present at the session [majlis].

Article 141 stipulates (translation of Whelan and Hall, 1987):

1. A contract may only be made upon the agreement of the two parties to the essential elements of the obligation, and the other lawful conditions, which the parties regard as essential.
2. If the parties agree on the essential elements of the obligation and the remainder of the other lawful conditions which both parties regard as essential and they leave matters of detail to be agreed upon afterwards but they do not stipulate that the contract shall not be regarded as made in the event of absence of agreement upon such matters, the contract shall be deemed to have been made, and if a dispute arises as to the matters which have not been agreed upon, the judge shall adjudicate thereon in accordance with the nature of the transaction and the provisions of the law.

There are options, which affect the binding nature of the contract in UAE legislature and also options which render contracts as non-binding whenever any of the parties has the option of conditionality. This option is based on the law, Article 222 of the CPC stipulates about the option of conditionality (translation of Whelan and Hall, 1987):

If both of the contracting parties have the advantage of the option of conditionality and one of them elects to cancel the contract, the contract shall be cancelled notwithstanding that the other may have affirmed, and if one affirms the contract the other shall retain his option to cancel throughout the period laid down for the option.

While Article 226 of the CPC stipulates in regards to the option to inspect:

The option to inspect shall arise in contracts liable to cancellation in favour of the person to whom the disposition is made even though not expressly stipulated if the subject matter of the contract has not been seen, and is specified.

Article 237 of the CPC stipulates when referring to the option to reject due to defects:

Contracts capable of being cancelled shall carry with them the right to cancel the contract under the defects option without there being a condition in that behalf in the contract.

5.3.2 The E-Contract as an International Contract

There is a legal view which holds that the e-contract is purely an international contract as both the supplier and the consumer are in the same country via the electronic network in what is a real example of globalisation. As a result it is difficult to confer a nationality to either the contract or the transaction (al-Manzalawi, 2006: 35-36).

This raises problems in regards to the identity of those making the contract, their suitability, and description of their contractual agreement, the time and place of the contract, the methods of verification, applicable law and a competent court to investigate the dispute and its related contract and enforcement. In addition to that, the consumer makes a contract for an item or service, which is not actually tangibly present. There are also problems with regards to the commitment of the business to deliver the goods or to perform the service and the costs for that.

Article 3 of the UAE Federal Act No. 1 of 2006 on e-Transactions and Commerce mentions that its objectives are as follows:

- Protect the rights of persons doing business electronically and determine their obligations.
- Encourage and facilitate Electronic Transactions and Communications by means of reliable electronic records.
- Facilitate and eliminate barriers to e-Commerce and other e-Transactions resulting from uncertainties over writing and signature requirements, and promote the development of the legal and business infrastructure necessary to implement secure e-Commerce.
- Facilitate the electronic filing of documents with governmental and non-governmental agencies and departments, and promote efficient delivery of the services of such agencies by means of reliable electronic communications.
- Minimise the incidence of forged electronic communications, alteration of communications and fraud in e-Commerce and other e-Transactions.

- Establish uniform rules, regulations and standards for the authentication and validity of electronic communications.
- Promote public confidence in the validity, integrity and reliability of electronic transactions, communications and records.
- Promote the growth of e-Commerce and other transactions in the national and international level through the use of e-Signatures.

Aljneibi (2014) notes that the wide range of objectives contained in Article 3 cannot be possibly attained without reliance on other laws and the legal environment as provided for in the UAE.

Research on the impact of the option to inspect in electronic consumer protection requires the Civil Transaction Act to govern the contractual relationship between the consumer and the supplier. This necessitates that the contract has been enacted via distance and also that one of the parties is foreign, and that even though an electronic consumer made the contract it could be outside the territorial scope of the UAE. Or it could be that the supplier falls outside of the territorial scope of the state as stipulated by the contract, this would then require determining the applicable law.

5.3.3 The Timing of an E-Contract

Difficulties can arise in determining when an e-contract is deemed to be have been formed due to the nature of the modern electronic contracting process, which involves communication between parties as absentees. In such contracts, a time delay occurs between the sending and receipt of offer and acceptance between the parties involved. As a result, it is disputable in such instances to determine the moment when a contract is deemed to be binding.

Legally, there are four core theories, which jurists utilise to determine the time at which a contract is formed between absentee parties:

1. The Declaration Theory
2. The Mailbox Theory
3. The Reception Theory
4. The Information Theory

There are other legal theories, *The Formulation theory* for example, which holds a contract legally effective at the moment the 'offeree begins to formulate its communication for the acceptance. As a result, it is generally used in conjunction with The Mailbox theory to prevent the 'offeror' from withdrawing his offer when the other party has started to respond to that communication (Eiselen, 1999). For example, in using the Internet a party communicates their offer via email to another offering to sell a particular good and enclosing its terms and conditions. The latter party accepts the offer and communicates his acceptance back via email. In this example, it is difficult to determine the exact point at which the contract is deemed to have formed. The questions posed are related to the time when the 'offeree' accepts the offer, the time when the acceptance is communicated back to the 'offeror', when the acceptance reaches 'offeree', regardless of whether they are aware of the acceptance or and (not limited to) the point that the acceptance comes to the notice of the 'offeror'. (Alzagy 2011: 158)

Establishing the time at which a contract is deemed to be formed is vital to determine whether the contracting parties can withdraw their communication before the contract becomes legally binding. This means that if a contract has been deemed to form as soon as the offer is accepted, the offer cannot be withdrawn when the acceptance has already been made. Whereas if the contract is deemed to form when the acceptance comes to the knowledge of the 'offeror', it is legally possible for the offer to be withdrawn so long as the 'offeror' has not received the acceptance. Likewise, the 'offeree' can revoke his acceptance before it comes to the notice of the 'offeror'.

Based on such a case, an offer of withdrawal or acceptance withdrawal is likely to come to the notice of the recipient before the offer or acceptance is communicated despite it being sent and received earlier. Alzāgy (2012) gives the example of a party, who lives in a country different from the 'offeree', sends his offer by email to the other recipient party and it was received say at 10:00 a.m. Several hours later, the 'offeror' changes his mind and sends another email withdrawing his offer, which arrives at the 'offeree's' inbox at 1:00 p.m. As long as the recipient party checks his inbox once a day at 4:00 p.m. the withdrawal of the offer should come to his attention before the offer itself, despite the offer being sent and received earlier. The same is likely to occur when revoking an acceptance by email; sending a notice of an acceptance's revocation after an earlier acceptance is emailed earlier may come to the attention of the offeror before the acceptance itself.

Article 22 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) states that:

An acceptance may be withdrawn if the withdrawal reaches the 'offeror' before, or at the same time as, the acceptance would have become effective.

While Article 136 of the UAE CPC stipulates (as per the translation of the CPC by Whelan and Hall, 1987):

The contracting parties shall retain the option (to rescind) from the time the offer has been made until the time the session [majlis] end. The offer shall be avoided if the one making the offer retracts it after making it and prior to its being accepted by the other side or if either of the contracting parties says or does anything to demonstrate that he is reneging from it, and no acceptance made after that shall be of any effect.

Article 137 of the UAE CPC stipulates:

If the parties concern themselves during the majlis of the contract with extraneous matters, that shall be regarded as rejection of the matter in hand.

Article 138 of the UAE CPC stipulates:

A repetition of the offer prior to acceptance annuls the first offer, and the last offer that has been made shall be regarded as the valid one.

Article 139 of the UAE CPC stipulates:

1. If a time is fixed for the acceptance to be given, the one making the offer shall be bound to keep to his offer until such time expires.
2. The time may be inferred from the circumstances of the case or from the nature of the transaction.

Article 140 of the UAE CPC stipulates:

1. The acceptance must coincide with the offer.

2. If the acceptance exceeds the subject matter of the offer or places a restriction on it or varies it, it shall be regarded as a rejection containing a new offer.

Due to this, it is vital to determine the time when a contract becomes legally binding in order to avoid potential disputes, which may arise from online e-contracts, yet with face-to-face transactions this does not really pose a problem. Based on this point, the contract is formed at the moment the acceptance comes to the knowledge of the 'offeror', which usually occurs as soon as the acceptance is expressed. An acceptance can either be an affirmative answer or the performance of a specified act, even silence can be recognised as acceptance in some instances. (Holthofer, 2001: 14; Chitty, 2012; 187-189)

Similarly, this general principle of contracting should be applied in contracts formed via direct forms of communication, such as on the telephone, when there is no time delay in the communication of offer and acceptance between the contracting parties. (Chitty, 2012: 202; Alzāgy 2011: 160)

With the UAE CPC we find that it does not consider distance-contracts, which have not been conducted electronically as being formed contracts as in the case of contracts concluded via phone, fax or the likes of such modern means of communication utilised for contracts between absentee parties.

Article 143 of the UAE CPC stipulates (as per the translation of Whelan and Hall, 1987):

A contract made by telephone or by any similar means shall be regarded, so far as concerns place, as if it had been made between the contracting parties otherwise than in a single majlis with them both present at the time of the contract, and with regard to time, it shall be regarded as having been made between those present at the majlis.

While Article 142 stipulates:

1. A contract made between parties not in each other's presence shall be deemed to have been made at the time and place at which the offeror learns of the acceptance unless there is an agreement or a provision of the law to the contrary.
2. The offeror shall be deemed to have learned of the acceptance at the time and place at which such acceptance reaches him unless there is evidence to the contrary.

The contracts therefore in the e-commerce transaction are in the form of e-documents. In order for these e-documents to enjoy the authority for authentication before all types of courts a number of requirements have to be maintained, the most important of these being the e-writing and the e-Signature.

5.4 Authenticating E-Commerce Contracts via Official Documents in the UAE

Documentation before a competent legal authority involves authentication of a certified e-Signature of a person via the use of documentation approval procedures. It also involves retaining the official document in its original form as agreed between the parties. In order for the e-document to be trusted, technological techniques have to be used which involve non-tampering with the data contained within the e-document, as would be the case with a paper document.

An e-Signature has various forms and types, which differ based on the different types of technology used to guarantee their integrity and security of the signature. This is also the case with traditional hand-written signatures on paper, which are maintained through a process of evidential authority.

Electronic data exchange forms the fundamental basis for e-commerce transactions and is regarded as the easiest and least expensive method to exchange data and information. It also enjoins security and protective measures, which cannot be easily accessible or compromised. However, EDI is not always subject to specific legal rules, which can lead to a legal void. Transactions via the Internet do not rely on paper documents and as a result it could be difficult to determine certain legal rules and this has been one of the obstacles in e-commerce. Paper documentation requires that all correspondence be kept in writing so that it can be referred to when needed in the event of any disputes between involved parties. As most legislatures regard the written document as a legally binding document, the questions posed are with regards to the equal legal recognition of the e-documents and the legal standing and authentication of these electronic transactions.

Therefore, it must be assessed if electronic documentation in the modern era, which is used more and more in contemporary transactions, can hold the same legal power for authentication as traditional forms of written paper documentation.

5.4.1 Definition of Official Documentation and the Requirements for their Authority in Authentication in the UAE Legislature

UAE legislature, in the form of Article 7 of the 1992 UAE Federal Law on the Issuance of Evidence for Civil and Commercial Transactions, defines ‘official documentation’ as:

Official exhibits are documents in which a public official or person entrusted with a public duty shall register all acts performed by him or articles given to him by concerned parties according to the legal requirements and within the limits of his authority and jurisdiction. If such exhibits have no official nature, they shall have only conventional value when such documents have been properly executed, signed, stamped and thumb printed.

The Emirati Federal Supreme Court defined ‘official documentation’ as:

“...Documents which have been written by a public official or a person entrusted with public service.”

The requirements for official documentation are as follows:

- The document has to be issued from a public official or a person who assumes such a position responsible for public service. The person does not have to be a government employee and can be a council or university employee.
- That the public official is specialised in authenticating paperwork – this is noted in Emirati legislature.
- That acknowledged legal circumstances are safeguarded.

To investigate this it is essential to investigate the definition and the requirements and legal authority of paper documents.

5.4.2 Definition of Paper Documentation and the Requirements for their Authority in Authentication in the UAE Legislature

The conventional practice of parties to legal dealings is to safeguard and verify all related documents. This will enable them to produce the requisite documents if required in a future time if disputes emerge between them or other parties.

However, legislations vary, with some having unrestricted authentication and others taking a restricted approach. The UAE legislature stipulates that the document have to be in writing for civil legal actions worth more than fifty thousand Emirati Dirham's. In legislations around the world writing is a means of evidence, which is a legal requirement to prove legal actions, based on the legal action that arises from the will of the parties to take legal effect. This effect can be from the will of one as in the case of an inheritance or a binding contract on one side, or legal action agreed by two as in the case of contracts which legally bind two sides, like a sales contract (Khattab, 1995: 88).

As a result of this, the growing use of e-Commerce to conclude legal actions and contracts has led to a number of difficulties, the most difficult of these being, the proof for contracts. Thus question posed in the review literature are concerned with the legal validity of electronic data.

Furthermore the principle for authenticating civil transactions is that the written authentication is compulsory especially for transactions over a certain amount or of an unlimited value. This holds true as long as there is not an agreement or stipulation which indicates to the contrary. The principle is applied to all claims raised before the judiciary, civil or criminal and the main issue here is in the nature of the action and not the court that inspects the claim (Sayyid, 2003: 55).

Article 36 of UAE Evidence Law of Civil and Commercial Transactions 1992 stipulates on 'Cases When the Testimony of Witnesses is Inadmissible' and notes:

"Where it violates or exceeds that which is contained in written evidence. If the liability is what remains of or part of a right, it may only be proved in writing. If any of the parties to a lawsuit claims in excess of Dhs. five thousand, then increases his claim to an amount exceeding this value."

UAE legislature requires some conditions for a document to acquire an official capacity and for individuals to be assured of its veracity and accuracy.

Article 5 of the 1992 UAE Federal Law on the Issuance of Evidence for Civil and Commercial Transactions states:

“The official exhibit shall be proof against all parties by virtue of its contents recorded by the official within the limits of his duty, or signed by the concerned parties in his presence unless it appears to have been forged by legally designed methods.”

There is still a further possibility for unofficial documents referred to as ‘customary documents’.

5.4.3 Definition of Customary Documents and the Requirements for their Authority in Authentication in the UAE Legislature

Customary documents or papers are those forms of documentation, which are non-official and issued by parties themselves, rather than being issued by public servants or the state, these are of two types:

1. Customary documentation, which are considered for authentication – these have been signed and attested to and are deemed assume evidential weight.
2. Customary documentation which cannot be used for authentication – these have not been signed however law still regards them as having a certain level of specific authority, as a result they are considered conflictual evidence.

UAE legislature has not addressed the definition of customary documentation despite stipulating that it carries evidential weight. A number of legal jurists have attempted to define them and what is related to them but all of those definitions revolve around customary documentation being issued from individuals without the presence of public civil servants (Buyūmī, 2006: 16; Yahiya, 1994: 842; Ali, 2000: 72). If a public official has any involvement in a document then at that point the document will be regarded as an official document.

The requirements for customary documents, which are considered for authentication are that they are written and signed. The document does not have to be hand-written, it could be produced on a computer, and in any language in which the parties made the agreement. UAE

law regards the signature as an important and necessary requirement for acknowledging the authenticity of a document.

The Emirati judiciary have noted that:

*It is acknowledged that a customary document attains authenticity via it being signed without the necessity of the signatures of the witnesses or a clarification of its date, as verification of the date is not required for authentication except when it is needed in challenging another disputant.*¹

A signature can take a variety of forms such as it being signed, a stamp or a thumbprint, which are options in places where there is high illiteracy. A point of note is that thumbprints are regarded as a more precise indication of a person's binding guarantee to a document, and they are difficult to falsify which cannot be said about stamps. (Marqas, 1952: 39)

5.5 Summary

This chapter explored the situation of e-Commerce in the UAE by firstly examining the literature. The findings from the examination revealed that the UAE government seeks to implement smart government applications for all government services. However at present although several e-government services are available online, there exists no systematic program to educate the populace on e-commerce and its benefits. Furthermore the examination highlighted the problems that exist with the publics' perception of conducting business transactions over the Internet and exemplified the notions of security, fraud, identity theft and the social alienation caused by conducting business solely over the Internet.

The following section then focused upon the legislative aspects of e-Commerce in the UAE and concluded that although legislation exists for conventional transactions there are major requirements for adapting to the demands of e-Commerce. Thus contracts made remotely and are deemed as international contracts, creating a situation, which necessitates both national and international legal regulation. This encompasses the security issues highlighted in the review entailing that e-transactions have the benefit of speed and widespread global usage but there exists no unified legislations to protect the consumers. Although legislation exists for

¹ Dubai Court of Appeal, Civil Petition no.3, 8th March 1998

conventional trade in the form of contracts, the developments in e-Commerce has led to the creation of previously unheralded situations. This is then addressed by analysing the notion of e-Contracts and the legitimacy associated them as opposed to the traditional methods of paper documentations. It is then concluded that although several laws in UAE have acted to address this new situation, the legislation is ambiguous with regards to the use of e-documents such as e-signatures and e-contracts.

The next section focuses upon the theoretical perspectives on the legal nature of arbitration.

CHAPTER SIX

LEGAL NATURE OF ARBITRATION AND THEORETICAL CONSIDERATIONS

6.0 Introduction

The chapter in seeking to explore the impact and validity of these theories begins by firstly defining the notion of arbitration in section 6.1. Here it is identified that although there exist numerous definitions of arbitration they describe it as a legal process that seeks to provide a resolution between disputing parties. It is also observed that arbitration from a legislative perspective can only be understood with specific reference to the nation State context in which it is discussed. The section then makes a distinction between the judicial rulings and arbitration. It will be demonstrated that the judicial process is backed by the national State legislature and is binding in accordance to the national State rules and regulations. The arbitral rulings are context and State dependent. The section then seeks to define the provisions afforded to the arbitrator's and its nature. The section then is concluded with a focus upon the legal system of the UAE and the role of arbitration in UAE legislation. In section 6.2 the chapter introduces the first of the five theories of arbitration introduced in the chapter, the 'Mono' theory of arbitration. In section 6.3 the chapter analyses the 'Contractual' theory by describing its theoretical base and the criticism levied against it. In section 6.4 the chapter introduces the 'Jurisdictional' theory of arbitration and again critically examines the theory, whilst in section 6.5 the 'Mixed/Hybrid' theory of arbitration is discussed and in section 6.6 the 'Autonomous' theory of arbitration.

In conclusion it is stated that due the broad nature of arbitration it is not a feasible at present to identify a single theory to be dominant or influencing the arbitration process.

6.1 Defining Arbitration

In defining the notion of arbitration, the linguistic perspective reveals that the term is derived from the Latin word '*arbitrae*', implying '*the authority to cope with something with wisdom*'. (Oxford Online Dictionary) It refers to an alternative means to resolving disputes that are independent of legal adjudication and litigation in a swift, private and efficient manner with the approval of a third party.

From a technically legal perspective the act or ‘to arbitrate’ is when an individual has been specifically appointed to judge upon a specific issue of dispute between two or more parties. Technically, ‘arbitration’ refers to disputants selecting another person, whom they both agree upon, to decide on their dispute and claims, this can also be stipulated as a clause within an agreement between two parties (Ibn Nujaym, 1893: vol.7, 24). The core features of arbitration are roughly the same even though across the globe different legal systems have various definitions. Lew et al. (2003: 3) note, “...As arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition of it.” However, in most legal systems today the features of arbitration are the similar.

6.1.1 Source of Arbitration Definitions

(Table 6.1.1: summarises a number of definitions of arbitration to demonstrate the universally accepted definition of the term)

Source of Definition	Definition of Term ‘Arbitration’
Blacks Law Dictionary (112)	“A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision are binding.”
Redfern and Hunter (2004: 2)	“Two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course... it will not be settled by a compromise, but by a decision.”

Tweedale and Tweedale (2005: 33)	“...The need for an arbitration agreement, a dispute, and a reference to a third party for its determination and an award by the third party...”
Poudret and Besson (2007: 3)	“A contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in place of state courts by rendering a decision having effects analogous to those of a judgement.”
Born (2009: 217)	“...A process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard...”

Table 6.1.1: Summarising the generally accepted definitions of arbitration

Lew et al. (2003: 3-4) propose that there are four fundamental features of arbitration:

1. An alternative to national courts;
2. A private mechanism for dispute resolution;
3. Selected and controlled by the disputing parties
4. A final and binding determination of the parties’ rights and obligations.

They then proceed to argue that in gaining an intellectual appreciation for the notion of arbitration it is essential that the key procedural characteristics be understood. They delineate four stages to this process:

1. Mutual Consent to Submit Arbitration: The disputing parties agree to the act of arbitration.
2. Choice of Arbitrators: The disputing parties mutually agree upon the choice for an individual or body to act as the arbitrator during the arbitration process.
3. Due Process: The disputing parties are fully committed to the process by providing all the requisite evidence requested by the arbitrators.
4. Binding Decision: The disputing parties agree to the decisions made by the arbitrators and accept its finality and totality.

Although the process of arbitration appears to be akin to a judiciary process, there are fundamental differences.

6.1.2 The Distinction Between Conventional Arbitration and Judicial Judgement

The main distinctions between conventional arbitration and judicial judgement are as follows:

1. Arbitration requires the consent of the parties to arbitrate whereas in the judicial system the state has specified a judge to rule.
2. The arbitration award is only binding on the parties whereas a judicial ruling is authoritative on all.
3. In arbitration, the parties can remove an arbitrator if they agree to this; this cannot be done in the judicial system.
4. The arbitral award is not restricted to a specific nation, whereas judicial ruling are.
5. An arbitrator is not bound to the application of Civil Codes of Procedure whereas the judges are by virtue of their duty and practice.
6. An arbitrator aims to work in the interests of private disputants in return for a fee. A judge on the other hand is working in a public office and works in the public interest without taking fees directly from disputants and litigants.

7. The arbitral award cannot be appealed against, contrary to a judicial ruling, which can be appealed against.
8. An arbitrator does not enjoy certain protections, which a judge does. Thus the arbitrators are liable to be held to account with the possibility of prosecution or liability to compensate for deemed errors and mistakes.

In clarifying the differences between the state sanctioned officials (judges) and the independent arbitrator, it is vital that the actual role of the arbitrator is understood in greater detail.

6.1.3 Definition of the Arbitrator's Provisions

The use of the arbitration system as a means to resolve disputes is a prehistoric method ('AbdulQādir, 1994), which is from the "*ancients in its inception and existence*" (Khalūsī, 1995: 5), in that it was known about in past societies that utilised it as a customary practice to resolve problems between individuals. (Al-Jamāl and 'Abdul'Āl, 1998: 5) People with authority in society such as religious figures or tribal leaders adjudicated upon disputes and disagreements and whatever they concurred on, the parties would accept regarding the particular dispute. (Khalūsī, 1995: 5) It can therefore be argued that this formulates the most basic and primitive version of the arbitration system.

Al-Jabalī, (2006: 7) observes that

"...After the emergence of the nation-state... the resolution of disputes and ascertaining justice became a prerogative of the state-sponsored judicial authorities designated to adjudicate over disputes among its citizens."

As a result, laws were enacted to clarify how to resort to these authorities, enforce awards, how any awards issued can be contested and the binding guarantees which guarantee the independence of this authority and how the rights and freedom of the parties to arbitration can be safeguarded when defending their interests (at-Taḥyawī, 1999: 1).

Hence the modern practice of arbitration is conducted under State authority via the judicial process, which acknowledges the arbitration process to be an alternative means of dispute resolution. As a result, laws have been enacted which include principles to safeguard the integrity of arbitration procedures and the ruling issued based on these procedures.

('AbdulQādir, 1994: 12)

6.1.4 The Nature of Arbitrators' Provisions

Arbitration is considered to be an alternative means to the judiciary process in seeking to settle commercial disputes. It is regarded to be an efficient, effective and economical process with regards to litigation.

Figure 6.1.4: highlights the benefits of arbitration for commercial disputes.

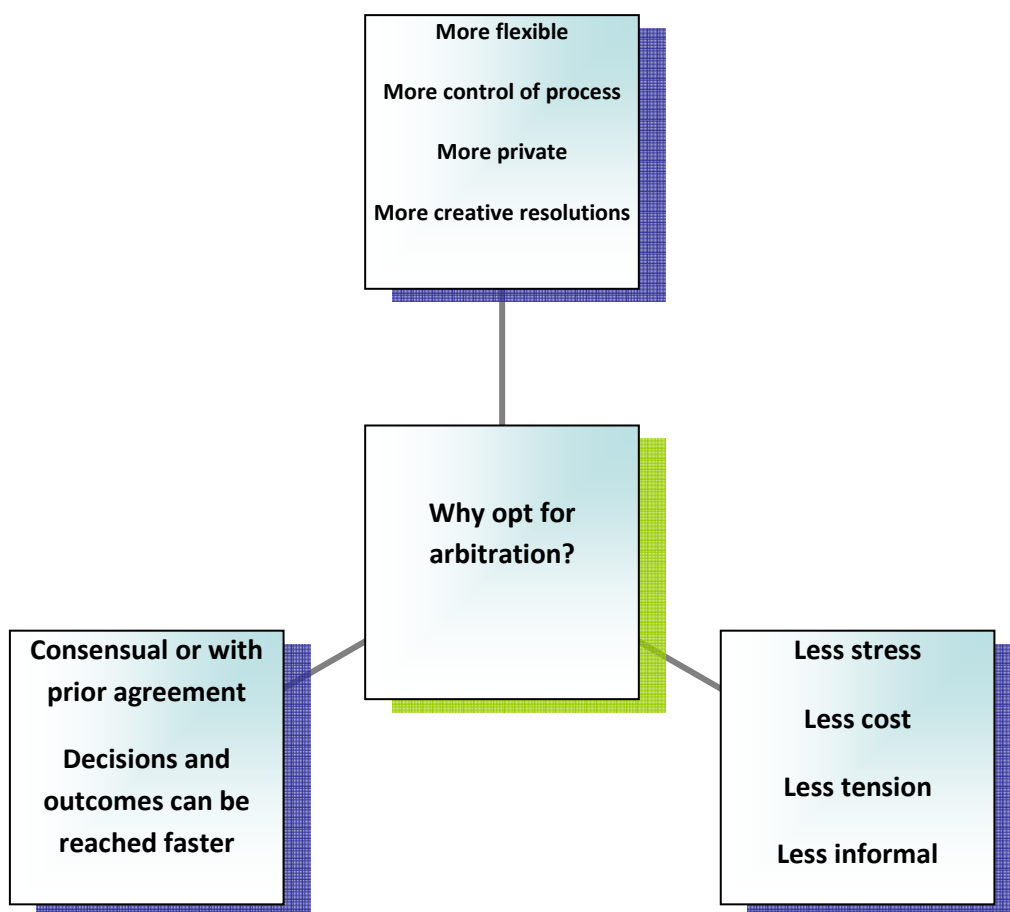


Figure 6.1.4: Why Opt for Arbitration?

Within the contemporary constructs of International agreements it has become a common practice to include an arbitration clause to resolve disputes that may arise from the contract.

What is implied by ‘arbitration’ here entails the voluntary recourse to an arbitration process if the parties partaking in a trade agreement fall into a dispute. Therefore, its proceedings and enforcement are all carried out voluntarily according to the bona fide principle. (Luo Guaqiang, 2009)

For example, a Jordanian company ‘X’ conducts a business deal with a French company ‘Y’. The contract between them stipulates that any disagreement between the two parties resulting from the contract should be resolved through an arbitration process in accordance to the provisions of Jordanian law, or in accordance to the International Chamber of Commerce (ICC) in Paris. Therefore, if a dispute occurs between the two parties it should be referred to the arbitration process as agreed upon in the contract between the two parties prior to the actual conduct of business. However, if one of the two parties refers the dispute to the judiciary, then the court, before which the dispute has been raised, should refer the case to arbitration in accordance to the legislations of their respective nations. This is however only possible if the national laws of the court before which the case has been presented recognises the place for arbitration between disputing parties thus validating and providing credibility to the pre-trade agreement and contract.

6.1.5 The UAE Legal System

It is important to firstly state that the UAE is a civil law state with a three tier legal system:

1. Federal laws – there are several of these which apply to each of the seven Emirates in the UAE.
2. After the Federal laws, there are a number of laws that are specific to each Emirate State.
3. Within Dubai and a number of the other Emirates, the UAE Government established ‘Free Zones’. The Dubai International Financial Centre (DIFC) is the primary ‘Free Zone for matters concerning arbitration in the UAE. The DIFC is an independent jurisdiction under the UAE Constitution and has its own civil and commercial laws, which are written in English and based on English law and other common laws. The

DIFC also has its own courts, with judges from leading common law jurisdictions such as England and Singapore. It is sometimes described as a '*common law island in a civil law ocean*'.

6.1.6 Arbitration in UAE Legislation

There are a number of stipulations regarding arbitration in UAE legislation and Articles 203 to 218, 235, 236 and 238 of the UAE CPC govern arbitration proceedings seated in the UAE. Article 215 of the CPC applies to the recognition and enforcement of domestic awards, while the recognition and enforcement of foreign awards is governed by Articles 235 to 238 of the CPC along with the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and other multilateral or bilateral conventions.

At present the UAE is intending to adopt a new Federal Arbitration Law to replace the current arbitration provisions of the CPC, which are deemed dated and not in line with International best practice. Yet the relevant authorities have yet to approve the new proposed Federal Arbitration Law and there is no set schedule for its enactment. The DIFC Arbitration Law governs arbitrations seated in the DIFC and is based on the Model Law, providing a comprehensive and sophisticated framework for the conduct of DIFC-seated arbitrations. Arbitration rules are found in the UAE Civil Procedure Code (UAE Federal Law No. 11 of 1992) (aka the UAE CPC); hence at present in the UAE arbitration has no independent and distinct set of legislation to regulate it, as is the situation in much of the Middle East.

Here are some rules for arbitration in the UAE legal system:

- The Arbitration Tribunal: according to Article no. 206 (2) of the UAE CPC, there is no limit set on the number of arbitrators, however it does have to be an odd number of arbitrators. If the parties do not agree on the number or identity of the arbitrators, Article 204 (2) of the UAE CPC stipulates that the UAE Courts will decide and this

decision will be final and not be subject to appeal.¹

- First Hearing: according to Article No. 208 (1) of the UAE CPC the arbitral tribunal must schedule a first hearing within 30 days from the acceptance of the appointment of the arbitral tribunal.
- Terms of Reference: Article No. 203 (3) of the UAE CPC states that the subject of the dispute must be specified in the terms of reference or during the hearing of the suit.
- Witness Testimonies: According to Article No. 211 of the UAE CPC, the testimonies of witnesses have to be provided under oath.
- Deadline for Award: according to Article No. 210 of the UAE CPC, an arbitration award has to be rendered within six months after the date of the first hearing, unless the parties have: (a) expressly agreed an extension of the time within which the award is to be rendered; or (b) have delegated to the arbitral tribunal the right to extend.
- Challenging court proceedings: According to Article No. 204 of the UAE CPC, if a dispute is the subject of a valid arbitration agreement, it is not allowed for a litigation claim to be made in respect of the same subject matter. If one party does wish to file a claim in the Courts, the other party has until the first hearing to request a stay of execution, otherwise, the right to resort to arbitration is considered to have been waived.
- Evidence: The rules of evidence and handling evidence in arbitration proceedings in the UAE are very flexible and there are no restrictions on this in the UAE. The parties are free to agree the rules of evidence, provided they do not contravene mandatory

¹One interviewee, with whom the researcher spoke, noted that a negative with E-Arb is the difficulties in knowing the identities of the parties, and also the concern in regards to identity security. Interview with “Noura” manager at the Islamic Bank of Abu Dhabi securities, September , 2015.

standards of due process, natural justice and defence rights.

- Language and Seat: according to Article No. 212 of the UAE CPC the parties are free to agree the language of the arbitration and also seat of the arbitration.
- Interim Relief: UAE legislation contains no details on the arbitration tribunal's authority to grant interim relief. Thus, without the specific agreement of the parties, arbitrators do not have power to grant interim or conservatory relief in UAE legislation.

After presenting the brief legal nature of arbitration and its presence in UAE legislation, we will now discuss the theoretical considerations of arbitration.

6.2 Mono-Theory of Arbitration

This theory is based on two main theories: the contractual theory of arbitration and the jurisdictional (sometimes referred to in the literature as the 'juridical' theory of arbitration). The supporters of the contractual theory perceive arbitration to be a special transaction among individuals based on a contractual obligation. The arbitrators are not official judges but regular individuals entrusted to enforce the implementation of this contract from which they derive their authority. Hence, the arbitration award derives its legitimacy from the arbitration agreement by which the parties are bound to and both submit (Bennett, 2002: 59; Fahmī, 1993: 133).¹

Those who advance the jurisdictional theory regard the task of arbitration as more important than the agreement to arbitrate. This is because the arbitration system begins with the agreement and ends with an award. (Hasheesh, 2007: 81 and al-Khazā'ilah, 2005:34) This award is regards as an act of the judiciary and the arbitrators do not act according to the will

¹This theory is related to French and Egyptian jurisprudence, see 'AbdulHameen Abū Hayf, *Turuq ut-Tanfeedh wa't-Tahaffudh fi'l-Mawād il-Madaniyyah wa't-Tijāriyyah* [Enforcement Methods and Preservation in Civil and Commercial Articles]. 1923, 137, p.922; transmitted from Mahmood as-Sayyid 'Umar at-Tahyawī (Alexandria: Dār ul-Matbū'āt al-Jāmi'iyyah, 2003), p.259.

of the disputants alone, for they also have to consider the dispute, how to resolve it and the requisite procedures. All of these tasks confirm the judicial nature of what the arbitrators have to do, which therefore confers upon them the role of a judge (Shatā, 2004: 23).

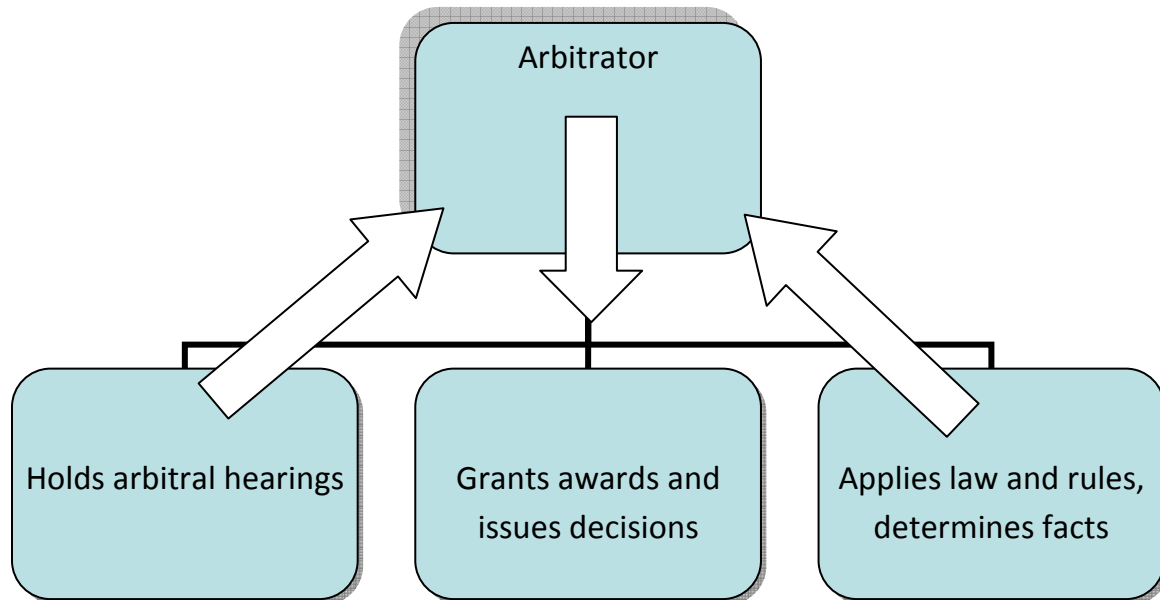


Figure 6.2: Role of an Arbitrator

6.3 Contractual Theory of Arbitration

The advocates of this theory view perceive the entire arbitral process, from seeking recourse to a tribunal, selecting arbitrators and the binding effect of the arbitral award to be regarded as part of the pre-trade agreement (Naón, 1992).

Contractual theory is based on the perspective that consent to arbitration assumes consent of the disputing parties to resolve a dispute amicably. (Darādakah, 1997: 43)

It also assumes that all parties have a common intention to comply with a legal ruling and do not assume that it solely protects the interest of a single party. (Ismail, 2013)

The theory thus emphasises that the consensual nature of the arbitration process is what determines the validity of the entire process and is totally independent from a state's own national legal system (the *lex fori*) and the *lex arbitri* ('the law of arbitration' which is not directly chosen by the parties). The other Latin term *lex loci arbitri* (laws of the place wherein the arbitration is taking place) is usually used once a specific location and/or seat has been identified. However, *lex arbitri* is the most common type employed by practitioners.

When a nation state selects a specific Country as the seat of arbitration, then the laws and legal framework of that chosen nation become the *lex arbitri*. (Greenberg et al., 2010: 58)

Lex arbitri therefore legitimises and provides a general framework for national arbitration. The relevant law can be extracted from an in an independent statute on International arbitration or extracted from the civil procedure code or a law which governs domestic arbitration.

Greenberg et al. (2010: 58) provides an example of the case of *PT Garuda Indonesia v Birgin Air*, which was referred to the Singapore Court of Appeal. The court had to determine the *lex arbitri* and whether the parties had changed the seat of arbitration from Indonesia to Singapore. The Singapore Court of Appeal stated:

“Clearly, if it was established that the parties had agreed to change the “place of arbitration” to Singapore then it must follow that the curial law would be Singapore law.”

Legislated contracts enacted between two parties include freedom for the two parties to choose a type of arbitration, which they can resort to if disputes arise. They can also select the arbitration tribunal that will decide on the dispute and assume responsibility of other arbitration proceedings. (As-Salāhī, 1994: 18).

In this way, the theory relinquishes any state interference in the arbitration processes. Power is devolved to the parties to the agreement who hereby enjoy complete freedom. They are self-regulating and free agents to decide on the issues pertaining to the arbitration, severing any connection between the *lex fori* and the arbitration process.

Advocates of this theory regard the arbitration agreement and the arbitration award as two stages of one procedure. The regulation of arbitration and its related procedures are the objective of the stage of ascertaining the ultimate goal to resolve the dispute. The parties in the dispute, when they make an arbitration agreement are bound to all of the obligations resulting from this agreement including enforcement of the arbitration award. (as-Salāhī, 1994: 23) The central focus of the arbitration system and the source of arbitration provisions to decide on the dispute and its binding powers are encompassed in the agreement of the disputing parties. (at-Tahyawī, 2003: 265) The contractual nature of arbitration extends to these provisions and does not perceive them to be distinct to the original agreements made. (al-Malījī, 2004: 52; Ridwān, 1981: 24) This is because the agreement is entrenched in the

entire arbitration process. It rectifies the basis for interpreting all the other stages until a binding ruling is issued to which all disputing parties are bound (Al-Khazā'ilah, 2005: 37; al-Jamāl and 'AbdulĀl, 1998: 38).

The arbitration award enjoys binding legitimacy as its effects extend from the will of the disputing parties to form a contract based on 'conditions', which these parties have agreed to in order to resolve the disputes among them. (al-Qassās, 2003: 75) This award is connected to the validity of the arbitration agreement and is a significant factor in determining the contents of the contract via the arbitrators. (at-Taḥyawī, 2003: 267) ¹

The supporters of this theory have intentionally refrained from determining the legal nature of the arbitration award and instead focus upon the differences between the arbitration and the judiciary. This is with regards to the work of the arbitration tribunal to decide on the dispute, alongside the distinctive nature of the arbitrator in comparison to the judge.

It is therefore argued that arbitration does not formulate a legislative action but is directly related to the original contract between the disputing parties. The implications in terms of the proceeding for the arbitration are usually continued within that original contract document in terms of stipulated conditions for trade.

Hence Luo Guoqiang (2009: 289) asserts that the contractual character of arbitration is the fundamental character of arbitration, and that long before legislation formally recognised arbitration, it had been established as a contractual system. The task of the arbitrator thus resembles that of a judicial authority, and performs his or her role based on a private agreement. They are appointed and sponsored by the parties to this agreement. This formulates the fundamental differences between an arbitrator and judge appointed by the State. (al-Khazā'ilah, 2005: 122)

Despite the supporters of this theory concurring on the contractual nature of the arbitral award, they differ amongst themselves on determining the nature of the connection between the parties to the arbitration agreement and the arbitrators. A perspective holds that this is a '*contract of agency*', i.e. a contract wherein the arbitrators are agents to the resolution on behalf of the parties, as their authority is to adjudicate the dispute derived from the parties' agreement and selection of themselves. (al-Fazāyarī, 1992: 37) In this way, the arbitrator's

¹See for further details: Ashraf Khaleel Rūyah, *at-Tabee'at ul-Qānūniyyah li't-Tahkeem* [The Legal Nature of Arbitration], an Online research paper, dated 24 September 2007:

<http://www.mohamoon.com/montada/Default.aspx?Action=.Display&ID=374&Type>

authority is not a judicial one, rather it derives from the desire of the relevant parties (at-Tahyawī, 1999; Redfern and Hunter, 1991: 8; Redfern and Hunter, 1999: 4).

While (al-Fazāyarī, 1992: 39) expresses that arbitration is an act of ‘free enterprise’ isolated from State systems. Another perspective presented, propounds that the connection between the arbitrators and the parties to arbitration is that of a lease contract in that the parties to arbitration borrow the arbitrator’s role.

6.3.1 The Theoretical Grounds of Contractual Theory

There are a number of grounds to support the contractual nature of the arbitration award based on the essential role that it represents, the will of the people to arbitrate. The difference between the arbitration award and the judicial ruling is a basis for the arbitrator not enjoying the powers of a judge. These grounds are:

- a. The basis of resorting to arbitration as a means to resolve a dispute is an agreement between the parties to arbitrate (stipulated as a clause). Wherein the arbitration processes and the final verdict on the dispute is considered part and parcel of this agreement. Thus, arbitration and its processes are considered an ‘*acte prive*’, that is a private arrangement between the parties.
- b. The desire of the parties to resolve the dispute via arbitration and selecting an arbitration tribunal to issue a final decision on the dispute, which will be accepted by all sides (Shatā, 1994: 21).
- c. The parties to the dispute possess the right to resort to arbitration and select an arbitration tribunal to assume the role of adjudicating on the dispute in accordance with procedures and principles stated by the parties. This requires giving importance to whomsoever the arbitration tribunal grants. Herein arbitration is similar to settlements and accords, which are subject to the judiciary for ratification. There is no dispute regarding the contractual nature of these settlements (al-Wāhidī, 1998: 28-29).

- d. The arbitrator fulfils the role of an agent or referee to the disputing parties, and the ruling. After being issued it is considered to be a binding contract between the parties. It is then enforced as per the order of a competent court, as is the case with awards, which require special enforcement procedures for their enforcement (as-Salāhī, 1994: 30).
- e. Mandatory arbitration, which is not resorted to (based on the agreement of the parties to the dispute) is not considered arbitration in the context that it is established only with the will to resort to it to resolve disputes (Ibrāheem, 2000: 30).
- f. Arbitration remains characterised by a contractual nature and it is not possible to say that it possesses a judicial nature until an arbitrator has been specified from the judicial authority as this authority when appointed represents individuals (Muhaysin, 1999: 21-22).
- g. The agreement of the disputing parties to refer to arbitration includes a waiver of seeking recourse to arbitration. This agreement grants the arbitrator the authority to issue it at the pleasure of the parties. This authority is not possible to be a judicial one as it is based on the will of the parties (ash-Shawāribī, 1996: 29), and requires that the arbitrators commit to the condition of the arbitration agreement when they issue a final ruling on the dispute. The parties' implementation of the enforcement of this ruling is considered a confirmation of their commitment to the contents of the agreement (al-Buhayrī, 1997: 19).
- h. The basis of the arbitral award enjoying the legitimacy of '*res judicata*' is due to the existence of an agreement between the parties to the arbitration agreement to be bound by the award, which is issued by the arbitrator, and also a commitment to not re-submit the dispute to the judiciary (Umar, 2004: 32).
- i. The parties to the dispute are to agree on the enforcement of the arbitral award without obtaining the order for its enforcement from a competent court if issued. This is in accordance with the conditions and procedures concurred upon among

themselves in consideration that this award is a consequence of the arbitration agreement (Al-Khazā'ilah, 2005: 37).

- j. The parties to the dispute are to agree to uphold the efficacy of the arbitral award and that the award is final which cannot be challenged by any form of appeal. This is due to the parties believing in the justice of the award, being pleased with it and agreeing prior to resort to arbitration (Salāmah, n.d.: 42).
- k. The contractual nature of the arbitral award indicates arbitration is one of the tools of International interaction, and this interaction could conflict with laws and judicial provisions within different States.
- l. Arbitration differs from a judicial judgement in terms of the goal, as judicial judgement is a general authority of State authorities, which is practised by the judges due to their judicial role. They aim to protect the law regardless of future relations between the parties to the dispute. As for the arbitrators their role is of a social nature in order to ensure positive relations between the parties within the dispute. As a result, arbitration is referred to as '*judgement on close relations*' whereas judicial judgement is referred to as '*judgement on shattered relations*' (Shafeeq, n.d.: 32).
- m. Arbitration requires the existence of an agreement between the litigants to which they refer, whereas judicial judgement is a general right used by a litigant without the need to gain agreement from the opponent (Shafeeq, n.d.: 32).
- n. The role of the arbitrators is mainly to be responsible for deciding a dispute and this is not a judicial role, as the two functions differ materially and formally (at-Taḥyawī, 1999: 290-291). The arbitrators do not possess the authority to issue orders as a judge does and subsequently do not enjoy safeguards that they (judges) do. Moreover, if arbitrators do not perform their roles appropriately, this is not considered to be a 'rejection of justice' and furthermore the government is not accountable. This is because the government is only to be asked about roles, which derive from its authority (Abu'l-Wafā, 1983: 206-207; Abu'l-Wafā, 1964, 195-196).

- o. The procedures taken by the arbitrator are not judicial procedures in a real sense. Procedures regarded as judicial have to be linked to the dispute taking place before the court and following judicial authority. Although the arbitrators are an alternative for an official judge in adjudicating on the disputes, they neither possess the description of the judge nor do they share the authority of the judge (Ziyādah, 2004: 99). The ruling issued from the arbitrators is not enforced by force except after the issuance of an order from a competent judicial authority ('Āshūr, 2006: 110; 'AbdulMajeed, 2000: 484; Mu'awwidh, 2000, 171; 'AbdulMajeed, 1995, 257; Khaleefah, 2006, 18; Abu'l-Wafā, 1964b, 105).

- p. The arbitral award enjoys the legitimacy in a general sense, which is not rejected, whereas a judicial rule enjoys legitimacy from a general rule that a ruling issued for a cancellation claim has absolute legitimacy before all (Khaleefah, 2006: 17), whether it is a complete or partial cancellation (al-Ghuwayrī, 1989: 453). As for a judgement to reject this claim then it enjoys legitimacy in the scope of a disputant. (al-Ghuwayrī, 1989: 450-451)

- q. A claim of nullification of the arbitral award based on reasons connected to the arbitration agreement can throw doubt on the judicial capacity of this award (Abu'l-Wafā, 1964b: 19). Such claims are not the preserve of judicial rulings, which are subject to various routes of appeal that are acknowledged by the law.

- r. The arbitrator when adjudicating in the dispute possesses powers, which are broader than those of a judge. Legal provisions with the exception of public order and morals do not restrict the arbitrator. Whereas a judge, when deciding upon a dispute, is restricted by legal precepts (Khālid, 2004: 169-170).

- s. The use of legal terminologies within arbitration and judgement, such as: “ruling”, or “dispute”, or “litigants” and other terms, with apparent similarities do not specify the legal nature of arbitration (as-Sālihī, 1994: 21).

6.3.2 Criticisms of Contractual Theory

The contractual aspect of arbitration is useful in presenting the role of the agreement to the parties when seeking arbitration. However, it has its pitfalls, Bělohávek (2011) argues that while the importance of agreement in arbitration is significant, the arbitration agreement is only enforceable as long as it is on the basis of a legal framework of the State in which the dispute occurs.

As a result, there are a number of criticisms of this theory:

1. The arbitrator only adjudicates in the dispute based on the will of the law; there is no concern to be given to the *will* of the parties to the dispute.¹
2. The consensual nature of the arbitration system is not sufficient in considering it a contractual system. There should just be a distinction between the source and the role of this system. Arbitration in its source is a contract, which authorises the parties to resolve the dispute, thereby self-appointing themselves as judges with a judicial role (‘Atiyah, 1990: 32).
3. Contractual theory therefore does not distinguish between arbitration and other contractually based institutions such as valuation, mediation and conciliation.
4. Contractual theory is incompatible with local common laws and International treaties on arbitration. The consequence of contractual theory is that arbitral awards can be enforced in theory anywhere in the world. In reality though, it is difficult to imagine a local court deeming domestic awards to be the same as International or foreign awards. This also goes against Article 5 of the New York Convention, which will be discussed later in the study.
5. The supporters of this perspective ignore the nature of work performed by the arbitrators responsible for settling the dispute. They embody a role which is designed to safeguard the rights of the disputing parties and thus conduct many functions that

¹Rūyah, op.cit.p.4

can be regarded as judicial but without them being connected to the judicial process. It is argued that the source of this imbalance is the dominance of the modern nation State over the judicial functions of the judges. (at-Tahyawī, 2003: 306-307)

6. The *will* of the parties to agree to resort to arbitration, is by itself not sufficient enough a reason to resort to arbitration. There has to be a legal acknowledgement of this agreement and an assurance that there will be a decisive enforcement of the ruling. The arbitrator then is just like all other people who are under the jurisdiction of the law and it is not possible for him to surpass that unless the State allows for it. Although the arbitrator's powers are founded on the parties' agreement, they are still defined, restricted and extended by national legal orders (Synkova, 2013: 49). Moreover, if arbitration is banned within a country it is not possible to resort to it on its territories (Haddād, 2001: 59).
7. The *will* of the parties to arbitrate is not absolute, as arbitration is not allowed except in matters wherein there can be a resolution. This '*will*' is not always considered a basis to resort to arbitration except in the case of mandatory arbitration, which is stipulated in the law ('Atiyyah, 1990: 32-33).
8. The arbitrators are not acting agents for the parties, as agency necessitates the actions the agent is responsible for can be performed by those appointing them – this cannot be said of parties to a dispute (as-Sālihī, 1994: 24). The arbitration agreement differs from agency in the decisive ruling on the dispute in that whatever is issued from an arbitrator is obliged on the parties, whereas with agency the will of the one who appoints the agent is placed on the agent (as-Sālihī, 1994: 24; ash-Shawāribī, 34).
9. The theory of the contractual agreement does not agree with the principle of the independence of the arbitration agreement from the original contract, which regulates the relationship between the parties to the dispute and contributed effectively to the delay of taking the independence of this agreement (Hasheeh, 2007: 98).
10. The contractual agreement is unable to justify an allowance to challenge the arbitral award.

11. The arbitration agreement differs fundamentally from all other agreements, in light of the impermissibility to adhere to the invalidity of the arbitration agreement in an independent form before the issuance of the final arbitral award (Hasheeh, 2007: 106).
12. The appeal against the arbitral award via filing a nullification claim before a competent court neither certifies the contractual nature of the arbitration system nor denies its judicial nature as some judicial provisions have invalid claims raised against it (At-Taḥyawī, 2003: 322; Fahmī, 1995: 38). In the instance when these are raised against the arbitral award. This ruling will still enjoy the legitimacy of a judicial ruling until it becomes nullified which is of the characteristics of a judicial ruling ('Atiyyah, 1990: 32)
13. The non-enforcement of the arbitral award, by legal force, except after the issuance of an order to enforce from a competent court, is not sufficient to say that the arbitration system has a contractual nature and not a judicial nature. Its status therefore is like that of foreign judicial provisions, which remain judicial rulings despite the impossibility of enforcing them except after the issuance of an order from a judicial body ('Atiyyah, 1990: 32)
14. The special legal principles for a judge differ from an arbitrator who has been appointed to resolve a dispute and hence the contractual nature cannot be applied to the arbitration system "*as the arbitrator fulfils his role which is of a judicial nature yet without representing the state*".¹ Whereas a judge in his capacity represents the State in some rules which differ from the rules that govern the judgement capacity of an arbitrator.² Hebaishi (2014) observes that the similarity between arbitrators and judges is quite remote, as arbitrators are not part of the State, serve private interests of the parties and are bound mainly by contractual terms and legislative provisions.

¹ Rūyah, op.cit.p.4

² Ibid.

15. The proponents of contractual theory also differ with regards to the determination of the relationship between the litigants and the arbitrator appointed to decide the dispute (al-Jabalī, 2006: 47)

It is argued that the proponents of contractual theory perceive all those connected to the arbitral award as consequential to the ‘will’ of the disputing parties. The relevance of the ‘will’ of the parties is what they utilised to support their argument while anything which undermined the role of the parties ‘will’ was not given credence. There is no doubt that the ‘will’ of the disputing parties has a major significance in the arbitration system and is the basis which obligates the litigants to resort to arbitration rather than to the judiciary.

However, this does not mean that the arbitral award has a contractual nature and that it is not possible to regard it as a contract established on the agreement of the ‘will’ of the parties. Rather it is an arbitration ruling, which is subject to principles that differ from the particular principles of contracts. The contrary view conflicts with the notion of enforced arbitration. This is not based on the ‘will’ of the parties to resolve the dispute via arbitration. It also conflicts with the consideration of the core legal nature of the arbitral award regardless of the type of arbitration.

The ‘will’ of the parties is not also sufficient enough to resort to the arbitration system as it also requires regulation and recognition from the law. Without this recognition individuals will be unable to resort to it and it is not permitted to ‘derogate’ from the jurisdiction of a particular State. (Synkova, 2013: 53) It is such law, which grants the disputing parties the freedom to resort to arbitration and choose the procedures that achieve their interests.¹

However, that does not mean that their wishes determine the contents of the ruling that decides the dispute. As the agreement of the disputing parties entails resorting to arbitration in accordance with a format that is recognised by the law means that they are bound to resolving the dispute via this route. The impact of their ‘will’ ends at this juncture and thus

¹ Like for example, Article nos. 8, 18 and 18 of the Palestinian Arbitration Law; Article nos. 14, 24, 27 and 36 of Jordanian Arbitration Law and Article nos. 15, 25, 28 and 39 of Egyptian Arbitration Law.

initiates the role of the arbitrators. They can then apply legal rules that govern the accuracy of the arbitration procedures. The ruling issued is then based on procedures such as:¹

- Stipulations connected to respecting the defence rights,
- How the arbitral award is to be issued,
- The mandatory rules in regards to it,
- How it is to be enforced in instances wherein the enforcement voluntary and how it can be contested.

As the arbitrator is not an agent or representative of the litigants he rather inspects the dispute and then decides on it in accordance with his own independent ‘will’ regardless of the ‘will’ of the parties.

Moreover, the law’s allowance to resort to arbitration is not an absolute or comprehensive allowance; rather it is restricted to the general system and issues, which do not allow resolution.² This means that it is not permitted to resort to arbitration to resolve disputes that are connected to the general system and disputes wherein it is not allowed to seek resolve such as criminal and nationality disputes, and all related to personal circumstances such as divorce, lineage, inheritance and expenditure. However, it is allowed for the substance of arbitration to be regarding the estimation of expenditure, dowry or any financial claim related to personal circumstances.³ This indicates that it is not possible to determine the legal nature of the arbitral award via contractual concepts.

6.4 Jurisdictional Theory of Arbitration

Jurisdictional theory relies on the state power to control and regulate arbitrations, which occur within its jurisdiction (Lew et al., 2003). The theory posits that the law of the place, or ‘seat’, of arbitration (*lex arbitri*) supersedes any agreement which they parties may have

¹ Article nos.23, 24, 31, 38, 39, 40, 43, 45 and 47 of Palestinian Arbitration Law; Article nos. 25, 29, 30, 37, 41, 48, 51 and 54 of Jordan Arbitration law and Article nos. 26, 30, 31, 40, 43, 52, 56, 57 and 58 of Egyptian Arbitration Law.

² i.e. Article no.4 of Palestinian Arbitration Law; Article no. 9 of Jordanian Arbitration Law and Article no.11 of Egyptian Arbitration Law.

³ Article no.2 of the Masjlis ul-Wuzarā’, no.39

made. F.A. Mann (1967), who is one of the leading jurisdictionalists, posits that the autonomy of the parties to arbitration only exists by virtue of a given system of law in a land and derives its legitimacy from national legal systems. In this way, state sovereignty takes precedence over the consensual agreement of the parties to arbitration as the main emphasis is on the location of arbitration.

Furthermore, the theory is based on the premise that the State in which arbitration takes place is entitled to approve or disapprove of such activities, which take place within their territories and thus any arbitration that occurs within their borders has to be subject to the State's own national legal system (the *lex fori*). This is expanded to then regulate the role and activities of the arbitrator and thus any arbitration proceedings must be within the confines of the *lex fori*. The jurisdictional theory also appears to run in sync with the New York Convention of 1958 that stipulates in Article 5 (1.a) that arbitration agreements and awards must be in accordance with the *lex fori* in which the arbitration is taking place.

Proponents of this theory view that determination of the legal nature of the arbitration system is via the predominance of the substantive criteria represented in the role, which is performed by the arbitrator. The intent of this system is not the predominance of formal criteria (Ridwān, 1981: 26-27). Despite the fact that the judiciary manifests the sovereignty of the modern nation State, laws have allowed individuals to agree on the resort to arbitration and selecting an arbitrator who assumes the position of deciding on the dispute in place of the judiciary (at-Taḥyawī, 2003: 2).

Ghusn (2005: 67) argues that the State vests judicial authority in individuals either on a permanent or temporary basis depending on the circumstances and nature of the role they are undertaking. Thus arbitrators are granted authority due to the nature and purpose of the role that they embody. Hence, Bělohlávek (2011) contends that the arbitration agreement is but a mere condition for the initiation of the arbitrators' jurisdiction so long as it is on the basis of a legal framework of the State in which the dispute occurs.

Proponents of the jurisdictional theory of arbitration regard the focal point of the arbitration system to be the arbitral award and not the arbitration agreement. This is because the arbitrator ensures justice within the scope of State sovereignty. The argument stipulates that it can be achieved within the general judiciary, which the State has assumed responsibility for in establishing and regulating. Additionally it can also be conducted through a special judgement represented in the arbitration system that the state recognises as being a type of judgement (Al-Jamāl and 'Abdul 'Āl, 1998: 42). Although there has to be recognition of the

connection between the arbitral award and the arbitration agreement leading to the issuance of this award, this does not deny the legal nature of arbitration. It merely serves to explain some exceptions, which distinguish this special judgement from the general judgement. An example of this could be the permission to appeal against the arbitral award on the grounds of nullification. (al-Fazāyarī, 1992: 69-70) The arbitrator, in his scope as a special type of judge, performs the functions of a judge when facing the relevant parties. (Haddād, 2001: 19) The arbitrator performs such temporary tasks, akin to a judge, when he inspects the dispute, which does not require the full powers as granted to a judge (Ibn Nāsir, 1988: 35). Steingruber (2012) observes that the arbitrator assumes a ‘quasi-judicial’ role as an alternative to a local judge.

Some legal systems permit challenges to be made against arbitral decisions before the State judiciary. However, appeal against arbitral awards are limited in comparison to the brevity to appeal against court decisions. For example, the Kuwaiti legal system, with certain conditions, allows the provisions of arbitrators to be contested as long as certain conditions have been fulfilled.¹

The arbitral award does not accept mandatory enforcement except after the issuance of an order to enforce it from the court. This does not change its jurisdictional nature as procedures connected to enforcement of an arbitral award are connected also to the remit of the courts. The disputing parties who are capable enough to agree on resorting to arbitration without the judiciary to resolve the dispute cannot grant an arbitrator the authority to issue an order to enforce the award. The goal of issuing this order is to ensure observance of the arbitral award to conditions required by law, and to ensure the extent the arbitrator abides by legal rules related to the arbitration agreement and its procedures.

Proponents of this theory view that the will of the parties has the same role in arbitration and the judiciary, in that they are both resorted to based on the ‘will’ of the disputing parties to agree to do so. If one party ‘wills’ they will resort to the courts and if the other party ‘wills’ they will resort to arbitration. This does not formulate a substantial argument for stating that the ‘will’ forms the basis for determining the jurisdictional nature of the arbitration system. (Al-Khazā’ilah, 2005: 34)

¹ Article no.861 from the Kuwaiti Procedural Law, no.38, 1980, herein it is allowed to appeal against the rule of an arbitrator with the condition of the agreement of the disputants to do that before its issuance, and there are no other solutions to stipulate the prevention of appeal.

The difference between the two is that in the case of resorting to arbitration, the party ‘wills’ for justice for a specific interest; whereas in the second case (resorting to the judiciary), justice in general is aimed for. This does not negate the jurisdictional nature of the arbitration system. Hence, Ismail (2013) indicates that the discrepancy between arbitration and the judiciary becomes evident in the objective sought by each.

The supporters of this theory therefore regard the arbitration system to be a global judicial system in agreement with national and international contracts. However, they differ on the nature of the judicial function, which the arbitrator performs. Some argue that the arbitrators have authority to establish private justice between the disputing parties. If the arbitrators act with the authority delegated to them from the State to directly perform what is usually regarded as a State-supported judicial function for a temporary period.

As the attainment of justice is a function of the public authority, it is regarded as a matter for the public authority to upkeep even to a minor capacity. The justice, whom the arbitrator administers, is thus based on what has been delegated to him by the State.

Another perspective contends that the nature of arbitration is the same as the judiciary, in that they are both judicial. This means there are two judicial systems, which take place synonymously. (Ismail, 2013) Whereas some suggest that the arbitral award has a jurisdictional nature only after an order to enforce it from a competent court has been issued. (Al-Khazā’ilah, 2005) Others contend that there does not have to be the condition of an order to enforce it. (Ghusn, 2005)

6.4.1 Theoretical Grounds of Jurisdictional Theory

Jurisdictionalists outlined a number of shared principles between the arbitrationists and the judiciary. These can lay the grounds for considering the arbitral award as a judicial ruling:

1. The work performed by the arbitrator is the same as that undertaken by a judge, in that he decides on the dispute. Both apply legal codes or codes of justice in order to decide on a dispute. Their verdict is thus a judicial ruling contrary to the proponents of contractual theory, which regard the verdict as a result of the agreement between the parties.

2. There is a distinction between the goals of the arbitration system and those of the judicial system within a State. Yet this does not support the contractual nature of the arbitration system and a negation of the juridical nature of it. As the judiciary has the goal of protecting private interests including those emphasised within arbitration so as to ensure the interests of private disputants and also those of the public.¹ This is represented in reducing the strain on the courts due to the many cases, which are brought before them (al-Fazāyarī, 1992: 68).
3. The law recognises the arbitration system as a way to resolve disputes. The arbitrator therefore is regarded as a judge as his authority extends from the arbitration agreement and also from the law, which permits this agreement in the first instance and thus makes any ruling issued from the arbitrator to be enforceable. (Fahmī, 1995: 140-141)
4. The arbitration system contains elements of judicial practice:
 - a. Claims: Represent legal protection, which a person aims to obtain by applying the rule of law.
 - b. Disputes: Represent different viewpoints between the disputing parties to verify their view in line with legal rules to solve the dispute.
 - c. Membership: Represented in the person who assumes responsibility to resolve the dispute ('Atiyyah, 1990: 23). The arbitrators assume their judicial capacity from the moment that the law allows a person to assume such a role.
5. The judicial authority of the arbitrators differs from the mandate they represent in their particular jurisdictions. This jurisdiction is restricted in accordance with the will of the parties of the arbitration agreement. If an arbitrator for instance decides that there is a lack of appropriate jurisdiction based on his inspection of the dispute due to the invalidity of the arbitration agreement, he or she is best to utilise his/her judicial authority. If he or she decides on this dispute, despite the invalidity of the agreement, he or she would have misused this authority (Ghusn, 2005: 75).

¹ At-Tahyawī, *op.cit.*, p.325

6. Arbitral proceedings are of a judicial nature, whether in terms of respect for the basic principle in litigation and representing the rights of defence, equality and confrontation between the disputants. Or in terms of the arbitrator's respect for time limits to perform these procedures such as inspecting the evidences and statements of the disputants, assessing them etc. The ruling, which is derived from these procedures is to be deemed as a judicial ruling (Jabalī, 2006: 52). The law granting permission to the disputants to agree on some arbitration procedures does not deny its judicial nature, rather it also compliments some of the aspects that the arbitration system is distinguished with such as flexibility and simplicity within the procedures (Ibn Nāsir, 1988: 37). Institutional arbitration wherein disputes are decided by arbitration centres in accordance with their own procedure is regarded as an indication that arbitration is a set of procedures (Ibn Nāsir, 1988: 38).
7. The use of legal and judiciary terminologies such as 'ruling', 'disputants', 'dispute' etc. can be utilised for arbitrational purposes. (al-Qassās, 2003: 78).
8. The issuance of the arbitration award necessitates the legitimacy of a ruled upon matter which has the same impacts as the issuance of a judicial verdict (Fahmī, 1995: 142). Meaning that the arbitration award assumes judicial legitimacy, which prevents from reconsidering what the arbitrator has judged, except via routes, which the law has restricted.
9. The arbitration agreement and the judicial ruling are both subject to the same legal rules that contain formal conditions, which have to be safeguarded when these provisions are issued. Such as documenting the personal statements of the disputants, causation, signatures and other data.
10. An appeal against an arbitral award via the route of making a nullification claim does not negate the judicial nature of arbitration. A void judicial ruling can possibly be found invalid via these claims. A judicial ruling will be deemed as annulled if it is devoid of any of the basic foundations such as its issuance from a court, which does not have a sound legal formation or if the ruling was issued against a deceased person.

11. The enforcement of the arbitral award after the order to issue it from a competent court does not negate its judicial nature, in this sense it is the same as a foreign judicial ruling.
12. The independence of the arbitration agreement from the original agreement, which regulated the relationship of the parties. This independence is regarded as acceptable in the field of International commercial arbitration (Muneer 'AbdulMajeed, 2000: 142). The validity of this agreement, or its invalidity, or its dissolution, does not lead to the invalidity of the arbitration agreement or its annulment so long as this agreement is valid in and of itself. This is because the subject of this agreement differs from the subject of the original agreement and all are independent of the other. This affirms the judicial make-up of the arbitration system.
13. The law recognises mandatory arbitration, which can be resorted to if stipulated by the law and not based on the agreement of the parties – this affirms the judicial nature of the arbitration system. As the arbitrator is the one who takes it upon her/himself to inspect the disputes, enjoying this judicial authority from the law (at-Tahyawī, 2003: 550). This type of arbitration indicates that the will (of the parties) to resort to the arbitration process is inadequate to describe the judicial nature of enforced arbitration ('AbdulMajeed, 1995: 9).
14. The increased usage of arbitration around the globe today and its application within many centres and organisations in line with special procedures indicates that the arbitration system is to be regarded as a legal judgement for International disputes (at-Tahyawī, 2003: 550). In light of the non-existence of International law to adjudicate in these disputes, arbitration organisations perform the role of an International judicial system. This differs from the perspective of the contractual theorists.

6.4.2 Criticisms of Jurisdictional Theory

A major criticism against Jurisdictional theory is that in showcasing the similarities between the judiciary and the arbitration system does not necessitate that both are the same. There are differences in the roles and aims of each system in regards to their legal impacts and common

rules. Here are some points of criticism which have been levelled against the jurisdictional theory:

1. The work undertaken by an arbitrator though being of a similar nature to that of a judge is not the same. The judges in their judicial roles protect the rights and legal centres regardless of whether there is a dispute or not. Thereby asserting responsibility of these rights. The traditional theory defined judicial functions as 'to decide upon dispute between individuals' yet a criticism of this definition was that this is not a comprehensive definition (at-Tahyawī, 2003: 629). Alternatively the arbitrators' function is more social, economic and to serve as a pacifier as they seek to resolve disputes to ensure the continued future relations between the parties. (Fahmī, 1995: 140) Yet they do not assume this role unless there is a dispute as the shared goal in all types of arbitration is to resolve the dispute in accordance with legal rules and justice. Franck (2006: 10-16) has classified the duties of arbitrators within the arbitral process as either adjudicatory or administrative, thereby being clearly distinct from the functions of a judge. The adjudicatory roles being the decision-making process, permitting the submission of evidence by the parties and offering sound arguments. This is in exchange for an impartial decision based on the records, independent judgement and analysis with the jurisdiction of the parties. Thus arbitrators manage and ensure due process in ways, which may be seen as being 'judicial'.
2. The arbitration agreement formulates the direct source from, which the arbitrators derive their role, whereas the law forms the indirect source. The arbitrator decides on the dispute as he has been delegated to do so from the disputing parties without any restriction by the legal principles. A judge on the other hand decides on a dispute while being limited to these principles and out of respect to his superiors (al-Malījī, 2004: 58). Lynch (2003) has therefore noted that the theory gives a one-dimensional evaluation of the arbitration process and gives insufficient weight to the importance of the parties' agreement. Chukwumerije (1994) also highlights in his criticisms of the theory that the right and freedom of the parties is disregarded and that the view that arbitration derives its powers from the authority of the law is biased. The theory therefore ignores the contractual aspect of arbitration.

3. The principle of ‘authoritative legitimacy’ refers to the binding strength or legitimacy of a treaty in resolving disputes. This legitimacy does not confer a judicial nature to this agreement. (Fahmī, 1995: 142-143) Therefore, the authoritative legitimacy of the arbitral award differs from that of the judicial ruling. In the case of the latter an appeal can be made in line with restricted rules and dates as documented in law. Moreover, it is not permitted to raise a claim of the nullification of the award except if it issued in contravention of this authoritative legitimacy (at-Taḥyawī, 2003: 584). As these claims are not raised except against a judicial ruling devoid of this legitimacy. (Hasheesh, 2001: 35) Whereas it is allowed to raise an invalidity claim against an arbitral award if there is such valid reason to do so, as the basis of the authoritative legitimacy of this award is traced back to the binding power of the contract and not to the functional nature of the role played by the arbitrator. The proof of that is that if the disputants agree that an award will not have any legitimacy until after the agreement of a specific body, or until the disputants have attested to the award, it has no prior authoritative legitimacy (Fahmī, 1995: 143-144). The legitimacy of the arbitral award is unrelated to the general rule and in opposition to the legitimacy of the judicial ruling, which is related to the general rule.
4. The law does not permit the enforcement of an arbitral award except after an order has been issued to do so from a competent judicial body. This is contrary to a judicial ruling, which does not require such an order, as it has already been legally validated.¹
5. There is an issue with regards to the precise translation and understanding of key terms. With regards to the term ‘ruling’ [of ‘verdict’] then its usage for judicial rulings and arbitral awards are limited to some aspects of Arab legislations. This is not due to the Arab legislator but due to entrenchment of the term ‘ruling’ and ‘court’ in the scope of the judiciary and arbitration. As for the term ‘jurisdiction’ then this is not limited to applicability only to judicial jurisdiction. Within the aspect of law it has a far broader connotation to include the authority, which the law also provides to any person who wishes to exercise private or public authority. The notion of ‘jurisdiction’

¹ Article 56 of Egyptian Arbitration Law.

therefore, with its detailed meaning in the scope of the judiciary, is not applied to arbitration. Rather it is limited to the judicial distribution among the courts within the judicial body. (Fahmī, 1995: 145-146)

6. The arbitration centres and bodies that seek to resolve International commercial disputes do not undertake the role of the judiciary. As these bodies do not enjoy the immunity, authority and stability of the judiciary. Moreover, the ruling which is issued from these arbitration bodies are not enforceable via the route that judicial rulings are except after the issue of an order to enforce from a competent judicial body (al-Buhayrī, 1997: 27).

The argument presented observes that the advocates of the jurisdictional theory have attempted to differentiate the judicial nature of the arbitral award based on the similarity between the role of the arbitrator and that of the judge in resolving disputes and the consequences of an arbitral award and a judicial ruling. Therefore, although the arbitration system has a judicial nature and could be deemed as being indicative of a judicial nature, this would imply that the arbitrator is a judge with limited powers and the ruling issued by him would be deemed as a judicial ruling, and this implication is incorrect.

6.5 Mixed/Hybrid Theory of Arbitration

The proponents of mixed/hybrid theory aims to combine between both contractual and jurisdictional theory on the basis that arbitration shares aspects of both public and private law and cannot merely be reduced down to either.

Redfern et al. (1991:4) observe that:

“International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognise and enforce. The private process has a public effect, implemented with the support of the public authorities of each State and expressed through its national laws.”

The theory contends that the State's judicial authority and party autonomy in contractual issues occur in a practical mixture being complementary rather than adversarial. Mixed theory holds that while arbitration is based on the contract as exemplified in the arbitration agreement it also has to be in line with statutory requirements under public law (jurisdiction). Onyema (2010) notes that proponents of mixed/hybrid theory argue that the validity of the arbitration agreement is determined by criteria applied to contracts in general, while the arbitral procedure is subject to principles of national law and enforcement of the award is a mere formality. And argued that arbitration must be subject to some national law, which determines the validity of the submission of the dispute to arbitration and the enforceability of any award so as to ensure a basic harmony with due process. He therefore defined arbitration as a mixed juridical institution that is both contractual and jurisdictional.

The crux of mixed theory lies in the link between the arbitration and the seat of the arbitration and that there should be a feasible link between the wishes of the parties and the law of the seat of arbitration.

6.5.1 Criticisms of Mixed/Hybrid Theory

The theory has been criticised for not being completely separating the elements of the compound theories and also for failing to provide a clear framework for the operation of International commercial arbitration. The theory is also deemed as giving too much freedom and autonomy to parties by holding that both contractual and jurisdictional aspects can go hand in hand does not adequately considering the reality of arbitration (Chang, 2009).

Hence, if arbitration does not achieve State approval it will be highly difficult for awards and decisions to gain recognition and enforcement. Onyema (2010: 39) also contends that its analysis does not examine the presence and role of arbitral institutions and their effect on the juridical nature of arbitration. The existence of an arbitration institution in the International arbitral terrain makes it quite possible for an International arbitral reference to be completely autonomous or at least semi-autonomous with little or no reference to the laws or courts of the seat.

6.6 Autonomous Theory of Arbitration

Autonomous theory was advanced in the 1960s and incorporates traditional arbitration with focus on International commercial arbitration. The theory does accept that arbitration is to be deemed as falling under the remit of the modern legal structure. However, it asserts that arbitration is a broad autonomous institution which is neither restricted to any one theoretical approach nor by the law of the seat of arbitration. As a result, when a dispute arises parties should have unrestricted freedom and autonomy to decide whether or not to resort to arbitration.

The theory was articulated by Rubellin-Devichi (1965) when she examined the International arbitration system independently from any particular national legal system. She emphasised that the legal and juridical nature of arbitration depends on its usages and as a result of this arbitration cannot be said to fall under any of the jurisdictional, contractual or mixed theories of arbitration.

Autonomous theory therefore acknowledges that International arbitration is detached from the laws, court of the seat of the arbitration and the authority of the autonomous parties as the controlling force in International commercial arbitration. Lynch (2003) maintains that the theory is useful as it emphasises the need of the international business community for a private means of resolving disputes with little judicial interference in the process and that arbitration be viewed in a broad context.

6.6.1 Criticisms of Autonomous Theory

The theory places too much emphasis on the aim and function of arbitration and the principle of party autonomy. It neglects socio-politico-economic issues, which determine the direction in which International arbitration may develop. Instead it mirrors trends in response to new requirements from the transnational entrepreneurial and business community for a flexible and private method of dispute resolution and International commercial arbitration.

Onyema (2010) also notes that although some of the premises upon which the autonomous theory is based have changed the theory is still of great relevance to International commercial arbitration. Yet Onyema highlights that even though delocalisation theorists and advocates of International public policy would like to seek the total elimination of the law and courts of

the seat of arbitration, so as to truly create an autonomous regime for International arbitration, the reality is otherwise. International arbitration is not completely autonomous from the national legal system, the law of the seat of arbitration and the place of enforcement is still significant in International arbitration and some countries are very hostile to international arbitration, such as the Gulf States.

Lynch (2003) therefore notes that the theory is limited and ignores the need for some form of national law to regulate International commercial arbitration and ensure the fairness within the arbitral process.

6.7 Summary

This chapter sought to explore the theoretical nature of arbitration from a legislative perspective. The chapter began with a legal definition of arbitration and concurred that it was in essence a legal process that sought to provide a resolution between disputing parties. However, the section then noted that due to the diverse nature and understanding of arbitration it was defined specifically and with recourse to the national legislature of the nation defining it. Thus in order to gain some clarity on the issue the rest of the first section sought to make a distinction between the judicial rulings and arbitration. It was demonstrated that the judicial process was backed by the national State legislature and was binding in accordance to the national State rules and regulations. The arbitrational rulings were context and State dependent and although the decisions made by arbitrators was also binding, the extent of that depended upon the willingness of the judicial system and legislative system to enforce those rulings. This was due to the arbitrational rulings not being secured with the backing of the national legislature.

The next section then identified the major theories of arbitration. It was observed that due to the diverse nature of arbitration it was impossible to pinpoint one single theory driving the arbitration process.

Thus the major theories introduced were the 'Mono', 'Contractual' and 'Jurisdictional', 'Mixed/Hybrid' and 'Autonomous' theories of arbitration.

In summation of these theories and the conclusions drawn it can be stated that although arbitration is contractual from the outset, when the final decision and ruling is made arbitration then becomes jurisdictional. As a result of this it is not possible to merely describe arbitration as one theory due to it having one feature in common. Every individual nationalistic legal system regulates arbitration in accordance to its own legislature and

national circumstances. Thus when a State seeks to control arbitration it then becomes jurisdictional. Whereas other liberal countries have a more *laissez-faire* approach and restrict court interference in the arbitration process and allow parties to have autonomy in their choice of applicable law.

Ismail (2013) suggests that arbitration in the Arab Middle East is of a mixed nature yet under Egyptian and most Arab judicial systems arbitration is more jurisdictional and considered another form of the judiciary. However, Ismail's viewpoint is not really adequate in describing the UAE experience where there is broad scope and increased autonomy in regards to arbitration.

With specific reference to the UAE, the mass influx and influence of International commerce and e-commerce has witnessed the development and renewed focus upon arbitration and its place within the national legislature. The developments and focus upon arbitration has resulted in the UAE becoming a global centre for arbitration.

In the next chapter the study focuses upon the issue of public policy and arbitration within the context of the UAE

CHAPTER SEVEN

PUBLIC POLICY IN ARBITRATION IN THE UAE

7.0 Introduction

It has been argued that the use of public policy as a challenge to arbitral awards, particularly foreign arbitral awards, in the UAE and other Gulf countries is rooted in the Middle East's colonialist experience. (Busit, 1991) The reaction against foreign colonial exploitation and influence has resulted in the perception that International arbitration is a tool for aiding colonial interests in the region. Foreign entities have thereby utilised the process of arbitration to control and usurp the resources of the region in disregard of the legal resolution systems and means already established.

The use of Public policy to counter these arbitral awards is based on the contextual environment of the nation State and its particular translation and understandings. Steingruber (2009:111) therefore suggests that the concept can be somewhat uncertain; hence, what is viewed as being contrary to public policy in one nation could be sound and acceptable in another.

For this reason, it is difficult to determine the opposition to public policy in specific cases, thus rulings of the judiciary are made on a case-by-case basis. Gibson (2009) observes that with the onset of globalisation the remit of public policy may encompass radically new issues such as natural environmental factors, labour rights, consumer protection, public health standards, human rights law, anti-corruption laws, anti-bribery laws, usury laws, money-laundering laws and other issues related to the economy in which the State is actively involved in terms of regulation and public policy formation.

However, Otto and Elwan (2010: 373) contend that the mere accusation of corruption and bribery for example are unsatisfactory claims in justifying a violation of public policy.

Kronke (2010:372) contends, "*If an award applies to a contract, which has been tainted by bribery (wherein an officer of a party was bribed to sign the contract) then the award can be denied enforcement on public policy grounds*".

Kronke (2010:373) cites several examples to demonstrate this argument. He discusses a case in England, UK where the legal State court refused to enforce an arbitral award ordering the defendant to pay a commission to a public official. The court viewed this 'commission' to

be no more than a bribe.¹ Another case from England revealed that the English Court of Appeal refused to enforce a monetary arbitral award as the parties smuggled carpets out of Iran illegally and smuggling activities are illegal in England and payments for smuggling would offend public policy.²

A Canadian court ruled that if an arbitration ruling conflicts with the peremptory norms in a state's law, this does not mean that it conflicts with its public policy. In the case of *Despeteaux v Editions Chouette Inc.*,³ the Canadian Supreme Court held that courts have broad scope to define “*the fundamental values and principles of a legal order*”. However, it emphasised:

It is important that we avoid excessive application of the concept by the courts. Such wide reliance on public order in the realm of arbitration would jeopardize that authority (note: of the arbitration system), contrary to the clear legislative approach and the judicial policy based on it.

The argument presented suggests that the use of public policy is context dependent, thus a varied example from the liberal Western nations is that of China. Here public policy is been perceived as being of social public interest. Therefore, the Chinese Arbitration Law ignores or refutes all foreign arbitral awards if “*the foreign judgement would cause harm to Chinese sovereignty, security or public order.*”⁴ There have been many concerns among legal practitioners and scholars about the grounds of public policy in China.

Peerenboom (2001) notes:

¹*Lemenda Trading Co. v. African Middle East Petroleum Co.*, [1988] QB 448 (High Court England): Cited in Kronke, H. (2010) *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*; Kluwer Law International (p. 373)

²*Soleymani v. Soleymani*. [1999] 3 All ER 847 (Court of Appeal England): Cited in Kronke, H. (2010) *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*; Kluwer Law International (p. 373)

³See: <http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Canada/Borden-Ladner-Gervais-LLP/The-Arbitrability-of-IP-Disputes>

⁴ See Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Legal System*. Available Online: http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/25_1/02_TXT.htm
Accessed 31 March 2015

“The fear has long been that PRC would find that enforcement of virtually any award against a Chinese party would violate public policy or social public interests.”¹

However Tao (2008) observes that the courts in Mainland China have not denied enforcement of a foreign arbitral award based on public policy violation.² Although the lower courts, the Supreme People’s Court in Beijing has overturned such decisions.

Within the context of the Gulf region the issue of public policy has always been connected with the ownership, distribution and use of land. This has formulated the essence of public policy within most of the Gulf States. However, with the advent of an interconnected International market and movement of goods and people, the notion of public policy has had to formulate a response to new social, economic, moral and religious issues within a society. Within the UAE ‘public policy’ is perceived to be the obligatory and authoritative rulings that are beyond the challenges of disputing parties. Thus they fall outside the remit and scope of the arbitral process and into the judicial jurisdiction.

Therefore this chapter will explore the notion of public policy and the argument that it has become a barrier to the implementation of arbitration in the UAE.

The chapter begins in section 7.1 by defining the concept of public policy and its possible implications. The purpose of this section is to explore the notion of public policy and its impact upon legislation. Section 7.2 then focuses upon the domestic, International and trans-national types of public policies. The chapter then discusses the issue of enforcing public policies in Section 7.3, before analysing both the Substantive and Procedural Public Policies in Section 7.4 and conducting an in-depth examination of the public policy within the UAE Legislation in Section 7.5.

¹ Randall Peerenboom, *Enforcement of Arbitral Awards in Doing Business in China* (Huntingdon, NY: Juris Publishing, 2001), n.5, p.289

² Jingzhou Tao, *Arbitration Law and Practice in China* (Kluwer Law International, 2008), p.189

7.1. Defining Public Policy

There are terms utilised that have the same connotations as public policy, such as ‘public order’, ‘public interest’ and the French term ‘*ordre public*’.

The House of Lords (England) in 1853 provides the roots for the concept of public policy:

“...*That principle of law that holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.*”¹

However, the referral to the notion became somewhat condescending when, in 1824, Mr Justice Burrough in presiding over the case of *Richardson v Mellish*, stated that “*Public policy is a high horse to mount, and is difficult to ride when you have mounted it.*”²

The implication of this statement can be deciphered from the fact that in the English Common Law the ‘costs follow the event’. Thus with regards to public policy the innocent party is liable for the initial financial costs even though it has been forced into litigation to defend its stance. The reason for this is to prevent any of the disputing parties to begin unjustified litigation procedures. They may do so in order to oppose the possible enforcement of an arbitration award. This is then perceived to be a complete disregard for the contract made to arbitrate. The decisions of the parties to enter into an arbitration agreement implies that the disputants are ready to accept and adhere to the outcomes of the arbitration and any subsequent awards regardless of whose favour they may be.

In the United Kingdom this is clearly regarded as being a breach of contractual obligations and hence there also is a public policy interest in urging parties to abide by their contractual obligations and agreements. For a party to begin litigation proceedings against enforcement of an arbitration award is in itself a move to disregard what the parties agreed on and this will result in damages for an innocent party. Furthermore, delaying the enforcement of an award will have dire trade and commercial consequences for the rightful party, which stands to benefit from the award.

Mohmeded (2014: 29) in his critical examination of arbitral provisional measures in England and Wales highlights that in some instances courts may in fact utilise the argument of public

¹ Julian D.M. Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (London and The Hague: Kluwer Law International, 2003), p.722

² Cited in James William Norton-Kyshe, *The Dictionary of Legal Quotations* (1904), p. 212-213.

policy when in fact there are no clear grounds for consideration of it vis-à-vis an arbitration agreement for example. Mohamed argues that there have been arbitration cases in the UK yet the court judgements have not adequately brought attention to exactly what the threats were to public policy. Mohamed thus suggests that a main factor was rather what he refers to as ‘judicial hostility’ and ‘judicial jealousy’, rather than threats to public policy.

Judicial jealousy and judicial hostility refers to the judiciary of a State and its courts guarding their judicial jurisdiction from what they perceived to be threats from the arbitration tribunals. It is therefore argued with consideration to Mohamed’s observation that if there are grounds for ‘judicial hostility’ and ‘judicial jealousy’ within courts in England and Wales then the same can be asserted for courts around the world, and the Middle East.

An example cited from the UAE to highlight this point is the case of *Deutsche Schachtbau- und Tiefbohrergesellschaft M.B.H (DST) v Ras Al Khaimah National Oil Company (Rakoil)*.¹

The case revolved around an oil exploration dispute between DST and Rakoil, with both parties opting to resolve the dispute via arbitration by invoking an International Chamber of Commerce (ICC) arbitration clause. However, when the dispute escalated, DST presented its claims to the ICC arbitration panel, whilst Rakoil attempted to invalidate the agreement with the Court of Ras al-Khaimah. Rakoil claimed damages against DST by accusing them of obtaining the original agreement via misrepresentation when going into the arbitration agreement. The ICC arbitration tribunal referred the dispute to arbitrators in Geneva, Switzerland, a common practice for international arbitrations in oil drilling disputes. During the proceedings in the English court for the recognition and enforcement of the Swiss arbitral award, Rakoil suggested that the arbitrator utilised ambiguous and vague International rules based on general usage in license rights rather than applying substantive law of a particular State, thereby contrary to English public policy. The court disagreed with this argument and noted:

“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution...it has to be shown that there is ...some element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be

¹See: http://www.jstor.org/stable/20693246?seq=1#page_scan_tab_contents

wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”¹

The ICC tribunal in Geneva stated:

“Reference either to the law of any one of the companies, or of such State, or of the State on whose territory one or several of these contracts were entered into, may seem inappropriate, for several reasons. The Arbitration Tribunal will refer to what has become common practice in International arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will... the Arbitration Tribunal therefore holds that Internationally accepted principles of law governing contractual relations to be the proper law applicable to the merits of this case.”

Frick (2001: 123) argues that the arbitrators in this case followed a two-step approach, firstly assessing the possibility of the application of a national law according to conflict rules; secondly, when it became evident that it would be arbitrary to apply national law, they applied the *lex mercatoria* respectively a “*lex petrolea*” as it were, a subsidiary of the *lex mercatoria*. All of this being in line with ICC Rule 13 (3), in that a *lex petrolea* can be said to be the application of International law to the petroleum sector or as a specific legal system with customary rules, which has developed in sync with the global oil and gas sector. Thus, the English Appeal Court concluded that this case was not contrary to the public policy of England. If the arbitrator had used common principles underlying the laws of different countries to govern contractual relations, particularly when the parties had not adequately designated, which legal system will be applicable. Therefore, the English Court could not identify any clear violation of public policy as there was no harm to English public interest wherein recognition or enforcement of the award would endanger the State’s public. The case of *DST v Rakoil* is particularly pertinent as it is a significant case in defining public policy for commercial arbitration.

¹ Excerpts of the decision published by the English Court of Appeal, March 24th 1987, 2 Lloyds Rep., 1987, p.246

7.2 A Brief Discussion on Public Policy in Arbitration

The review of literature reveals that there exists a dedicated field of study and numerous academic departments dedicated to the study of public policy within many university institutions all across the world.¹

As a result of this intense focus and attention to the subject there have been subsequent developments, which have led to the emergence of new areas of study. The most significant division of public policy has been into the domestic, International and Trans-national perspectives.

7.2.1 Domestic Public Policy

Domestic national courts can utilise public policy to reject the enforcement of an arbitral award for being in opposition to the standards of that court's jurisdiction, and in violation of the fundamental norms and values prevalent in the land. Domestic public policy is articulated via judicial practice, constitutional restrictions and legislative enactments in individual countries. It entails that the parties are all from the same nation and so the laws and norms of that country's domestic public policy are implemented. The mandatory rules of a country's public policy serve to safeguard the public interests of the country and not to aid any private individual.

7.2.2 International Public Policy

Otto and Elwan (2010: 366) observe that a State's International public policy is that which affects its essential principles governing the administration of justice and the maintenance of moral, political and economic order in that State. In some instances, a State's international public policy may be totally different from its domestic public policy. Thus courts have the discretion to weigh up its national public policy with consideration to the trade and commercial concerns. (Anusornsen, 2012)

Otto and Elwan (2010: 367) therefore observe that public policy can change and this can be witnessed within the tenets of the New York Convention (NYC). The NYC acknowledges the

¹For a comprehensive list of available university courses in Public Policy see:<http://www.topuniversities.com/courses/public-policy/grad/guide>

right of State courts to determine what exactly comprises public policy within their jurisdictions. Hence there is explicit recognition that the NYC cannot just be applied uncritically as it is open to interpretation.

Although it must be remembered that International public policy standards that are applied to International arbitral awards should not to be confused with local and domestic policies. However it can be very difficult for arbitrators to comply with the public policy norms in every jurisdiction during the arbitration proceedings due to the variations in public policy provisions in different vicinities.

The French Civil Code takes account of the distinctions between domestic and International notions of public policy, Article 1498 of the French Civil Code of Procedure states:

Arbitral awards will remain recognised in France where their existence has been established by the one claiming a right under it and where recognition of the same would not expressly be in opposition to International public order.

However, there are examples of judiciaries from some States being more lenient when applying these standards to domestic awards. Redfern and Hunter (2004) exemplify a case from Germany to make this point:

The viewpoint of German procedural public policy, the recognition of a foreign arbitral award can only be denied if the arbitral procedure suffers from a grave defect that touches the foundations of the state and economic functions.¹

Berger and Sun (2010) have noted that in Switzerland an arbitral award was recently rejected on public policy grounds, marking the first ever occasion when this had occurred since the enactment in Switzerland of the Private International Law Act in 1989 (PILA). This Act is Switzerland's federal codification of private international law which not only governs issues related to jurisdiction but also recognition of judgements and conflicts of law.

Article 190 of the Swiss Federal Code on Private International Law states that an award may be challenged, "if the award is incompatible with Swiss public policy."

¹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet and Maxwell, 2004), p.459

The most significant case to highlight this point is the case, *Club Athletico de Madrid v Sport Lisboa E Benfica-Futebol SAD*. This dispute between two major European football teams was over compensation for a player who left his Portuguese club for Madrid while three months into his contract. The court annulled an arbitration award issued by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland (a hub for controversial arbitration cases) on the grounds that the award violated procedural public policy under Article 190 (2) (e) of PILA. The Swiss court also found that the award violated the principle of *res judicata* as it disregarded a previous decision issued by the Commercial Court of the Canton of Zurich on 21st June 2004. *Res judicata* being the legal principle that prevents a party from bringing the same issue to court once the case has already been decided upon, unless new evidence can be presented.

As the case is very significant with regards to public policy doctrine, and due to it being a very interesting example of public policy in arbitration, it will be worth assessing the background of this case.

In 2000, three months after joining Sport Lisboa E Benfica-Futebol (i.e. Benfica) from the Dutch football team Ajax, Daniel da Cruz Carvalho (i.e. Carvalho) terminated his four-season contract for cause and joined Athletico Madrid. On 1st June 2001, Benfica claimed compensation for training and promotion of Carvalho within the meaning of Article 14.1 of the 1997 FIFA Regulations for the Status and Transfer of Players, which at the time was in force. On April 26th 2002 the FIFA Special Committee awarded \$2.5 million to Benfica for the teams investments in Carvalho.

Athletico Madrid challenged this award on an *ex parte* basis before the Commercial Court of the Canton of Zurich in June 2002. On 12th June 2004, the court voided the FIFA Special Committee decision based on the 1997 Transfer Regulation violating the European and Swiss competition laws. As a result, FIFA entered into an agreement with Athletico to take the Zurich's court decision into consideration if faced with another claim by Benfica over the same issue. Benfica however did not challenge the Zurich court's decision but on 21st October 2004 they did bring another claim before the FIFA Special Committee over its investment in Carvalho and seeking compensation in the region of €3, 165, 928 (\$3, 983, 050). The FIFA Special Committee rejected this claim on 14th February 2008; Benfica appealed the decision to the CAS on 9th January 2009.

The CAS tribunal reversed the decision of the Special Committee and ordered Athletico Madrid to pay Benfica €400,000 for training and promotion. The Special Committee rejected

Athletico Madrid's argument that the Zurich Commercial Court decision had *res judicata* effect with regard to whether Benfica was entitled to compensation over its investment in Carvalho, reasoning that the Zurich Commercial Court's decision determined only the legality of FIFA's regulations, but not the merits of Benfica's original claim. The CAS tribunal also ruled that because Benfica was not party to the Zurich proceedings, it was not bound by the Zurich Commercial Court's decision.

Athletico Madrid appealed the award to the Swiss Federal Tribunal and on April 13 2010 its ruling was issued. The Swiss Federal Tribunal disagreed with the Special Committee's standpoint and annulled its award on the grounds that the decision impermissibly ignored the principle of *res judicata*. This is established as part of Swiss public policy and the purpose of which is to prevent future judgement from contradicting the previous one. Basing their rule on Article 192 (2) (e) of the PILA, the Swiss Federal Tribunal held that a court could set aside an arbitration award that is incompatible with public policy. The court observed that public policy within the meaning outlined in the Article included both procedural and substantive aspects and ruled that an arbitration tribunal breaches public policy when its decision violates basic procedural principles.

The Swiss Federal Tribunal found that the CAS tribunal's disregard of the 'material legal force' of the decision of the Zurich Commercial Court constituted such a breach. The CAS tribunal's award of €400,000 to Athletico ignored the earlier court decision, which deemed such compensation as erroneous. It was irrelevant to the Swiss Federal Tribunal that the judgement involved an independent Swiss domestic procedure aiming to contest a decision rendered by a Swiss law association under Article 75 of the Swiss Civil Code rather than an arbitral proceeding. It was also of no consequence to the Swiss Tribunal that FIFA had introduced an arbitral examination of its decisions after the original decision of the Special Committee. A key issue was that, as the CAS tribunal had obtained jurisdiction later, it could not examine anew an issue, which had already been decided. Anusornsen (2012) notes that the case also demonstrates that while the Swiss court accepts public policy as a State's defence, the court will largely interpret it conservatively to maintain an arbitration friendly environment.

Von Segesser (2010) indicates that though this was not the first instance wherein the Swiss Federal Court held the principle of *res judicata* to be part of Swiss procedural public policy, it was the first instance wherein the Swiss Federal Tribunal had overturned an arbitral award based on public policy. Thus it has far-reaching implications for requiring courts to overturn

arbitral awards when it disregards an earlier award of the same issue between the same parties.¹

The concept of international public policy while being useful in helping parties to challenge awards which have major breaches of procedural laws, are however fraught with uncertainties and inconsistencies in their interpretation and application. In some cases this has led to a losing party to refer to it in order to delay enforcement or undermine one.

7.2.3 Trans-National Public Policy

This refers to standards, norms and values, which are adhered to by the international community. The distinction between transnational public policy and international public policy is that while trans-national public policy is about the international consensus on codes of legal conduct and practice, international public policy is based on the laws and standards of certain countries.

7.3 Enforcing Public Policy

The concept of public policy has an impact on the enforcement of foreign arbitration, as it's liable to arise at any stages within the arbitration process. An arbitration tribunal may find that it is mandatory to apply public policy rules that may affect the actual validity of their decision (Talhuni, 2008). Furthermore the national State courts that have jurisdiction over the arbitration process may refuse to support the arbitration process. They may also refuse to recognise the validity of the arbitration agreement and any associated awards if it deems the award to violate its national public policy concerns.

It is evident that it is not permitted for an arbitration tribunal appointed by the court, or designated in a private arbitration, or in an institutional arbitration, to issue a ruling that is contrary to public policy. In the instance of national arbitration, the private court, by issuing the arbitrator's ruling, which opposes public policy, the court is required to accept a request for annulment. This principle is also applied in cases of foreign arbitrators. The notion of

¹ James E. Berger and Charlene Sun, 'Swiss Federal Tribunal Overturns Arbitration Award on Public Policy Grounds.' *Paul Hastings Stay Current: Client Alert*, August 2010.

public policy has been noted in local and International legislations, including the New York Convention (NYC).

Ryabinin (2009) notes that the exclusive application of International public policy to foreign arbitral awards was supported in all major jurisdictions and on an International level.

Article 5 (2) of the NYC for instance states:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹

This provision is of specific relevance to the UAE wherein the judge will inspect the contract and the broader principles of public policy and notions of the 'common good'.

Mistelis and Di Peitro (2010: 21) note that two general considerations are taken into account that relate to whether the subject matter of the dispute could be settled by arbitration in the enforcing State (Arbitrability) and whether the recognition and enforcement of the award would violate the international public policy of the enforcing state:

- Arbitrability - a national court may refuse recognition and enforcement if the subject matter cannot be settled by arbitration on its own territory. Some countries have a wide interpretation of arbitrability and there are few cases where an enforcement of an award has been refused based on lack of arbitrability.

¹The New York Convention is available Online, I will be referring to the version accessible from the 'Inter Arb' website and Virtual Library on Arbitration:

<http://interarb.com/vl/p967871780>

Accessed, February 2015.

- Enforcement violates public policy – wherein a state’s public policy with regards to morality and justice is deemed or threatened with being violated.

Article 36 (1) of the Model Law states:

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) At the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(b) If the court finds that:

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) The recognition or enforcement of the award would be contrary to the public policy of this State.

7.4 Substantive and Procedural Public Policy

Mistelis and Di Peitro (2010: 22) noted that in 2000-2001 the International Law Association Committee on International Commercial Arbitration published a report and a resolution on public policy as a bar to the enforcement of foreign arbitral award. The report offers guidance for the classification of public policy grounds as substantive or procedural. Based on this possible procedural public policy grounds include:

- Fraud in the composition of the tribunal
- Breach of the natural course of justice
- Lack of impartiality
- Lack of reasons in the award
- Manifest disregard of the law
- Annulment at the place of arbitration

The report listed as substantive public policy grounds:

- Mandatory rules
- Fundamental principles of law

- Actions contrary to good morals
- National interests/foreign relations

Rubino-Sammartano (2014: 736) argues that the distinction between substantive issues and procedural is not always clear and an example is with regards to the means of providing evidence and how a contract is to be proven. In some legal systems a contract does not have to be proven by witnesses and must be proven in writing and the written form is required *ad probationem* (for the purposes of evidence). This is related to procedure and thus would be governed by procedural law. As for those legal systems when the contract must be entered into in writing and the written form is required *ad substantiam* (in order that the contract comes into existence) and is therefore substantive and governed by the law which governs the merits, the *lex causae*.

Substantive public policy directly addresses the violation of the essential principles. It covers the subject matter of an award due to which a State is justified in refusing an award if it is deemed to be contrary to the fundamental principles of a state.

The following cases are regarded as violations of substantive public policy:

- Violation of the principle *pacta sunt servanda*
- Violation of the principle of good faith and the prohibition of the abuse of rights
- Criminal offences such as fraud, bribery, corruption, terrorism, trafficking
- Violation of the protection of propriety rights, such as expropriation without appropriate compensation and damages in some civil law countries.
- Violation of anti-trust and competition laws
- Violation of fiscal laws, i.e. tax laws and currency control laws
- Violation of social protection laws, such as consumer protection laws
- Violation of laws enforcing foreign policy or other direct international obligations which may be related to import and export restrictions, embargoes, sanctions etc.
- Subject matter which cannot be settled via arbitration

Here public policy comprises only mandatory rules, which protect the interests of society and the general public. Substantive categories of public policy include mandatory laws, which prove to be imperative provisions of the law; good morals and public order; national interests and foreign relations.

Thus it is argued that the provisions of the NYC are limited to substantive public policy issues.

Procedural public policy is regarded as the technical and procedure related standard and covers the proceedings of the arbitration. Article 5 (1) (b) of the NYC states:

*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...*¹

This article on due process concerns public policy.

The parties can control and direct proceedings with the result being that neither party can claim a public policy violation, which results from their own behaviour such as negligence or intentional non-participation in the proceedings.

In light of this procedural public policy is considered to be:

- Violation of the right to be heard
- Violation of the right of effective neutrality and impartiality of the arbitrators
- Violation of the right to the parties' equal footing in the appointment of arbitrators, neither one party should be predominant in an arbitral tribunal.
- Conducting arbitral proceedings despite pending insolvency proceedings
- Lack of a valid arbitration agreement
- Unacceptability of proceedings, such as war wherein a party cannot participate
- Violation of time-limits which have been agreed by the parties
- Violation of the principle of *res judicata*
- Lack of valid reasons in the award
- Criminal offense affecting the award, such as fraud, bribery or corruption.
- Malicious use of process, such as bad faith. Like for instance if a party is prevented from voluntarily complying with an award or where a party obtains award despite a prior out-of-court settlement.

¹See: <http://interarb.com/vl/p967047127>

Accessed Online February 2015.

Recognition or enforcement of an arbitral award, based on the above list of procedural public policy issues, can be denied in dire circumstances. In terms of the ‘right to be heard’, it constitutes the most formative right before a court when defending oneself. If this right is violated it would render an arbitration award unenforceable as a violation of public policy. The ‘right to be heard’ includes the right to at least present arguments to the arbitration tribunals. Otto and Elwan (2010: 376) discuss the issue of arbitrators not providing valid and acceptable reasons for their decision not to award without a valid reason, as constituting a violation of public policy.

7.5 Public Policy in UAE Legislation

A personal conversation conducted with a respected senior arbitrator in the UAE revealed that he held reservations about the arbitration system in the UAE.¹ He emphasised that legislation within the Gulf States with regards to foreign arbitration needs to be amended in order to attract increased foreign investment.

The public policy of the UAE dictates that “*arbitration shall not be permitted in matters in which settlement is not permitted*”² and this includes commercial agency agreements,³ labour disputes,⁴ disputes relating to deferred debt,⁵ and counterfeiting and criminal activity. All of these must be referred to the court and the arbitration must be suspended until the court has reached a final decision.

A case cited to exemplify the situation of arbitration and public policy in the UAE involves *Baiti Real Estate Development v Dynasty Zarooni Inc.* On September 16th 2012, the Dubai Court of Cassation nullified an arbitration award on the grounds that the arbitrator had found the respondent to be in breach of a law. The requirement for the registration of contracts for the sale of land, which the Court deemed was a matter of public policy, could not be resolved

¹ Interview with Dr ‘Abdullāh Jad’ān, Senior arbitrator in UAE, September 2015.

² Article 203 (4), CPC.

³ Federal Law no.18 of 1981; Article no.6, the Commercial Agency Law.

⁴ Federal Law no.8 of 1980; the Labour Law.

⁵ Article 733, UAE Civil Code.

through arbitration.¹

Blanke (2013) is particularly critical of this case and argues that this decision is flawed and questions its compliance with the Islamic Shari'ah law. Blanke et al. (2012) in their highly critical article on public policy implementation in the UAE² demonstrate that in the case of *Baiti Real Estate Development v Dynasty Zarooni Inc.*, the Dubai Court of Cassation, in light of what it deemed to be 'public policy', set aside an order for enforcement of a domestic arbitration award initially made by the Dubai Court of the First Instance and subsequently affirmed by the Dubai Court of Appeal.

The dispute was with regards to a Dubai International Arbitration Centre (DIAC) arbitration about an off-plan property transaction. Dynasty Zarooni purchased an entire building, which was also developed by the sellers Baiti Real Estate Development. The arbitration award declared the sale and purchase agreement between the parties to be null and void and thus automatically terminated based on the agreement being in violation of Article 3 of Law No. 13 2008, which provides for mandatory registration of any sale and purchase of properties in Dubai with the Real Estate Register through the Dubai Lands Department. Any sale and purchase, which is therefore not registered, will be rendered null and void under the terms of Article 3.

Baiti did not register the transfer of the off-plan property to Dynasty and the Sole Arbitrator considered the transaction between the parties to be null and void and ordered Baiti to reimburse Dynasty the entire purchase price. However, the Dubai Court of Cassation held that the Sole Arbitrator did not have the power to adjudicate issues, which fall under the remit of Article 3 and argued:

“Such a dispute is considered to be related to public policy for being related to the rules of private ownership and the circulation of wealth.”

Herein it has been argued by commentators that the Court of Cassation took the unprecedented step of giving a very wide interpretation of 'public policy' as it relates to the

¹ Dubai Court of Cassation, Petition no.14/2012.

² Gordon Blanke, 'Public Policy in the UAE: Has the Unruly Horse Turned into a Camel?' *Kluwer Arbitration Blog*, 14 October 2012: <http://kluwerarbitrationblog.com/blog/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/>

Accessed 30 March 2015.

UAE, annulling three DIAC arbitral awards in the process. Nassif (2009) had argued previously that the definition of public policy in the UAE legislature is generally very narrow and in practice is hardly ever taken into consideration for the annulment of an arbitration award.¹ However, the Dubai Court of Cassation therefore included within ‘public policy’ the application of rules related to the circulation of wealth and private ownership, and that proper ownership of any real estate with the UAE is to fall under ‘public policy’. Article 3 of the UAE Civil Transaction Law No. 3 of 1983 defines ‘public policy’ as (as per the translation of Whelan and Hall, 1987):

“Public order shall be viewed as including such provisions related to personal status such as marriage, inheritance and lineage; as well as provisions related to government systems, freedom of trade, the distribution of wealth, rules of private ownership and the other rules and foundations upon which society is based in all matters which are not in conflict with the conclusive provisions and essential principles of the Islamic Shari’ah.”

Hence, it has been argued that the Dubai Court of Cassation totally overlooked what Article 3 clearly states about the statutory limit in the scope of public policy. Article 3 clearly outlines the actual remit and boundaries of public policy and that it pertains to issues of personal status, individual ownership, freedom of trade etc. Furthermore, within Article 3 there is much to be drawn from it with regards to issues, which run contrary to Islamic Sharia as constituting a violation of public policy. Therefore the Shari’ah is taken as part of UAE public policy, however this has little bearing on most commercial and real estate arbitration cases. The interpretation of the Dubai Court of Cassation did not take into account procedural and conceptual nuances commonly attributed to public policy in arbitration contexts. As a result, Blanke (2012) argues that the Dubai Court case law is very underdeveloped in this regard and is inadequate in the explanation of public policy in domestic arbitration. The logical conclusion from this decision from the Court of Cassation is that there can be no arbitration on public policy issues, which are impartial and fair, if restricted to the Islamic Sharia wherein it could be argued UAE courts has exclusive jurisdictional authority.

¹ Karim J. Nassif, ‘Note on Arbitration Under UAE Law’ in *DIAC Journal*, vol.3, Special Edition 2, April-December 2009.

However, Kutty (2006:603) argues that this signifies the major difference between public policy in Islamic countries and Western countries. The Shari'ah focuses on collective rights, this implies that each individual is part of a collective whole, responsible for maintaining the status quo of society in accordance to the divine and secular law of the land. The rules and regulations of the legislature therefore seek to protect the overarching aspects of society as opposed to the sole interest of the individual. The Muslim perspective deems the experience and relationship of individuals living together under communal code to constitute the nexus of a society, which in turn then has a relationship with God as a collective whole. Although this does not deny the role of the individuals' relationships with God, on a societal scale it is the collective will of the people as a group that forms the best for the entire group. Whereas the Western secular derived law is orientated towards the rights of individuals with their society. Thus individuals have a responsibility for maintaining the status quo of status but society has a right to protect their essential freedoms even though they may be against the majority societal ideals and norms. Therefore he observes that these differences alongside the challenges presented by the interpretation and application of legal codes and treaties implied that in the 1970's the Islamic domestic laws were deemed as wholly inferior in comparison to Western law. Thus they were undermined in favour of Western laws, which were to govern long-standing oil concession disputes. In the case of *Petroleum Development (Trucial Coasts) Ltd. v Sheikh of Abu Dhabi*, the arbitrator Lord Asquith acknowledged that as the contract was executed in Abu Dhabi the applicable laws of Abu Dhabi were to be applied. However, Asquith then went on to undermine the laws of Abu Dhabi, famously retorting:

*"It would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial equipment."*¹

Lord Asquith therefore applied English laws to the arbitration, as they were the "*common practice of the generality of civilised nations*".

Similar sentiments were also expressed during the case of *Ruler of Qatar v. International Marine Oil Co. Ltd.*, herein the arbitrator deemed Qatari law, which was based on Islamic law, as the applicable law but then at the same time disregarded it saying:

*"I am satisfied that the [Islamic] law does not contain any principles, which would be sufficient to interpret this particular contract."*¹

¹See for full details on the case: <http://lawjournal.mcgill.ca/userfiles/other/2058317-1.2.Cosford.pdf>

The insinuation was that there is no general law of contract in Shari'ah legislation, a blatant disregard of centuries worth of detailed and rigorous Islamic legal scholarship in which are tomes of clear principles for contract law based on the Islamic sources.

The requirements concerning the subject matter of the contract are paramount in Islamic law. The Islamic Shari'ah legislation insists that all the elements of the contract be determined in a manner that makes the transaction free of any eventual ambiguity and uncertainty. This is to avert any possibility of unjustified profit for one of the parties generated by an unfavourable outcome of the uncertainty in question, i.e. the unripened fruits sold though they are spoiled.² Therefore, the courts in the Middle East and the UAE have taken a protectionist stance on defending the Shari'ah against both domestic and foreign threats. Due to the historical narrative and experience of the constant undermining of the Shari'ah by colonial powers, the juridical system in the UAE has become an official authority and guardian of the Islamic norms and laws. Thus any issue with a potential of violating the ethos of the Islamic cultural and traditional heritage of the nation, is enmeshed in the public policy of the nation, which is itself derived directly from the Islamic ideology.

7.6 Summary

This chapter explored the issue of arbitration and public policy in the UAE and the notion that it has become a barrier to the implementation of arbitration in the UAE. The chapter began by defining the notion of public policy and identified its early development and usage within the courts of England, UK. It was noted that public policy was understood to be anything that was “...*injurious to the public or against the public good*”. However, it was also noted by the early proponents and proven in later cases from across the world that national courts often employed public policy to challenge arbitral awards that went against their national interests. A major case *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H (DST) v Ras Al Khaimah National Oil Company (Rak oil)* was utilised as an example of this practice.

The chapter then introduced the three major types of public policy, the domestic, the

¹See for full details on the case:

<http://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316151471&id=CBO9781316151471A191>

²See: https://www.jstor.org/stable/1051062?seq=1#page_scan_tab_contents

International and the trans-national. Here it was demonstrated that the domestic public policies sought to protect national interests between domestic actors. However public policy seeking to protect the socio-politico-economic and religious-cultural standards of a country especially in the Middle East and the UAE undermined the arbitration process. The International public policies exemplified in the cited case of *Club Atletico de Madrid v Sport Lisboa E Benfica-Futebol SAD* demonstrated that nations were willing to alter their public policies to meet the requirements for furthering their national interests such as trade and investment. Trans-national public policies however were designed to create a consensus to ensure partner nations were able to coordinate and work harmoniously.

The chapter then discussed the issue of enforcing public policies and discovered that it was context dependent and even the NYC made concessions to recognise that nations would only enforce provisions and awards that were not violating their laws and policies or causing injury and defamation to the good of their public.

The argument then focused upon the various notions of public policy that could be enforced such as the Substantive and Procedural public policies. It was demonstrated that the legal system requiring a written form of evidence was related to Procedure and thus would be governed by procedural law. As for legal systems requiring contracts to be entered into writing, in written form, it was Substantive as it directly addressed the violation of the essential principles. It covered the subject matter of an award due to which a State was justified in refusing an award if it is deemed to be contrary to the fundamental principles of a State.

The chapter then examined the situation of public policy within the UAE Legislation. It was noted that the criticism levied against the UAE and the Gulf States in general was that public policy was used to negate arbitral awards that were against UAE or Gulf based corporations. It was argued that this was detracting the UAE's potential for attaining greater business and trade opportunities. Its judicial system was perceived to be usurping the public policy to implement their form of Islamic Shari'ah law in an ad hoc fashion.

However in contradistinction it was also discovered that due to the historical colonial subjugation of its domestic laws, the current practices and attitudes against International arbitration processes and awards was mired in suspicion. They were perceived as foreign intrusions and attempts at controlling their resources. Furthermore, as noted in the early part of the chapter each State in accordance to the principles of the NYC had the right to regulate public policy as a key principle. It would be a violation of a nation's sovereignty if there were

any outside interference in its right to determine its own public policy. Hence the UAE national courts are merely seeking to protect the interest of their nation by reintroducing and invoking the principles of the Islamic Shari'ah law, which formulates a part of their heritage, culture and traditions.

The next section introduces a definitive exploration of the concept of Electronic Arbitration (E-Arb).

CHAPTER EIGHT

ELECTRONIC ARBITRATION AND ITS FEATURES

8.0 Introduction

Online Electronic Arbitration (E-Arb) is a private dispute resolution process that involves the intervention of a neutral, impartial decision-maker, the arbitrator. This individual presides over the arbitration by hearing the arguments and contentions of both parties and renders a binding decision upon them. With the advent of ICT, the process of online arbitration has become increasingly popular and is being utilised by corporations operating via the Internet as an efficient and inexpensive method in comparison to the traditional court proceedings and conventional arbitration.

The attraction of the online process is its ease of accessibility, for example a claimant can fill out a form on the Indian online arbitration website Cyber Tribunal,¹ which is then sent to the other party. If the other party agrees to arbitration they are requested to respond to the claim. When both parties undergo arbitration, the parties agree to comply with the award regardless of the outcome and final decision. In the instance of there being noncompliance, and in accordance with applicable laws and conventions, the injured party can request enforcement of the award.

At present there exist three main methods of arbitrational procedure:

(Meier and Stormer, 2009: 93)

1. The conventional arbitration procedures;
2. The use of the Internet for initial submissions within a conventional procedure;
3. The e-process involving an electronic arbitration agreement with digital signatures, video-conferencing and an electronic arbitral award

Arbitration that is partially conducted online utilises modern ICT with offline aspects of arbitration such as live-in person hearings, computers, printers, fax machines, handheld devices such as Smartphone's and regular postal services for the communication between arbitrators, submission of evidence and deliberations on final decision and the award.

¹<http://catindia.gov.in> example from India

(Cevenini and Fioriglio, 2008: 317) The use of ICT within arbitration may also cover online research, billing software, shared calendaring, automated conflict of interest checking, as well as general emailing and video-conferencing (Schultz, 2006: 16).

Thus the adoption and use of ICT in the arbitration process has led to an increasing set of domestic legislations and International regulations being developed to oversee E-Arb.

In light of these developments, this chapter seeks to discuss the notion of E-Arbitration (e-Arb), its agreement and procedures along with a definitive understanding of the concept from a theoretical and practical perspective.

Section 8.1 defines E-Arb to be a method of resolving disputes via online platforms that provide arbitration services. It then identifies the advantages and disadvantages of E-Arb.

Section 8.2 then begins a discussion on the notion of the online dispute mechanisms such as electronic negotiation, electronic mediation and electronic reconciliation; these are then compared to E-Arb. Section 8.3 focuses upon some of the core E-Arb Institutions within the contemporary period. The section provides a descriptive account of the American Arbitration Association, CyberSettle and the World Intellectual Property Organization. In conclusion Section 8.4 states that the growth of the ODR methods has evolved in line with the development of online commercial transactions and legislative procedures.

The following sections then focus upon the notion of the E-Arb agreement by firstly examining in Section 8.5 the features of the E-Arb agreement, its requirements as embodied in e writing and e-signature in Section 8.6. The chapter then focuses upon the legal Implications of E-Arb Agreements in Section 8.7. An examination of the E-Arb Agreements in Section 8.8 between B2C reveals a lower level of dispute hearings in comparison to B2B. It is argued that due to the procedural implications of the arbitration agreement (Positive and Negative Implications) many consumers don't have the appropriate knowledge of the E-Arb Agreement to make use of it. It is finally argued in Section 8.9 that the substantive implications of the E-Arb Agreement is its ability for a binding award without having to resort to the courts and judicial process.

The final section of this chapter focuses upon the E-Arb procedures to provide a clear understanding of the functionality of E-Arb. Section 8.10 introduces the processes by which tribunals are formed through both conventional arbitration and E-Arb. This also encompasses key considerations such as the requirements and choice of the arbitrator. Section 8.11 focuses upon and introduces the procedural characteristics of E-Arb: Mutual Consent, Due Process,

Binding Decision and Confidentiality. This is followed in Section 8.12 with a brief discussion on arbitrability and its use in refuting awards. Whilst Section 8.13 examines the important notion of the 'Seat' of E-Arb and its place in an electronic context, which leads directly to the debate upon the e-production of documents and e-submissions and e-hearings in sections 8.14 and 8.15. The applicability of the law in E-Arb procedures is discussed in section 8.16 and a summary of the section and chapter in Section 8.17.

8.1 Features of the Electronic Arbitration (E-Arb)

Electronic arbitration (E-Arb) is generally understood to be a method of resolving disputes via online platforms that provide arbitration services. E-Arb as it has already been demonstrated in earlier chapters is linked directly to the growth in e-commerce, cross-border and trans-national trade. Parties who make contracts and agreements in such transactions anticipate a quick, proficient and cost-effective mechanism for resolving disputes. The request for arbitration, the proposal for the appointment of the arbitrator, the parties' exchange of arguments, documents to be produced can all be arranged electronically. (Rubino-Sammartano, 2014: 1737; Cevenini and Fioriglio, 2008: 317) Thus the positives for electronic arbitration include the parties having the opportunity to choose the arbitrator, the applicable rules and regulations and attaining a final decision, which is Internationally enforceable. (Alfuraih and Snow, 2005: 185)

Katsh et al. (2000: 27) support this assertion by arguing that the reviewing and processing of information by an arbitrator can be easily managed online, digitally and in the electronic environment. They further observe that online arbitration offers a simple communications process than mediation. Therefore, the development of software to arbitrate online disputes is much less of a challenge than developing software that would support mediation. They argue that an online marketplace can rely on an arbitration process rather than mediation as it encompasses the use of the threat of exclusion as the mechanism for enforcing the terms of the ruling. Therefore, a core benefit of arbitration is that arbitral awards can be enforced internationally as long as specific requirements are met. This is due to many countries signing up to the NYC of 1958, which ensures mutual recognition and enforcement of arbitral awards. (Katsh et al., 2000: 17)

An informal conversation with the Businessman & Consumer in the UAE agreed that E-Arb

would contribute to increased users of e-commerce, as consumers will have a sense of security in their online transactions.¹

8.1.1 Advantages of E-Arb

Electronic arbitration negates the stress and trauma associated with face-face (F2F) arbitration and litigation processes. (Schmitz, 2010: 203). F2F arbitration can become very adversarial, offensive and ill mannered, this is particularly an issue in the Gulf Arab countries.

As a result, the option of E-Arb for International arbitration presents several benefits that protects confidentiality, safeguards intra-State relationships and secures documentation exchanged electronically among disputing parties and the tribunal via secure sites and networks. In a conversation with a UAE based professor of law, the academic argued that although there was no substantive difference between conventional arbitration and E-Arb, the differences arose in the means and mode of arbitration.² Figure 8.1.1: summarises the advantages of e-arbitration as identified through the review of literature and conversations with experts over more traditional and conventional forms of arbitration:



Figure 8.1.1: Advantages of E-Arb

¹Interview with Abdurahmān al-Hashimī , Businessman & Consumer, August , 2015.

²Interview with Dr. Imād Abū Sadd, professor of law, former head of Department , September 2015.

Faster Process: The parties and arbitrators are not obliged to travel great distances to attend hearings. Using the latest technology for audio and video conferencing allows the disputing parties to conduct meetings and hearings remotely. This reduces travel expenses and the overheads in arranging the arbitration. Furthermore, with the use of asynchronous communication, parties can exchange information, exhibit evidence and post and examination briefs, documents and evidentiary submissions (Schmitz, 2010: 220). Conducting E-Arb via the Internet, along with transferring and sharing relevant documentation, helps to fast track the process and reduces delays. This ensures a swift conclusion to the procedure and the dispute.

A renowned professor of law in the UAE revealed in a personal conversation with the researcher that E-Arb would become the main reason for the development of arbitration in the UAE. He articulated that it would reduce the time and process of arbitration due to the usage of modern technologies.¹

Cost-Effective: As the parties are not required to travel in order to meet and discuss matters related to the arbitration, the relevant parties can access materials and examine them at suitable times. This eliminates the costs and wastage associated with sending paper records (Schmitz, 2010: 201).

Efficient Case Management: Parties can initiate and defend claims by accessing dedicated websites and the requisite forms online, as the web-based document filing systems assist parties to submit directly the relevant documents regardless of distance and with little or no charges. Kaufmann-Kohler, Schultz and Ware (2002: 179) identified speed and cost effectiveness as two of the advantages, which make e-arbitration a favoured ODR method over litigation or traditional arbitration.

24/7/365² Availability and Accessibility: Due to the permanent presence of the websites the tribunal and the disputing parties can access material related to the arbitration anywhere, without having to travel to attend sessions or physically submit documentation to a tribunal. The process presents the potential for swift decision-making with award being communicated and enforced online. (Schmitz, 2010: 205)

¹Interview with Dr. Imād Abū Sadd, professor of law, former head of Department , September 2015.

²24/7/365 refers to twenty four hours, seven days and three hundred and sixty five days of the year

Adequate and Convenient: The ease of universally accessing the Internet implies for example that websites such as Virtual Courthouse can provide disputing parties an online space to file claims, select neutral arbitrators to resolve their dispute and submit exhibits and supporting materials for their cases to the assigned arbitrators in a secure online electronic environment. The arbitrators can then examine the presentations and render a binding decision within twenty hours after the parties have completed their case presentations. (Schmitz, 2010: 197)

8.1.2 Disadvantages of E-Arb

In citing the disadvantages of E-Arb, the opinion put forth by the deputy secretary of Dubai Arbitrators is particularly informative. He notes that a potential risk identified by the official arbitration bodies is that E-Arb could possibly lead to further disputes with regards to the validity of the presented evidence.¹For example, Walden and Hörnle (2001: 23) observe that there are serious concerns about data exchange, confidentiality, privacy and validating information via E-Arb, as people are concerned about the Internet as a platform being abused by cyber criminals.

Furthermore, with the current ambivalence in the legal structure with regards to E-Arb, consumers are uncertain and hesitant with the legal will to enforce awards. This concern is also manifested in the selection and agreement upon the ‘seat’ from which an E-Arb award is decided. As the electronic domain is outside the sphere of national boundaries, it is often difficult to fix a seat for E-Arb. (Rubino-Sammartano, 2014: 1737; Lynch, 2003: 393)

8.2 Distinctions Between E-Arb and Other Forms of Dispute Resolution, Such as Electronic Negotiation, Electronic Mediation and Electronic Reconciliation

Kaufmann-Kohler and Schultz (2004: 6) observe that the Alternative Dispute Resolution (ADR) process emerged in the US in the 1970’s due to perceived deficiencies within the judicial processes. They note that there was also an explicit recognition by the government that there existed alternative resolvers of disputes than courts. With the advent of e-commerce and its subsequent popularity in the contemporary period the ADR available to businesses

¹Interview with Yūsuf Al-Matrūshī, Deputy Secretary of Dubai Arbitrators, August 2015.

and consumers is the Online Dispute Resolution (ODR).¹This method of arbitration entails four stages, all conducted online: (ibid)

1. Negotiation
2. Court Proceedings
3. Mediation
4. Arbitration

While Katsh and Rifkin (2001) demonstrate the manner in which ODR is utilised to enhance the processes of conflict and dispute resolution. ODR incorporates the usage of the Internet platform to access databases, websites, emails, and communications technology such as streaming and posting material. Furthermore there now exists software that can provide instant translation, thus assisting multilingual parties in real-time video conferencing and dialogue. Thus it provides the basic tools for arbitration and can empower SME's and individual consumers or businesses in the resolution process. This is evident from the fact that in many instances travel expenses, geographical distances and rising costs can deter many (such as individual consumers and small businesses) from participating in any dispute resolution proceedings with big businesses and multinational companies. (Schmitz, 2010: 222, 229)

A significant example entailing ODR and cyberspace technology is The Internet Corporation for Assigned Names and Numbers (ICANN). This organisation is responsible for assigning and managing the names of website domain names on the Internet. In 1999 ICANN established the Uniform Dispute Resolution Policy (UDRP), a regulation providing the mandatory submission to ODR with regards to disputes on the registration of domain names.²

Three major types of ODR are discussed below and then briefly compared to E-Arb.

¹This is also sometimes referred to by other acronyms such as IDR (Internet Dispute Resolution), EDR (Electronic Dispute Resolution), e-ADR (Electronic Alternative Dispute resolution) and o-ADR (Online Dispute Resolution).

²The arbitration processes are conducted according to the ICANN Rules for Uniform Domain Name Dispute Resolution Policy (RUDNDRP).

8.2.1 Electronic Negotiation

The computer software recognised to be the 'negotiator' acts or takes the place of a third party arbitrator. Negotiation is conducted online in the first instance as a record of the e-transactions and e-commerce dealings. The software system is then presented with the arguments of the disputants and through complex algorithmic functions it decides upon a final solution. The parties are however bound to the final verdict as pronounced by an artificial intelligent (AI) piece of software. Abdel Wahab (2012: 411) argues against the use of AI and observes that there will be severe repercussions upon ODR methods like E-Arb. He argues that by depending upon the decisions and verdicts made by a machine running algorithms will eventually run contrary to the purpose of arbitration, as there is no room for discussion or negotiation.

8.2.2 Electronic Mediation

During the online mediation process, the mediator and the disputing parties communicate via cyber based communication platforms such as email, online video and voice conferencing. However, the utilisation and possibility for these video-teleconferences to be conducted are dependent upon the legislation of the State in which the online mediation is taking place. The parties agree to resolve a dispute via a mediator and the courts choose the mediator based on the interests of the parties. The mediator suggests the requirements to resolve the dispute, however this is not binding as the parties can either accept it or reject it. (Cortes, 2008)

8.2.3 Electronic Reconciliation

Disputing parties agree to attempt a resolution through a mutually agreed upon intermediary. The idea is for the intermediary to present a non-binding solution, which the parties can either accept or reject. If this reconciliatory approach fails, the parties may resort to arbitration. (Zamzamī, 2007: 336)

8.2.4 Electronic Arbitration

It is therefore evident that e-negotiation, e mediation and e-reconciliation differ from e-Arb with regards to their procedures. E-negotiation does not entail a third party, whereas it is required in the arbitration process. Furthermore, e-negotiation is often customary and not dependent upon the law, whereas e-Arb is based on the state legislation provided to resolve disputes. The e mediation and e-reconciliation processes present non-binding resolutions, which parties can either accept or reject, whereas in e-Arb an arbitrator's decisions are binding and have to be enforced on the disputing parties. Therefore, e-Arb in comparison can be considered a formal legislative approach to arbitration but without becoming involved in the States judicial processes. The other ODR methods could also be considered as possible steps preceding the arbitration process, with arbitration becoming the last resort.

8.2.5 Regulation of ODR

The impact of the adoption and utilisation of ODR has resulted in a European Union (EU) Directive 2000/31/EC of the European Parliament and of the Council dated June 8, 2000 re:

Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (Directive on electronic commerce)», which provides in paragraph 1 of its article 17 that «Member States shall ensure that, in the event of disagreement between an Information Society Service Provider and the recipient of the service, their Legislation does not hamper the use of out-of-court schemes available under National Law for dispute settlement, including appropriate electronic means.

This directive was further developed and acted upon by the EU's Green Paper of 2002 (COM/2002/196), which actively encouraged the use of ADR methods.¹ In recent times the Global Business Dialogue on Electronic Commerce (GIBED), the International Union of Consumers Organizations (Consumers International (CI)) and an association of business companies issued guidelines for the regulation of disputes ensuing from of e-transactions between consumers. This set the minimum requirements for ODR processes and endorsed online arbitration, online mediation and online negotiation.

¹See: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133189>

8.3 Electronic Arbitration Institutions

A recent Ernst & Young report¹ suggests that the number of institutions providing e-Arb services has increased due to the rigidity and inflexibility of the regulatory framework for conventional arbitration. With the advent of e-commerce and other e-based services this has led to the emergence of new institutions that are solely focused upon the electronic world of cyber space. Therefore, they operate globally and within many jurisdictions. Popular examples include the Virtual Magistrates Project,² an online arbitration initiative created in 1996 to handle matters relating to defamation of character, personal libel injury and cases of fraud and deception. The other significant example includes Cyber Tribunal, which was formed by the Law School of the University of Montreal in 1996, the same year in which the University of Massachusetts began the Online Ombudsmen Office (Rubino-Sammartano, 2014: 1090). A descriptive account of the three major e-Arb providers has been presented below to demonstrate their varying approaches

8.3.1 American Arbitration Association and CyberSettle

The American Arbitration Association (AAA)³ established in 1926 is a non-profit making public service organisation and global leader in conflict management. It provides services to individuals and organisations that wish to resolve conflicts out of court. The AAA appoints sole arbitrators in concert with the disputants and an award can be issued five days after the end of the hearings when all relevant evidence has been submitted. They anticipate that online disputes can be fully resolved between five to thirty days.

According to Schmitz (2010:189) CyberSettle⁴ founded in the 1990's is the foremost ODR institution in the world with a patented double blind bidding process focused on a single

¹See: [http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/\\$FILE/EY-Emerging-trends-in-arbitration-in-India.pdf](http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY-Emerging-trends-in-arbitration-in-India.pdf)

²See: <http://vmag.law.vill.edu:8080>

³See AAA website: <https://www.adr.org/>

⁴<http://www.cybersettle.com>

variable, money. Cyber Settle has handled nearly 200,000 cases and \$1.2 billion worth of settlements. However, it has been criticised for only focusing on monetary settlements.

In October 2006 AAA and Cyber Settle announced a strategic partnership to provide clients of both institutes with the opportunity to use dispute resolution systems of both companies exclusively. Wang (2014: 156-157) observes that in this way CyberSettle clients who have not been able to reach a settlement via online negotiation can switch to AAA's dispute resolution processes, which include conciliation, mediation and arbitration.

8.3.2 World Intellectual Property Organization

In the 1990's the World Intellectual Property Organization (WIPO) initiated a domain-name resolution system, the Arbitration and Mediation Centre (AMC). This system dispensed with the physical presentation of evidence and demonstrated the possibility of a cyber tribunal. The AMC is an approved dispute resolution service provider and its decisions are based on procedures outlined in ICANN's 'Rules for Uniform Domain Name Dispute Resolution Policy', which can be enforced by any registrar. (Spindler and Börner, 2002: 425)

The functions performed by the WIPO AMC are administrative procedures, which are not binding and the parties are free to file a claim before a court. The parties can select the WIPO Arbitration Tribunal as a binding International arbitration tribunal according to the Italian Civil Procedure Code. (Spindler and Börner, 2002: 349) Judgements made by arbitration courts, which have been accredited by WIPO are passed on from the arbitration court to the disputing parties as well as to ICANN. Then the judgement is published and made available on the Internet by the arbitration court in order to facilitate its easy access. After expiry of a waiting period of 10 business days from delivery of its decision, the issuing office must promptly implement the judgement via either deleting the domain or transferring it to the applicant. If the losing party within that waiting period can prove that it has filed proceedings against the winning party before a competent state court, the arbitration judgement will not be implemented until the issuing office is notified of the result of such proceedings. (Spindler and Börner, 2002: 197).

The WIPO AMC rules and procedures provide the tribunal with responsibility of the case at an early stage of the process. This extends the discretion to the disputing parties with regards to the extension or reduction in time limits for administration and appointment of arbitrators.

The AMC also has expedited rules that allow for a faster resolution process with lower fee costs and shorter times for hearings before the arbitrator. These usually do not take more than three days. The 'expedited rules' however require that arbitrations be conducted with no more than one arbitrator, whereas in conventional arbitration tribunals have more arbitrators depending on the disputant's agreement or as determined by the WIPO Centre.

Nsour (2006: 192) notes that the WIPO AMC dispute resolution system has been successful mainly in domain name disputes as a huge number of such cases are filed with the WIPO. Likewise, a massive number of cases related to Cyber squatting (the registration or use of a domain name in bad faith in order to profit from the goodwill of a trademark belonging to someone else) have also been filed with the WIPO Centre.

8.4 Summary of Sections Defining E-Arbitration

This section sought to introduce E-Arbitration (e-Arb) and present a definitive understanding of the concept from a theoretical and practical perspective. Thus E-Arb was defined to be a method of resolving disputes via online platforms that provide arbitration services. The advantages of E-Arb were identified as being a faster process, more cost-effective, have efficient case management, available and accessible 24/7/365 and be adequate and convenient. The disadvantages identified were its validity of the presented evidence, confidentiality and privacy issues alongside a current ambivalence in the legal structure to E-Arb. The section then moved on to begin a discussion on the notion of the online dispute mechanisms such as electronic negotiation, electronic mediation and electronic reconciliation; these were then compared to E-Arb. It was concluded that the other ODR methods in comparison to E-Arb were more informal and non-binding whilst they could be steps taken before the arbitration process was invoked. The section then focused upon some of the core E-Arb Institutions within the contemporary period. The section provided a descriptive account of the American Arbitration Association, CyberSettle and the World Intellectual Property Organization.

The section concludes by observing that the developments in ICT are leading to technological enhancements and potential abilities to conduct a greater scope of business and trade in cyberspace. Therefore, the growth of the ODR methods has naturally evolved in synch with the development of online commercial transactions and legislative procedures. The development of various ODR methods such as e-negotiation for example can be considered

possible steps to take before arbitration (E-Arb) is required. This demonstrates the technical evolution of the arbitration process. ODR technology has made it possible to provide the pre-arbitration stages, for example negotiation and reconciliation. These are now being offered as non-binding agreements, which the disputants may utilise to achieve an outcome without resorting to a financial claim in an arbitration or judicial court. The processes therefore being offered with the ODR methods reflect the physical customs and tribal culture of ‘dispute resolution’ in the Gulf region.

In order to gain an in depth understanding the Electronic Arbitration (E-Arb) process the next section introduces the discussion on the electronic arbitration agreement.

8.5 Electronic Arbitration Agreement

The arbitration agreement formulates the basis upon, which the disputing parties resort to arbitration. There is no difference between E-Arb agreements and conventional arbitration agreements as it is the agreement of two parties to resort to arbitration without judicial intervention of the state to resolve all or some of the disputes which develop or could develop between the parties due to a specific legal issue (Sāwī, 2004: 31, clause 19). This agreement must be made available in order for the arbitration award to be valid; otherwise the award will be rendered invalid. The arbitration agreement can be considered an expression of the consent of the parties to arbitrate, acceptance of the verdict of the arbitrator, maintenance and practice of a certain ethos of mutual respect by the disputing parties, and to identify the concerns from either of the parties.¹

Article 2 (2) 1958 NYC recognises the arbitration agreement to fall under the definition of a written agreement any arbitration clause or condition complete with signatures from the parties, the NYC states:

*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.*²

¹ Dubai Court of Cassation, Petition no. 173/1996, Judgement of 16 March 1997.

²See: <http://interarb.com/vl/p967889643>

Accessed Online February 2015.

Article 202 (1) of the UAE CPC recognises that it is permissible for contracting parties to generally include in the initial agreement or a subsequent agreement the possibilities and conditions of future disputes that may transpire. It is acceptable to agree to arbitrate for a specific dispute with special conditions (UAE CPC, Article 202 (1)). Dubai Court of Cassation (Petition No. 355) 1997 defined the arbitration agreement as being “*a private agreement between two parties which is considered to be a manifestation of the authority of their consent*”. Likewise, the AAA defines the E-Arb agreement to be “*the agreements of the parties electronically via the internet to arbitrate to resolve their dispute or which will arise between them.*”¹ Therefore, the E-Arb agreement is a document stipulating the offer from one party with regards to an offer to arbitrate via an electronic method, over the cyberspace platform. This offer has to also be accepted by the other party via electronic means. The aim in this agreement is to resolve some or all disputes, which develop or could develop between them due to restricted legal relationships.

8.6 Features of the E-Arb Agreement

The E-Arb agreement is regarded as an e-contract and related to contracts concluded by distance. This feature distinguishes the E-Arb agreement (concluded by two parties which are not physically present) from the conventional arbitration agreement concluded by two physically present parties (Ma'mūn, 2006: 246).

Therefore, the utilisation of ICT to conclude E-Arb agreements is of the most important features of the E-Arb agreement, as all of the parties involved in the arbitration use modern ICT to communicate. (Muhammad, 2004) This involves the verification of the e-documents, which takes place through agreed upon software by the disputants and appointed arbitrators. Further still it's also the case for the arbitration costs and expenses, which are transferred electronically as credit or a direct payment. (Cooley and Lubet, 2003: section P-11)

The final feature that distinguishes the E-Arb from conventional agreements is its International characteristic. The agreement is usually concluded by parties of varying nationalities in different countries via a universal mode of communication (i.e. the Internet). Thus the arbitration agreement concluded via an electronic method is of an International

¹See AAA website: <https://www.adr.org/>

scope and nature as opposed to it being nationalistic and domestic as is the case with agreements made prior to conventional arbitration (Friedman, 2001).

However, there may arise problems with the validity of an arbitration agreement concluded electronically. The concerns are with the formalities that can be enforced by national and International legislations on the validity of an arbitration agreement or clause.

8.7 Requirements for E-Arb Agreements

Online arbitral proceedings take into consideration rules that have been stipulated by the ICC, CIArb, the CIETAC and other legal institutions. However, the requirement that an arbitration agreement be in ‘writing’ has posed considerable issues with the use of digital communications. Thus a debate as ensued as to the validity and acceptability of e-writing and the e-signature.

8.7.1 E-Writing

Legislation in many countries requires the physically written document so that the arbitration agreement is recognised by the legal stature. In some legal systems governed by procedural law a contract does not have to be proven by witnesses and must be proven in writing and the written form is required *ad probationem* (for the purposes of evidence). Legal systems where the contract must be entered into ‘in writing’ and the written form is required *ad substantiam* (in order that the contract comes into existence) is therefore substantive and governed by the law, which governs the merits, the *lex causae*.

Arbitration law is thus the principle of the agreement being in ‘writing’, for evidentiary purposes or as a formality, which is noted in Article 12 of the Egyptian Arbitration Act:

The arbitral agreement must, be concluded in writing; otherwise it shall be null and void. It shall be in writing if included in a document signed by both parties or in letters, cables or other means of written communication exchanged between them.

The New York Convention of 1958 stipulates:

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any difference, 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 arbitration, signed by the parties or contained in an exchange of letters or telegrams.

While Article 7 (2-6) UNCITRAL Model Law stipulates:

- (2) The arbitration agreement shall be in writing.
- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the references such as to make that clause part of the contract.

The 2006 amendment of the UNCITRAL Model Law were made to reflect the contemporary development of ‘e-writing’ as an equivalent authority to the traditional paper based written documents. This effectively sought to validate and legitimise the use of e-communication to provide authentic proof of the parties’ agreement to arbitrate.

The UNCITRAL Model Law on E-Commerce of 2006 has modernised the notions of writing and signatures and thus facilitated e-commerce. It refers to ‘data messages’, such as electronic data interchange (EDI), emails, telegrams, telexes and telecopy. These contemporary types of communication fulfil the requirement of ‘in writing’ so long as the information within them is accessible so as to be usable for subsequent reference (Article 6). As for the formation of the contract, an offer and the acceptance of an offer may be expressed by means of data messages, unless otherwise agreed by the parties (Article 11).

Thus it is argued that the NYC due to it being drafted in 1958 before the developments ICT could not foresee the advent of electronic methods of communications. (Wang 2010:157) Lynch (2003: 393) suggests however that Article 2 (2) of the NYC is sufficient to recognise any arbitration agreement concluded electronically. Lynch also notes at the time of her research that UNCITRAL were looking to reform this. Abdel Wahab (2012: 406) demonstrates that in 2006 UNCITRAL issued a guidance note for States to broadly interpret Article 2 of the NYC as its circumstances are non-exhaustive. Wang (2010: 174) also argues that the revised UNCITRAL Model Law of 2006 revised its article 7 so as to modernise the form of the requirement of an arbitration agreement. This was to conform to contract practices prevalent in e-commerce and acknowledge the validity of an arbitration agreement by electronic means.

However discussing from the context of the UAE, the legislature fails to recognise and factor the developments experienced in ICT and so provides little details on the validity of e-writing. Article 10 of the 2006 UAE ECL under ‘Admissibility and Evidential Weight of Electronic Records’:

1. In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a Data Message or Electronic Signature in evidence:
 - a. On the grounds that the message or signature is in Electronic format; or

- b. If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that the message or signature is not original or in its original form.
2. In assessing the evidential weight of Electronic Information, regard shall be given to:
 - a. The reliability of the manner in which one or more of the operations of executing, entering, generating, processing, storing, presenting or communicating was performed;
 - b. The reliability of the manner in which the integrity of the information was maintained;
 - c. The reliability of the source of information, if identifiable;
 - d. The reliability of the manner in which the Originator was identified;
 - e. Any other factor that may be relevant.
3. Absent proof to the contrary, it shall be presumed that a Secure Electronic Signature:
 - a. Is reliable;
 - b. Is the signature of the person to whom it correlates;
 - c. Was affixed by that person with the intention of signing or approving the Data Message attributed to him.
4. Absent proof to the contrary, it shall be presumed that a Secure Electronic Record:
 - a. Remained unaltered since creation; and
 - b. Is reliable.

The interpretation for the requirement to 'write' is dependent upon the legislature of individual nation States. It is therefore argued that if some States consider arbitration to be an exception to the functioning of the normal courts general jurisdiction, then they will interpret the agree upon rulings from a narrow perspective thus undermining the validity of e-

agreements. However, if nation States recognise the contemporary developments in ICT to have become a part of the arbitration process, then they are likely to recognise e-agreements (along with e-communications, e-documents and e-signatures). These are understood to be fulfilling the requirement for ‘writing’ as these electronic means can be authenticated and recorded.

For example in Egypt in 2004 there was the enactment of the E-Signatures Law No. 15, assigning e-communications, e-signatures and e-documents with the same probative value as paper-based documentation, which complimented the Egyptian Arbitration Law and its stipulation for ‘writing’ and recording documentations. (Abdel Wahab, 2012: 407)

In the UK, the English Arbitration Act (1996) defines the ‘writing’ requirement in Section 5 (6) to include what has been ‘recorded by electronic means’.

In Germany, Article 1031 (5) of the German Code of Civil Procedure clearly mentions that the ‘written’ form includes the ‘electronic’ form pursuant to Section 126 (a) of the German Civil Code (Edward and Wilson, 2007: 323).

In the USA, Article 6 (a) of the Federal Uniform Arbitration Act mentions ‘an agreement contained in a record’. The Act then notes that a ‘record’ refers to ‘information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form’.

8.7.2 E-Signature

Traditionally handwritten signatures of relevant parties demonstrated their consent and will to enter into a contract. A signature can take a variety of forms such as it being signed, a stamp or a thumb- print, which are options in places where there are high levels of illiteracy.¹

Henceforth, UAE legislature has accepted such forms of signature as a requirement for the validity of an arbitration agreement. Marqas (1952: 39) observes that a “*thumbprint is also regarded as a more precise indication of a person’s binding guarantee to a document. It is difficult to falsify which cannot be said about stamps.*”

However, in the modern world with the aid of new technologies, various ways have been developed to reinvent signatures in a digital format. Many States have accepted the electronic signature as a new technological method to identify consumers, participants and stakeholders

¹Article No.2 of the 2002 Dubai ECL discusses the definition of a signature.

in the electronic environment. The European Parliament and Council on December 13, 1999 adopted the Directive on a Community framework for electronic signatures, which establishes all of the elements required to ensure that the new approach will be recognized in law. The Directive stipulates that legal systems should not disregard or discount an electronic signature based on it being electronic. (Walden and Hörnle, 2001: 2)

A signature and electronic certificate are officially accepted to be an equal to the handwritten document after a certification service approves the identities of the relevant parties and thus confirms the integrity of the document by checking it against a standard criterion.

The onus is on nation States to develop and adopt the legislations, regulations and administrative provisions that recognise e-written documents. This would adhere to the United Nations Commission on International Trade Law (UNCITRAL) Directive of July 19, 2001 Article 6 (1) states:

Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

A signature's reliability is found in paragraph three of the same article, according to which an electronic signature will be considered reliable if it meets the following conditions: (Article 6 (3))

- The signature creation data are, within the context in which they are used, linked to the signatory and no other person;
- The signature creation data were, at the time of signing, under the control of the signatory and of no other person;
- Any alteration to the electronic signature, made after the time of signing, is detectable;
- Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates; any alteration made to that information after the time of signing is detectable.

The electronic signature provides legal certainty and in e-commerce is used so as to represent a person's valid signature. Most online contracts are deemed as legally binding largely due to

the recognition of the e-signature in Article 7(1) of the Model Law on E-Commerce and in the European Union, the Directive on Electronic Signatures. These provisions stipulate that EU Member States ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form. Due to these developments in the legislation, the vast majority of online contracts are deemed as legally binding. Consequently, this suggests the recognition of the validity of online arbitration agreements.

Rubino-Sammartano (2014: 1730) therefore holds that digital signature technology fulfils the requirement and its validity affirmed under the UNCITRAL Model Law. It can be concluded here therefore, that the usage of the electronic signature is not a serious impediment to the development of electronic arbitration.

8.8 Legal Implications of the E-Arb Agreements

The disputing parties essentially agree to arbitration by signing the agreement to resolve a dispute via an arbitration tribunal or panel. This agreement also stipulates that the disputants are consciously not seeking judicial intervention but are willing to come to a mutual agreement independently. This implies that there is recognition by the parties involved in arbitration of the possibility of a legally binding decision being awarded against them. Thus the eventual possibility of arbitration may have been included in the original contract. Barīrī, (2007: 69-70) observes that when the original contract contains the requirement to arbitrate, it may also contain clauses to invalidate, annul or terminate this arrangement under certain conditions. However, Barīrī argues that legal progress and jurisprudential developments in arbitration, particularly commercial arbitration, have altered this classical understanding. He observes that if the principle of arbitration is a separate independent clause within the original contract then it is not subject to the invalidity, annulment or termination clauses, as it was put into the original contract due to a desire for arbitration during a dispute.

Although this broad discussion on the subject can be considered a general description of the process it is mostly derived from disputes between B2B. In seeking to identify the legal implications of E-Arb upon a significant aspect of the market, the focus must be placed upon the mass consumers and their relations to the corporations that they trade with over cyberspace.

8.8.1 E-Arb Agreements in B2C Disputes

Abdel Wahab (2012: 408) argues that E-Arb within B2B disputes rarely present difficulties with regards to arbitrability yet is an issue in B2C disputes. He observes that problems arise largely due to the imbalance of power between consumers and businesses. Many arbitration laws limit or reject arbitration in B2C disputes where consumers are not presented with the opportunity to negotiate the terms of the agreement. This is a major issue for online agreements where consumers can be bound by non-negotiable agreements by the mere click of a button. Due to this there has been some discussion among commentators on the credibility of e-arbitration clauses.

Edwards and Wilson (2007: 328) note that a contentious issue around online B2C contracts was with regards to the potential of the arbitration clause to be fairly imposed on the consumer unilaterally or if it was voidable under consumer protection law. They highlight that formal rules of arbitration are laid down in advance either as part of the agreement to arbitrate, and in a B2C environment will usually be imposed as a clause which forms part of a standard term 'shrink-wrap', 'click-wrap' or possibly a 'browsewrap' contract (Rubino-Sammartano, 2014: 1737). It can also be incorporated by reference to internationally regulated sets of rules such as the UNCITRAL rules.

Edwards and Wilson (2007:328) identified a 2007 Eurobarometer survey to demonstrate that while 41% of cross-border consumers had unresolved complaints, only 6% went to an arbitration or mediation body. While an eBay survey conducted by Edwards and Theunissen (2006) of 400 UK eBay users found that two thirds of respondents had encountered problems with one or more eBay transaction, but only 8% of sellers and 3% of buyers had used the mediation and arbitration services provided by SquareTrade. Email interviews indicated that few if any had gone as far as arbitration.

SquareTrade established a direct negotiation ODR system for eBay, handling 80% of auction related disputes. (Alfuraih and Snow, 2004: 184) Wang (2014) notes that SquareTrade is eBay's preferred dispute resolution provider and the one that eBay refers to exclusively for its users. An examination of the eBay/SquareTrade relationship reveals two stages:

1. SquareTrade offers eBay users a free forum in which to resolve disputes, the 'automated negotiation platform'.

2. When the above does not reap any benefits, 'online mediation' is utilised complete with a professional mediator with a nominal sum of fees as eBay subsidises the remaining costs.

Wang (2014) notes that the use of SquareTrade for eBay helps to resolve misunderstandings, provide a neutral go-between for buyers and sellers, reduce premature feedback and generate trust among the eBay community. Alfuraih and Snow (2005: 185) also noted that while the Internet is useful for documents-only arbitration, online consumer arbitration is not very common.

A perspective identified through the review of literature argues that the 'problem is that the 1958 NYC does not give any detail or guidelines with regards to the non-arbitrability of certain disputes'. (See chapter two) Thus, such disputes are relegated to the applicable national laws, *lex loci arbiti*. However, under national laws there is no single rule about the arbitrability of consumer disputes. In England for example, arbitration by means of a contractual clause in consumer contracts is not excluded. The 1996 Arbitration Act, Sections 89-91 dealt with consumer arbitration agreements and provided for application of the 1994 Unfair Terms in Consumer Contracts Regulations (UTCCR).

The 1994 UTCCR was replaced by the Unfair Terms in Consumer Contracts Regulations (1999), inline with the EU Council Directive and Section 91 of the 1996 Arbitration Act. There was now supposed to be less ambiguity in the interpretation of unfair dispute resolution clauses. These were considered to be all those clauses with *'the objective of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take dispute exclusively to arbitration not covered by legal provisions'*¹(Devenney and Johnson, 2013: 349)

Abdel Wahab (2012: 410) therefore identifies and presents a number of measures that seek to prevent formation of unfair e-clauses:

1. The consumer should have the opportunity to examine e-clauses and they should be easily visible and accessible.
2. The consumer should be required to perform some specific act of assent to the terms.

¹As per Schedule 2, Regulation 5 (5) of the EU Council Directive on Unfair Terms in Consumer Contracts (1993).

3. The consumer should be notified that s/he is entering into a binding e-agreement that is equivalent and just as binding as paper and signature-based documents.
4. There should be adequate and clear notice, in block capitals or red colour etc., to such specific E-Arb agreement.
5. Ensure that the consumer cannot obtain the product or service without an explicit consent to these e-clauses.
6. That it would be better to seek an explicit additional and separate consent to such e-arbitration agreements.
7. It may be useful to use digital signature technologies and encryption to authenticate an addressee's consent or maintain additional information, which the Internet service provider can capture, including the IP address or the addressee and any other relevant information.

8.8.2 Procedural Implications of the Arbitration Agreement

The basic principles of any arbitration agreement stipulate that two important procedural implications be fulfilled. The first is 'Positive Implication', which is the right of each party to resort to arbitration; the second is 'Negative Implication', which is for each party bound from resorting to the State judiciary to investigate the dispute referred to arbitration.

8.8.2.1 Positive Implications of the E-Arb Agreement

This is verification of the arbitral tribunal's competence to inspect the dispute. The arbitral tribunal in being deemed competent enough to resolve the dispute maintains its primary status even if one of the disputants halts the arbitration agreement by resorting to the judiciary. The arbitral tribunal is the legally recognised body chosen to resolve the dispute. The arbitral body has this competency by the mere agreement of the parties to resolve the dispute by resorting to it. This is confirmed by the 1965 Washington Convention Article No.41 (1), "*the tribunal shall be the judge of its own competence*".

Thus national courts are prevented from inspecting disputes already in agreement to arbitration.

8.8.2.2 Negative Implications of the E-Arb Agreement

If an arbitration agreement is deemed as valid then it has a negative implication for the parties to the agreement. They are not allowed to resort to the state judiciary, and that if they do it is to be rejected based on the presence of the requirement to refer to arbitration. This necessitates two points:

1. The impermissibility to raise a claim or dispute, which is in the scope of arbitration before the judiciary.
2. The courts adhering to not accept inspecting the dispute (of the parties to the arbitration agreement).

Hence arbitration as an alternative form of adjudication, does not allow parties agreeing to resort to arbitration then raise a claim before the judiciary. Arbitration can be considered a parallel service to the judiciary and to maintain its credibility and purpose the disputants are bound to the decisions of the arbitral tribunal or panel.

8.8.2.3 Implications of the E-Arb Agreement

The positive and negative implications are implied by the mere confirmation of the agreement to arbitration. So this understanding arises even before the process of selecting and confirming arbitrators. Furthermore as the arbitration agreement is not related to public policy it's not allowed for the national courts to utilise any of these two implications from its own accord (Fathī Wālī, 2007: 177).

Article 6 (3) of the 1961 European Convention on International Commercial Arbitration on states:

Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.

In the UAE, a jurisdictional objection can be made before the local courts on the grounds that there exists an arbitration agreement between the parties. Yet this objection has to be highlighted at the first hearing, if not then the court assumes jurisdiction. In the UAE, courts will often drop jurisdiction if a valid arbitration clause is present and if the objection is made during the first hearing. However (Tannous and Bono, 2015) note that in the UAE referring disputes to arbitration is an exception to the courts' general jurisdiction and that the courts in the UAE tend to construe arbitration agreements narrowly.

8.8.3 Substantive Implications of the E-Arb Agreement

The arbitration agreement has binding authority, whereby the parties are bound to adhere to the meaning the agreement and refer the dispute, which has resulted from either a conventional or an electronic commercial contract to arbitration. All international conventions on arbitration have acknowledged this by binding the signatories of the parties to resolve the dispute via arbitration (Tannous and Bono, 2015).

Article 1 of the 1923 Geneva Protocol on Arbitration Clauses acknowledges this principle of the requirement to arbitrate. It states:

Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in arbitration is to take place in a country to whose jurisdiction none of the parties is subject. Each Contracting State reserves the right to limit the obligation mentioned above to contracts, which are considered as commercial under its national law. Any Contracting State, which avails itself of this right, will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

Likewise, Article No.2 (1) of the 1958 NYC posits:

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.*¹

Paragraph 1 of article 203 of the UAE CPC No. 11 of 1992 as amended:

It shall be permissible for contracting parties generally to stipulate in the original contract or in a subsequent agreement to refer any dispute between them concerning the implementation of a specified contract to one or more arbitrators and it shall likewise be permissible to agree by special conditions to arbitration in a particular dispute.

It must also be taken into consideration that the competency of the arbitral tribunal to resolve the dispute must be established (Positive Implication) before the arbitration process begins. This establishes the credibility in the arbitrators as they deemed competent and this prevents the inclusion of any judicial monitoring and oversight.

8.9 Summary of Sections on the E-Arb Agreement

These sections presented a discussion upon the notion of the E-Arb Agreement by firstly analysing its features as an e-contract that was being exercised by dispersed parties from all across the world. It was demonstrated that these features entail the utilisation of ICT to enable the E-Arb process; the verification of the e-documents; arbitration costs and expenses, which are transferred electronically as credit or a direct payment and arbitration agreement concluded via an electronic method. It was argued that this implied to an extent that the focus of E-Arb was International as opposed to it being nationalistic and domestic.

The argument then examined the requirements for E-Arb Agreements and identified E-Writing and E-Signature to be adequate substitutes or replacements for hand written paper documents and traditional forms of signature.

In establishing this foundational level of understanding of E-Arb, the legislative implications

¹See: <http://interarb.com/vl/p967889643>

Accessed Online February 2015

of it were then examined. In the first instance it was noted that many of the arbitration laws limit or reject arbitration in B2C disputes, as consumers are not presented with the opportunity to negotiate the terms of the agreement. This however runs contrary to the positive and negative procedural implications of the arbitration agreement as both disputing parties should be equally informed about the process without any unfair or undue advantages to a specific party. It was then argued that the positive and negative implications were accepted just by agreeing to arbitration. This meant that the substantive implication of the E-Arb agreement was its binding authority, whereby the parties were bound to adhere to the decision and presented award.

In concluding these sections, it is observed that the infrastructure to facilitate the adoption and functioning of E-Arb like the regulatory instruments and International and domestic legislations already exist. These institutional rules and national arbitration acts, codes, and laws actively support the use of E-Arb to the extent that there are now dedicated organisations such as AAA, CIArb, the ICC, CIETAC and WIPO that are focused completely upon providing arbitrations services.

The UAE in keeping up modern developments has also amended its legislature to reflect the change of pace in International legislation with specific reference to E-Arbitration. Jewels and Albon (2013: 37) thus argue that the UAE has not only been successful in providing Internet access to the people in the country but also has initiated e-services which are on par with advanced nations such as the UK, US and Australia.

The next sections introduce the discussions upon the electronic arbitration procedures.

8.10 Electronic Arbitration Procedures

It can be said that the procedures for E-Arb are similar to those of conventional arbitration in that they both comprise a number of stages such as:

- Presenting the request to arbitrate.
- Formation of an arbitration body/tribunal/panel.
- Sessions.
- Exchange of documentation and evidence.
- Issuance of the decision.

However, the conventional arbitral procedures differ from E-Arb in that the actual arbitral proceedings formulates a significant part of the procedure and the method by which an arbitration is conducted by an arbitral tribunal or administered by an institution. In addition arbitration proceedings can utilise the latest ICT with agreement from the disputing parties. The arbitrators can collate electronic evidence and substitute oral testimonies with written evidence so as to keep the proceedings brief (Yu and Nasir, 2003: 465).

The E-Arb proceeding is demonstrated through the following diagram: (Figure 8.10)

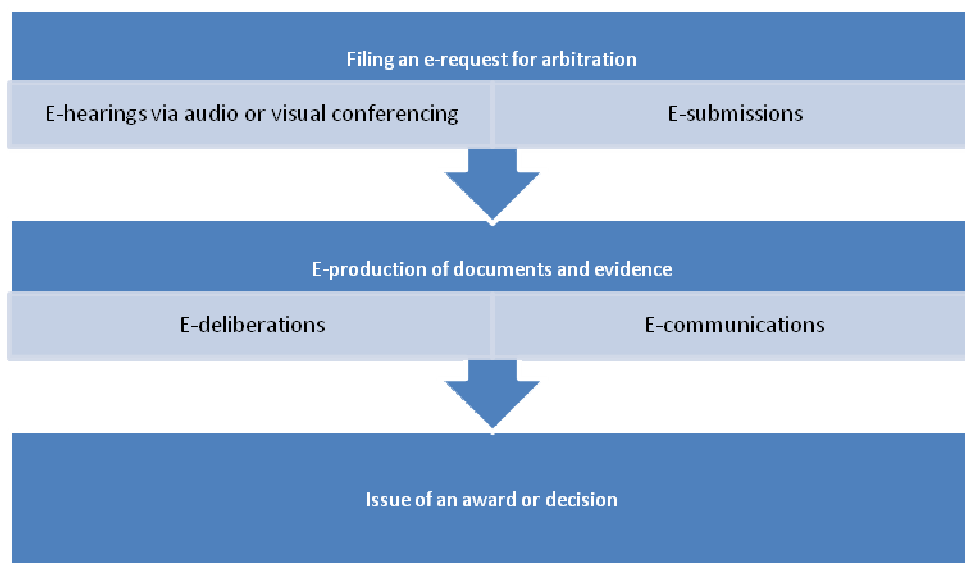


Figure 8.10: E-Arb Processes

Schmitz (2010: 185) argues that arbitral proceedings that are conducted online are more cost-effective than conventional offline arbitral proceedings, which involve F2F hearings. Figure 10.0 demonstrates the simple process of E-Arb as all the stages are conducted online, with no requirement for travel or F2F meetings.

There are however issues with E-Arb that include and are not limited to the certainty of the time and place of an arbitral hearing; the technological capability for all parties to submit all of the required documentation; the user experience with electronic communication and the legislative authority of the arbitrators and the enforceability of the electronic awards.

8.11 Forming the E-Arb Tribunal

Tribunals are formed by the consent of the parties; this distinguishes it from the judicial process.

8.11.1 Forming the Tribunal in Conventional Arbitration

These tribunals are formed by the agreement of the disputing parties, whom are free to select the tribunal, or indirectly via a third party be it an individual, body or institution. There is an explicit agreement in the arbitrational agreement that in the case of non-agreement upon an arbitrator, the parties will allow a third party to arbitrate.

The 1987 Arab Amman Convention, Article No. 18 grants its arbitration centre the authority to select the arbitrators when parties do not agree on the selection. Article 204 (1) of the UAE CPC states that if the parties have failed to agree on the number of, or identity of, the arbitrators, either party can move for the appointment of arbitrators by the UAE courts. The court's decision will be final and not subject to appeal (Article 204(2), CPC). In institutional arbitrations, the UAE rules will often prescribe a default procedure when the process of appointment fails. The parties are free to determine the number of arbitrators, and the procedure for appointing arbitrators. However, the UAE CPC prescribes that the arbitral tribunal must consist of an uneven number of arbitrators if there is more than one arbitrator (Article 206(2) UAE CPC).

8.11.2 Forming the Tribunal in E-Arb

The process for forming tribunals in E-Arb does not differ from the process noted above in conventional arbitration. Zamzam (2009: 120) notes that AAA, Cyber Tribunal, Virtual Magistrate and WIPO describe their approach to be similar to the way conventional arbitration is conducted. Arbitral tribunals even maintain lists of arbitrators and their resumes to facilitate the parties in selecting suitable arbitrators for disputes.

8.11.3 Requirements for an Arbitrator

When the disputants agree to arbitration and establish their choice of arbitrator, it is not permitted for any of them to resort to a competent court to appoint another arbitrator other than whom they have all concurred upon. This is unless the arbitrator has not conducted his role adequately, has withdrawn or has been deemed unfit and thus to be rejected. Then so long as the disputants agree on this, the burden of proving one of these cases rests on the shoulders of the one who makes such claims and wants the selection of a new arbitrator.¹

However, if the disputants cannot select an arbitrator then a competent court can inspect the dispute and appoint them based on a request from one of the disputants even if the arbitration case is in a foreign country.²

The requirements, which have to be maintained when appointing an arbitrator, are impartiality, independence, neutrality and academic sufficiency. If an arbitrator is devoid of impartiality and neutrality they will not be considered appropriate to adjudicate a dispute and therefore be rejected to preside over the case. Those who are responsible for deeming such an arbitrator as inappropriate have to give serious reasons for the invalidity of his verdict or for the request to reject him as outlined by law.³ According to the UAE CPC, when selecting arbitrators, the parties must also ensure the impartiality and independence of the appointees, failing which grounds for challenge to the appointment of the arbitrator may arise pursuant to Article 207(4) of the UAE CPC. Also in UAE law, a party can challenge the appointment of an arbitrator on the same grounds as a public judge (Article 207(4), CPC). These grounds are emphasised in Article Nos. 114 and 115 of the UAE CPC and include:

- A particular disqualifying relationship between the arbitrator and one of the parties, including marital, intimate, professional or trustee relationships.
- Conflicting interests in other proceedings.

¹ Dubai Court of Cassation, Petition no.167, 1994, *Majallat ut-Tashrī' wa'l-Qadā'* [Journal of Legislation and Judgement], no.5, p.849

² Dubai Court of Cassation, Petition no.175, 1993, *Majallat ut-Tashrī' wa'l-Qadā'* [Journal of Legislation and Judgement], no.4, p.899

³ Dubai Court of Cassation, Petition no.10, 1995, *Majallat ut-Tashrī' wa'l-Qadā'* [Journal of Legislation and Judgement], no.6; Dubai Court of Cassation, Petition no.173, 1996, *Majallat ut-Tashrī' wa'l-Qadā'* [Journal of Legislation and Judgement], no.8, p.181

- Bias.
- A deliberate failure to comply with the arbitration agreement.

According to the DIFC-LCIA rules arbitrators must be, and remain, independent and not advise, or advocate for, any of the parties (Article 5.2). Arbitrators are under a continuing obligation to disclose any circumstances likely to give rise to justified doubts regarding their impartiality or independence (Article 5.3).

For example the Swiss Federal Court in Geneva ruled in the case of the Arab Organisation for Industrialisation that the arbitrators should be removed and the courts placed to arbitrate instead and that no agreement contrary to that decision can be made. The Dubai Court of Cassation ruled that there is no error upon the arbitrators if they used their experience and expertise in public affairs within the market as they are considered judges. However, what is not prohibited to them is not extended to the judges, such as the use of personal knowledge, so long as this knowledge is related to the general issues related to the market.¹

8.11.4 Choice of Arbitrator in E-Arb

The arbitrators are required to possess two characteristics above all else, in that they are independent and impartial. In any arbitration process, firm adherence to procedural principles is essential and a key procedural principle of arbitration is the selection of independent and impartial arbitrators.

Moses (2008: 132-133) observes that traditionally arbitrators were neither government representatives nor State judges, rather they were privately funded and unconnected to the parties. Born (2010: 2) notes that decision makers in arbitration are largely selected by the parties or on their behalf.

Donahey (1992: 31) defines ‘independence’ to be the distance in relationship between the arbitrators and any of the disputing parties in terms of personal, social or financial connections. Any revelations of a close proximity of the arbitrators to a disputing party will then compromise the ‘independence’ of the arbitrators and thus their neutral impartial authority. Poudret and Besson (2007: 348) suggest that although ‘impartiality’ is a subjective notion, it denotes clearly the absence of bias from an arbitrator and that s/he has no prior

¹Dubai Court of Cassation, Petition no.537, 1999, session 23 April 2000, *Majallat ul-Qadā’ wa’t-Tashrī’*, no.10

connection to, or interest in, the matter to be decided. Redfern and Hunter (2004),¹ identify impartiality and independence to be the crucial factors in arbitration. They argue that given its adjudicatory nature it is unethical for arbitrators to serve as mere representatives of a party. If impartiality and independence cannot be maintained then it seriously calls into question the arbitral process and its authority. Redfern and Hunter (2004: 199-200) emphasise that independence and impartiality is a fundamental principle as the arbitrators are not to be seen as advocates for a party, and this aspect should not be compromised unless agreed to by both parties and the arbitrators.

8.12 E-Arb Procedural Characteristics

It is argued that E-Arb procedures are considered to be more efficient than conventional arbitration. The disputants are not required to travel or add to their costs through physical endeavours such as mailing items and documents as well as the hefty costs of the arbitration itself. There is no specific national legislature, which obligates the parties and regulates these arbitral processes. The parties are free to choose the law to regulate these stages. This is now beginning to be perceived as the evolution of the substantive law for E-Arb, the *Lex Electronica*.

8.12.1 Mutual Consent

Mutual consent is a core principle of conventional arbitration and its legitimisation of the arbitration process is vital (Brynes and Pollman, 2003). In order for arbitration agreements to create legal obligations then it must pay heed to the factors of due consideration, valid offer and acceptance, and intention. It has been firmly established by the review of literature that the disputing parties are not to be coerced into arbitration and they have to freely agree to any form of dispute settlement. (Domke, 1973) However, it is the case that entering into an online

¹Independence has been argued as being a more objective term which delineates an arbitrator's lack of 'dependence', be it financial or otherwise, on any of the parties to the arbitration. While impartiality is seen as subjective as it refers to an abstract state of mind which only the arbitrator her/his self would be able to adequately assess. As a result of this slight differentiation, ICC rules refer to arbitrators in the sense of 'independence'. An arbitrator could therefore be lacking in independence yet still be impartial, and vice versa.

(or non-traditional) arbitration agreement may not be always consensual. It is often the case that consumers or users have not actually given consent to the arbitration clause and thus they have been indirectly coerced into an arbitration agreement. Mayer and Seitz (2000) thus argue that a 'freely consenting party' is a legal fiction in such cases.

This coercion to arbitrate indicates non-consent to arbitrate online or offline. Forced pre-dispute arbitration clauses in B2C agreements are indicative of inequality and big businesses flexing their commercial powers over consumers. Herein, the consumer (who is the weaker party) has to choose between entering into an arbitration agreement or waive the contract. (Kaufmann-Kohler and Schultz, 2004: 169) This imbalance of power forces the weaker party into an arbitration agreement.

The issue of the pre-arbitration clauses has been discussed widely in the literature (Hörnle, 2003: 25; Wang, 2010: 162; Schmitz, 2010: 182; Aslam, 2013; Cortes, 2011; Edwards and Wilson, 2007). Wang (2010: 162) highlights that countries can restrict the enforceability of a pre-dispute arbitration clause against a consumer and gives example of section 91(1) of the English Arbitration Act, which states that an arbitration agreement with a consumer is considered to be unfair and thereby unenforceable if the claim is below £5000. In this case such an agreement is non-binding.

Kaufmann-Kohler and Schultz (2004: 169) contend that where there is lack of choice to enter into an arbitration agreement, it is better to accept that consent to arbitrate does not exist, but that other requirements, such as fairness may reasonably have replaced consent and this is what should be emphasised. To summarise then, whenever the weaker party may not truly have consented to arbitrate, this indicates an uneven playing field between parties. However, the non-existence of consent does not necessarily invalidate the e-arbitration agreement when other requirements such as cost-effective arbitral procedures and fairness have replaced consent.

8.12.2 Due Process

Edwards and Wilson (2007: 327) argue that the relative formality of arbitration has advantages for consumers in terms of preservation of rights of due process. Schultz (2006: 108) states that due process in arbitration involves the right to be heard, the right to adversary proceedings and the right to be treated equally. In e-arbitration however, complete adherence to all requirements of due process could possibly have negative repercussions on the speed

and cost-effectiveness of the e-arbitration process. Some “short cuts” might be taken to keep the process from stalling and costs from rising. (Ware, 2002: 179)

Kaufmann-Kohler and Schultz (2004) argue that due process is a flexible principle and the degree to which due process is required may vary depending upon the case or the category of cases. Therefore the arbitration tribunal or institution can adapt the extent of compliance in a way, which is proportionate with the nature of disputes. (Kaufmann-Kohler and Schultz, 2004)

8.12.3 Binding Decision

In conventional arbitration the idea of the ‘binding decision’, is a core factor in ascertaining if the proceedings are congruent with arbitration. The parties’ agreement to arbitration gives arbitrators a judicial role to adjudicate between them and issue an award that is as effective as a court’s decision (Poudret and Besson, 2007: 348). This binding decision distinguishes arbitration from other dispute resolution procedures. However, the decision is generally binding on both parties and it is possible for arbitral rules to sanction or veto any later admission to the courts. (Redfern and Hunter, 2004)

In contravention to the above argument Abdel Wahab (2012: 428) and Kaufmann-Kohler and Schultz (2004), argue that E-Arb decisions may not be always binding. The arbitral award may be non-binding for either of the parties, or it may be unilaterally binding. If an e-arbitration award is non-binding on either of the parties, the process cannot be recognized as ‘true’ arbitration as the decision is not the same as a court judgement, and the arbitrator does not have a judicial position. If the binding nature of arbitration depends on one of the parties’ intention, the process can be regarded as true arbitration if the party admits that the award is binding after the award has been issued. In other judicial systems, conditionally binding arbitration can be deemed as true arbitration so long as the arbitration fulfils applicable procedural standards (Kaufmann-Kohler, 2005: 443).

8.12.4 Confidentiality

There are no provisions under UAE law regarding the confidentiality of arbitral proceedings. However, the Dubai Court of Cassation (Case 157/2009) affirms as a general principle that

arbitral proceedings are private unless otherwise agreed by the parties. Both the DIAC Rules (Article 41) and the new ADCCCA Rules (Article 33) expressly provide for the confidentiality of the arbitral award and the documents and evidence generated during the proceedings, unless agreed otherwise.

With regards to the open publication of the e-award, it has been argued that e-awards should be published to allow for the development of arbitral case law and that transparency boosts trust in electronic arbitration. However, the personal details of the parties must be protected when awards are publicised and it's thus the role of arbitration institutions and arbitrators to ensure the security and protection of people's data.

8.13 Arbitrability

Arbitrability is when a national court may refuse recognition and enforcement, if the subject matter cannot be settled by arbitration on its own territory. Some national legislation has broadened the interpretations of arbitrability and there are some instances wherein an enforcement of an award has been refused due to it lacking arbitrability.

Article 203(1) of the UAE CPC states that any dispute which arises over the implementation (or performance) of a contract may be arbitrated. However, Article 203(4) provides that matters in respect of which “conciliation is not permissible” cannot be arbitrated. Tannous and Bono (2015) therefore highlight that under current UAE law, the following matters are non-arbitrable:

- Matters listed in Article 733 of the UAE Civil Transactions Code, including for instance the cancellation of a debt by another debt;
- Commercial agency and distributorship disputes which are subject to the exclusive jurisdiction of the UAE courts pursuant to the Commercial Agencies Law (Federal Law No. 18 of 1981, as amended). However, the recent decision of the Dubai Court of Cassation in *Al Reyami Group LLC v BTIBefestigungstechnik GmbH & Co KG* (Case No. 434/2014), has called into question the scope of this prohibition;
- Criminal matters, including issues of forgery; and

- Labour disputes.

In a number of recent decisions, the UAE courts have considered the question of the arbitrability of certain real estate disputes. In 2012, the Dubai Court of Cassation held that disputes relating to issues of registration of properties in the real estate register in Dubai in the context of off-plan sales of units were non-arbitrable on public policy grounds (Case No. 180/2011 and Case No. 14/2012).

Blanke (2012) et al. cites the case of *Baiti Real Estate Development v Dynasty Zarooni Inc.* to signify the close relationship between policy and legislative decisions. In this case the Dubai Court of Cassation, in light of what it deemed to be ‘public policy’, set aside an order for enforcement of a domestic arbitration award initially made by the Dubai Court of the First Instance and subsequently affirmed by the Dubai Court of Appeal.

Tannous and Bono (2015) note that some practitioners have sought to argue that this should be interpreted broadly to include all manner of real estate disputes. However, subsequent decisions of the courts in both Dubai and Abu Dhabi have narrowed the scope of the exception and clarified that real estate disputes not relating to registration are capable of being resolved by arbitration.

8.14 The Seat of E-Arb

The ‘seat of arbitration’ refers to the place where the arbitration is taking place. In some cases, a common procedure is for the parties to make up a fictional location for their arbitral proceedings which in reality neither they nor the arbitrator/s will ever have to travel to in order resolve their dispute. This can simplify the legal monitoring of the proceedings and it allows for parties to insert a clause in their agreement, which establishes this fictional location.

The seat of the arbitration is vital as it governs the nationality of the award and this is relevant when an arbitral tribunal pursues support from a local court. It also determines the jurisdiction of local courts for setting aside the award. After the disputing parties have selected the seat of arbitration, they have to deliberate on the geographical location and, if the legislation of the state they have selected has a modern awareness of international arbitration and if it is a member-state to the NYC.

With E-Arb the boundary concerns are shifted as the utilisation and eventual operation over

the global electronic medium of the Internet implies that the seat of arbitration could be anywhere and is thus hard to determine. Both domestic and international law recognise the substantial link between the arbitral award and the jurisdiction in which it was issued yet with electronic transactions it is almost as if it has rendered the notion of the *lex fori* obsolete. (Rubino-Sammartano, 2014: 1737; Lynch, 2003: 393)

As noted earlier in the study many national legislation around the world hold that the *lex arbitri* law is the only law, which has total control over the arbitration procedure. This is to prevent any abuse of powers of the arbitrators and safeguards due process. This however conflicts with the main aim of E-Arb, wherein the seat of arbitration is not known for sure. Here one can adopt the conventional territorial notion that the parties are free to choose the seat of arbitration (Wang, 2010: 157). Or that they merely unwillingly choose the seat of the E-Arb institution and in some cases the arbitrators will do just that in the absence of the parties' choice. Article 20(1) of the Model Law on Arbitration takes this into account, stating that when the parties do not agree on a location, "*the place of arbitration shall be determined by the arbitral tribunal*".

However it is also argued that arbitration conducted via electronic means should be deemed as a national or floating without an attachment to the *lex arbitri* (Lynch, 2003: 395). This argument is supported by the delocalisation theory, wherein it is suggested that the arbitration should be detached from the control imposed by law of the place of arbitration (Yu and Nasir, 2003: 463). Furthermore it perceives national law to be ill suited to the fast development and practice of international commercial arbitration. As a result, that jurisdiction falls to the country where the enforcement of an award is sought. At this point, the arbitrator is not only allowed to disregard the substantive law of *lex arbitri*, but can apply the procedural law considered suitable.

Delocalisation theory however conflicts with the current framework of the New York Convention, which stipulates in Article 5 (1) (e) that the 'court of the country where the enforcement of an award is sought has the right to reject enforcement if the award has not become binding under the law of the country in which the award was made'. Yet the NYC does give parties autonomy and freedom to use electronic means and videoconferencing to conduct arbitral proceedings, which can be held anywhere.

The subsequent award is considered made at the seat of arbitration determined by the parties or at the place where the written award was signed. This understanding deems the

‘place of arbitration’ as a legal fiction, which can be determined by the parties themselves. Some have argued that E-Arb has rendered the notion of the locale of arbitration as a ‘legal fiction’ (Rubino-Sammartano, 2014: 1731).

Hill (1997: 104) therefore rebuts the notion that electronic arbitration conducted in Cyberspace presents any legal problems. Moreover, Lynch (2003) argues that the latest communications and technological developments, which are utilised within electronic arbitration, may assist in broadening the acceptance of delocalisation theory.

In utilising E-Arb, the parties and arbitrators can interact from a variety of locations, arbitrators can resolve the dispute without the need for hearings unless expressly stipulated and the arbitrators are not required to physically meet and decide at the seat of arbitration. As soon as the parties have determined the seat of arbitration, the related hearings and proceedings can be conducted electronically and the arbitrators just have to mention the seat of arbitration within the award (as agreed by the parties) and then they sign the award. There is no requirement for any link between the seat of arbitration and the award decision.

In the case where the seat of arbitration has not been clearly mentioned by the disputing parties, the arbitral tribunal or arbitration institution can determine the seat. Article 20 of the UNCITRAL Model Law stipulates that if the parties have not decided the place of arbitration, the arbitral tribunal based on the circumstances can determine it. Within the UAE only the DIFC stipulates that the parties can freely choose the seat, but the DIFC has to be clearly selected as the seat of arbitration. DIFC highlight that DIFC Courts:

“...Are bound by the New York Convention and that awards made within the jurisdiction of the DIFC are to be enforced by Dubai courts without further review of the tribunal’s decision.”¹

Importantly, in *Amarjeet Singh Dhir v Waterfront Property Investment Limited and Linarus FZE*, The DIFC emphasised that parties must ‘expressly select the DIFC as the seat of arbitration’. This was because the DIFC has refused to apply DIFC rules to a case where the parties chose DIFC-LCIA rules but Dubai as the place of arbitration and “the laws of the Emirate of Dubai” as the applicable law. DIFC highlight that DIFC Courts:

¹See DIFC-LCIA website (no.5)

“...Are bound by the New York Convention and that awards made within the jurisdiction of the DIFC are to be enforced by Dubai courts without further review of the tribunal’s decision.”

8.15 E-Production of Documents for E-Arb

Alfuraih and Snow (2005: 185) argue that the Internet is a very suitable medium for documents-only arbitration. Schultz (2006: 17) concurs by noting that developments in ICT have generated a new way of producing documents, which facilitates arbitration (Schultz, 2006: 17). The e-production of relevant documents and evidence is a comparatively negligible impediment to digitising arbitration proceedings for the electronic environment. As long as the parties agree, to serve documents via electronic means, Article 19 of the UNCITRAL Model Law grants broad discretion to the arbitral tribunal regarding the documents required for a particular case.

Hill (2008: 90) and Jagusch (2008: 39) note that some analysts have perceived the electronic production of documents as a *‘burdensome intrusion’* of ligation style proportions. However, as there is growing acceptance of document production regardless of format this has been reflected within the IBA Rules on the ‘Taking of Evidence in International Commercial Arbitration’.¹ As a result, electronic production of documents may in future be increasingly incorporated into international arbitration proceedings.

Article 3 of the IBA Rules stipulate that a party submits a Request to Produce containing a description of specific documents or of a narrow and specific category of documents that are believed to exist, and describes how such documents are *“relevant and material to the case”*. All requested documents are then disclosed by the other party (Carter and Fellas, 2010: 570). The issue which arises from Article 3 here is what exactly is to be included within the scope of *“narrow and specific category of documents”*?

Hill (2008: 90) suggests arbitral tribunals should undertake a liberal approach where electronic documents are accepted rather than the historical and out-dated reliance on the copy and production of pieces of paper. This is important as over the last twenty years businesses and enterprises have new approaches to the transmission and storage of data,

¹See: www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49...

information and communication. As the amount of data has increased due to the use of electronic communications, documents are stored in different forms and versions and disseminated via a range of platforms, servers and networks to I-phones, Blackberries, tablets, hard drives and laptops. E-document management services also assist businesses in the retrieval and identification of documents in a fast and efficient manner, which is far from being burdensome.

This is reflected by the development of the Sedona Principles in recognition of the increasing requirements for online storage capacity for electronic documents. These are the 'Best Practices' and 'Recommendations and Principles for Addressing Electronic Document Production'. The Creswell Committee Report followed the Sedona Principles, which lead to the Practice Direction to Part 31 of the English Civil Procedural Rules and the amendment of the US Federal Rules of Civil Procedure, all of which are consistent with IBA Rules. These rules contain a regard and understanding that parties cannot manually reproduce all documents and that some documents are in electronic format. It represents a modern common sense approach to arbitration.

8.15.1 E-Submissions

A main aspect of arbitration is the interchange of related documents between the disputing parties and the arbitrator of the dispute. With modern ICT developments however it can be exchanged instantly. (Jagusch, 2008: 39) Submissions can be archived by automated document management systems and can be checked at any time and from any location. It is also the case that arbitral awards can be awarded on account of the strength of the evidence and there does not have to be oral hearings so long as the parties have agreed to this and it is suitable to their case. Digitisation of evidence is only a concern in cases where the authenticity of the documents is challenged. (Schultz, 2006: 16)

8.15.2 E-Hearings

In international arbitration today, video conferencing is utilised often even when hearing to testimonial evidence and oral arguments (Schultz, 2006: 16; Meier and Stormer, 2009: 93). It is used regularly due to the readily available Internet based services at low costs. However an

issue with e-hearings is its lack of F2F and oral hearings, which occur in conventional offline arbitration and can aid the arbitral process.

8.16 Applicable Law for E-Arb Procedures

When the ‘seat’ of arbitration cannot be determined in E-Arb, it becomes difficult to know which countries procedural law is applicable. The UAE CPC stipulates for example in Article 24 (translation by Whelan and Hall, 1987):

“The law of the State of the United Arab Emirates shall apply in the case of persons of unknown nationality, or persons who are shown to have more than one nationality at the same time. Provided that in the case of persons shown to have at the same time the nationality of the United Arab Emirates and of another State, United Arab Emirates law must be applied.”

The forceful application of the UAE legislative article could be considered in violation of the NYC as the parties are being forced to accept UAE law (Wang, 2010: 158). However, this also contravenes the right of the UAE to exercise its own interpretation of its public policy requirements with regards to the legislations. Therefore there needs to be flexible interpretations of the Convention, and even though the NYC appears to be somewhat dated in the modern context, it is still the foremost agreement on matter.

Therefore if certain national legislature requires F2F hearings, this requirement has to be observed on order to have an enforceable award, as stipulated in Article 5 (1) (d) of the NYC. Hence, it is clear that electronic arbitration cannot fully discount the requirements of conventional laws. This means that if the arbitration procedures do not concur with the agreement of the parties, or are not in accordance with the national legislations of where the ‘seat’ of arbitration took place, it is possible for the enforcement to be rejected.

In terms of the applicable substantive law, there is a discourse in the literature about the need for creating an independent set of substantive rules applicable to electronic arbitration.

Whereas others propose that conventional rules should merely be applied in other types of dispute resolution. (Patrikios, 2006)

The literature reveals two perspectives on this, with the first being that conventional rules should be applied as e-traders still deal with tangible goods and services, so any disputes, which could arise do not actually differ greatly from real offline transactions. These

commentators argue that creating a new body of substantive rules applicable to e-commerce is not needed.

The second perspective posits the full creation of new independent rules in line with the nature and nuances of e-commerce. This argument holds that rigid and dated national rules, which have been determined in accordance to the old conventional private International laws, are no longer suitable for the delocalised arena of contemporary e-commerce in the 21st century. According to this argument, national rules are considered obstacle to further progress in global trade and commerce. (Ohmae, 1995)

As a result of this, a new system of rules to regulate International business and its specific nuances has been suggested. Commentators, such as Hadfield (2000) and Patrikios (2006) are thus of the view that there have to be new and modern substantive rules, which are applicable to e-commerce transactions and disputes taking place in Cyberspace. Moreover, the Internet has been regarded as a fast-growing arena of business for which transnational legal structures have developed into a set of rules, known as the *Lex Informatica* (Reidenburg, 1997) or the *Lex Electronica* (Benytkhlef and Gelinas, 2001: 8; Berger, 2011: 44; Railas, 2004).

According to Hassan and Ren (2006: 284) *Lex Electronica* may include the certain categories of norms within its rules such as:

- General principles of law
- Arbitration case law
- Model contracts
- International treaties and conventions
- Trade usage

However, Teubner (2004: 21) argues that the *Lex Electronica* brings with it the problem of structural corruption wherein there is a huge influence of private interests in the law-making process. Advocates of the *Lex Informatica/Lex Electronica* admit that the concept is still in its infancy yet could be fully codified and developed in the not too distance future. Its proponents claim that although *Lex Informatica* requires ecommerce to be uniformed and predictable it has the flexibility to adapt to change and reflect the contemporary business practices.

8.17 Summary

It was discovered in this section that the processes required forming tribunals in both conventional and electronic arbitration processes whereby the consent of the disputing parties. It was then argued that they both required arbitrators, which were mutually selected or if an agreement could not be reached between the disputants then a national court, where the seat of arbitration took place would appoint an arbitrator on behalf of the parties.

The section then discussed the characteristic of the E-Arb procedure and discovered that, as there was no specific national legislature, governing the parties and regulating the arbitral processes, the parties were free to choose the law to regulate these stages. It was argued that this is an evolution of the substantive law for E-Arb, *Lex Electronica*. This was characterised by: 'Mutual Consent', whereby the parties are equally able to decide the workings of the process. However the review of literature revealed that this is not always the case as individual users or small businesses are indirectly coerced into an arbitration agreement; 'Due Process', although it ensures an extremely thorough and calculated approach, it is not always efficient or feasible with consideration to time and resources. However, it has been proven that this concept is flexible and adaptable to change; 'Binding Decisions', ensure that the disputants as agreed prior to the agreement accept the awards and decisions. Although it is argued that E-Arb awards can be non-binding as a judicial judge does not enforce them. 'Confidentiality', unfortunately there are no provisions under UAE law regarding the confidentiality of arbitral procedures. Although there are established standards, protocols and practices to ensure confidentiality it cannot be guaranteed due to human nature and the unpredictability of the ICT.

The section then introduced the notion of 'arbitrability, the refusal of recognition and enforcement by a national court of an issue that could not be settled by arbitration on its own territory. It was demonstrated that some national legislation's had broadened the interpretations of arbitrability and there were some instances wherein an enforcement of an award has been refused due to it lacking arbitrability. This question of territory then leads to the question of the actual 'seat of arbitration', and what legislation was applicable. It was uncovered that in some cases, a common procedure was for the parties to construct a fictional location for their arbitral proceedings, which in reality neither they nor the arbitrator/s would ever visit in order resolve their dispute. There was also no requirement for any link between the seat of arbitration and the award decision. In the case where the seat of arbitration had not been clearly mentioned by the disputing parties, the arbitral tribunal or arbitration institution

could determine the seat.

The section then turned its focus to utilisation of E-Production, E-Submission and E-Hearings in the E-Arb process and discovered that they were popular methods due to their ease of access, lower costs to use and easy to manage and organise. Finally the section discussed the applicability of the law for E-Arb procedures and determined the existence of two schools of thought. The first stipulated the reformulation of conventional rules to reflect the modern developments, whereas the second proposed the need for creating an independent set of substantive rules applicable to electronic arbitration. These new rules and laws, *Lex Informatica* or the *Lex Electronica* are being formulated with consideration to the growth of e-commerce transactions and the subsequent disputes taking place in Cyberspace.

In conclusion it is said that some identified commentators are arguing for e-arbitration to be accepted as the logical progression of conventional offline arbitration and its methods, and that traditional arbitration principles are inadequate for the electronic environment. On the other hand, a number of researchers suggest that e-arbitration is invalid without its adherence to conventional arbitration requirements and principles. Here they allude to the requirement of 'writing' and F2F sessions between disputing parties. There does however now exist a hybrid fashion of arbitration, which utilises the conventional model of arbitration with new technological developments. Abdel Wahab (2012: 430) argues that the institution of traditional arbitration is lagging behind with regards to e-arbitration. E-Arb procedures are appropriate for the modern online environment of virtual communities wherein disputes may occur largely via electronic means and thus need to be resolved swiftly via electronic means. However, it is argued that there are also a number of significant issues with e-arbitration namely in its lack of adherence to the core principles of conventional international commercial arbitration. Furthermore it is taken for granted that the parties will have the necessary technical abilities and expertise to be able to adequately utilise it. Moreover, there are issues in terms of:

- The confidentiality and security of E-Arb proceedings
- Related communications
- Organising and conducting arbitral hearings online
- The integrity of related data
- Authentication of related documentation

Jewels and Albon (2013: 36) observe that there are particularly issues with the elderly using the Internet for transactions in the UAE alongside illiteracy issues amongst individuals of different age groups. Commentators have identified this to be the dearth in ICT training for the national population. This means that a significant proportion of the people in the UAE are not effectively able to conduct a number of online services let alone arbitration.

Furthermore, the collectivist nature of UAE society could also hamper the widespread utilisation of E-Arb. In a conversation with a current Professor of commercial Law at the UAE University, he noted that an obstacle to E-Arb is people's trust in it and how willing they are to open up to the idea.¹ While a discussion undertaken with the Manager of the Islamic Bank of Abu Dhabi Securities, emphasised that UAE citizens need more awareness about E-Arb, as many may not be familiar with how it works.²

The next chapter introduces the discussion upon the electronic arbitration award.

¹Interview with Dr. Abdullāh al-Khateeb, Professor of commercial Law at the UAE University, October 2015.

²Interview with "Noura", Manager at the Islamic Bank of Abu Dhabi Securities, September , 2015.

CHAPTER NINE

THE ELECTRONIC ARBITRATION AWARD

9.0 Introduction

This chapter focuses upon the (examination/analysis) on the electronic arbitration award by introducing a definition of the arbitral award in Section 9.1 and the issuing of E-Arb awards in Section 9.2. Here it will be noted that the ‘seat’ of arbitration, the location and local laws provide the specific legislation for the arbitral hearing. In Section 9.3 the requirement for the issuing of E-Arb awards is considered and it is noted that although parties must consent to the arbitration process without coercion and enforcement, the decision made is binding. However, the parties can in accordance to specific legislation challenge the awards in normal judicial courts. Section 9.4 therefore moves on to examine the legal Implications of the E-Arb award in terms of the notification required, the authorities presiding over it and the possibilities of challenging the arbitral award. In the final Section 9.5 the chapter focuses upon the enforceability of the E-Arb awards in accordance to the national legislature and the NYC. It will be argued that although two types of awards exist, domestic and foreign, the foreign awards are harder to enforce due to national and legislative policies issues. In conclusion it is stated that the perceived shortfalls in the UAE legislature with regards to E-Arb, is a reflection of the countries developmental progress In time the legislation will reflect the increasing adoption of E-Arb with sound legislation.

9.1 Definition of the Arbitral Award

Al-Ahdab (1998:302), a specialist on arbitration in the Middle East, observes that the suggested stipulation for the definition of the arbitral award is that “*the term has to be understood to mean a final ruling to decide on every topic which has been set before an arbitration court*”. However, the NYC in regards to the enforcement of the provisions of foreign arbitrators set limits on the objectives of the arbitrators’ provisions, for it states in Article 1:

*The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.*¹

It is suggested that this definition is general as preliminary or partial provisions could be issued from arbitrators upon which the final ruling is not contingent. However in accordance to the definition of arbitration these partial provisions are regarded as part of the arbitral decision. Therefore, it is possible to determine the intent of the ‘arbitral award’, which can be enforced Internationally as being the award that is binding and decisive on the issue of dispute.²

9.2 Issuing E-Arb Awards

The disputing parties in agreeing to a mutual ‘seat’ for arbitration also decide concurrently the place from where the award will be issued. The 1958 NYC stipulates that an award has deemed to having been granted at the seat of the arbitration. The Model Law on Arbitration stipulates in Article 31 (3) that an award “*shall state its date and place. The award shall be deemed to have been made at that place*”. The stipulation applies irrespective of the location of the hearings and the place where the award was signed. In a situation where there are no alternatives and in keeping with the territorial considerations outlined in the New York Convention, the e-award is unlikely to be enforced.

However according to the ‘delocalisation theory’, if an award is issued by electronic means, domestic laws governing the e-commerce will decide the validity of the award (Yu and Nasir, 2003: 471). As for the issue of ‘writing’ (discussed in chapter 10) this depends upon the individual State accepting an electronic form of writing to enforce the electronic award.

¹See: <http://interarb.com/vl/p296707918>

Accessed Online February 2015.

²The Court of Appeal in Paris gave a definition of the arbitral award in its ruling on 25 March 1994 in the issue of *Société Sardisud Vs Société Technip* and stated:

The functions of the arbitrators which decide with finality every, or some, disputes which are presented to them, whether in the basis of the dispute, the jurisdiction or the trial proceedings, and lead to a definitive end to the dispute.

See al-Ahdab, *op.cit.*, p.302

To overcome some of the problems associated with e-awards, Edwards and Wilson (2007: 323) along with Wang (2010: 157) suggest the use of an ‘e-watermarked’ printed version of the arbitral award. The arbiter could sign this with the signed printout constituting the original award. Moreover, some of the contentions experienced in issuing e-awards can be resolved in the same manner as the problems with the arbitration clauses are rectified. Wang (2010: 157) argues that electronic arbitration agreements and arbitral awards should be treated as electronic contracts. This would increase their validity and be automatically recognised under the UN Convention on the Use of Electronic Communications in International Contracts and other national electronic contract laws.

9.3 Requirements for the Issuing of E-Arb Awards

The argument presented thus far suggest that the simplicity of the arbitration process such as its informal structure and reduced bureaucracy makes it a more attractive proposition than the formal structures of the courts and judiciary. This is in addition to the ability for the disputants to agree upon a specific legislation of their choice to dictate procedure of rulings. This means that although the provisions of the arbitrators are binding and enforceable, the disputants are in theory control of the process and the ruling is thus akin to the judicial rulings without the influence and control of the State.

Article 212 (3) of the UAE CPC governing arbitration states: *“the special rulings for accelerated enforcement are to be applicable to arbitrators provisions.”* As for what is connected to the structures of the arbitrator’s provisions then the award is issued based on the perspective of most of the arbitrators. The ruling has to be in writing and include details of the agreement between the disputants. In particular, there has to be a summary of the agreement and of the parties’ verified statements within the proceedings; verification of all documents of each of the present parties and of all memoranda of their defences during the hearings. Furthermore the reasons presented by the arbitrator in issuing the final decision and award must also be provided with a date and place of issue. All arbitrators must also sign the verdict and if there are a number of them then they have to mention the arbitrator who did not sign it. In this instance, it will be sound if the majority of arbitrators sign it. This is stipulated in Article 212 (5) of the UAE CPC governing arbitration that:

The arbitrators award is issued by the majority-view and has to be written along with mention of the opposing view; and it has to include a copy of the

arbitration agreement; a summary of the parties statements and their documents; and the grounds for the award along with mention of the date and place of issue; and the arbitrators' signatures. If one or more of the arbitrator's refuses to sign the award that must also be mentioned in it and it will be deemed as valid if the majority of the arbitrators sign it.

The ruling has to be relayed in Arabic, unless there is an agreement between the disputants stating otherwise. In this case, the award is filed that there is an official translation and then the ruling will be considered issued from that date of the arbitrators' signature.

With regards to Article 212 (6) of the CPC governing arbitration in the UAE that:

Unless otherwise agreed between the parties to the dispute, the award shall be in the Arabic language; otherwise, the award shall, at the time of filing, be accompanied by a legalized translation thereof.

The arbitrators' award is not enforced unless ratified by the court where the ruling was filed. This is after the ruling has been examined along with the verification of the arbitration documents that there is nothing to prevent its application. A court will be allocated to correct any errors in the arbitrators' award at the request of the stakeholders.

Article 215 of the UAE CPC governing arbitration stipulates:

“The arbitrators' award may not be enforced unless the same has been approved by the court with which the award was filed; provided that the court has reviewed the award and the terms of reference and ensured that there is no encumbrance to such enforcement. The said court shall, at the request of one of the parties concerned, correct the material errors in the arbitrators award in accordance with the legally prescribed manners applicable to correction of errors.”

All of that has to be within a term specified by law or agreement as sought by the arbitration, unless the award has been contested either by appeal or by the nullification of the award. At this juncture a competent court is to investigate the dispute, be it regarding an invalidation/nullification claim or an appeal court, and seek an explanation, correction or cancellation.

As for the requirements for E-Arb awards, Cyber Tribunal states that the requirements found in conventional arbitration do not differ from those in E-Arb.

9.4 Legal Implications of the E-Arb Award

The issuance of the E-Arb award has a number of legal implications, the most important of which is enforcing the E-Arb award immediately after its issuance and after it has *res judicata* effect. This will then prevent the dispute from being re-litigated in court, even if there is new legal or factual evidence, provided the award is still valid and has not been set aside. The first of these implications is notifying the parties of the award as this notification is considered to be the first procedure, which begins the stage of enforcing the award. Based on this, there are two aspects to discuss: notification of the award and enforcing the award.

9.4.1 Notification of the E-Arb Award

The award is rendered electronically online and the parties notified by the E-Arb provider or/and the arbitral tribunal. This ‘e-notification’ lets the parties know of the content of the award and to prepare voluntarily to comply, have it enforced or seek recourse regarding it. Some national laws have no issue or concern with e-notification of awards in arbitration and some countries such as England and Wales have a very liberal approach to this. The English Arbitration Act (1996) under Section 55(1) state that the parties are free to agree on the requirements as to notification of the award.

In such a case, the parties may well agree that the arbitral award is to be notified to them by e-mail or uploaded on a secure platform accessible to them, which is quite frequent in e-arbitration. (Abdel Wahab, 2012: 427, ff. 90)

Based on the stipulations of the UAE CPC regarding notification of arbitral award as per conventional arbitration, there does not appear to be anything, which would be opposed to the e-notification system in E-Arb, as e-notification still maintains the stipulations. Moreover, the UAE CPC gives broad scope to the parties in this regard, similar to the English Arbitration Act of 1996. For example, Article 212 (5) of the UAE CPC governing arbitration that:

“The arbitrators’ award is issued by the majority-view and has to be written along with mention of the opposing view; and it has to include a copy of the arbitration agreement; a summary of the parties statements and their

documents; and the grounds for the award along with mention of the date and place of issue; and the arbitrators' signatures. If one or more of the arbitrators refuses to sign the award that must also be mentioned in it and it will be deemed as valid if the majority of the arbitrators sign it.”

This stipulation can be easily fulfilled via e-notification along with the stipulation in the UAE CPC that the arbitral award has to be relayed in Arabic unless the parties agree otherwise. With regards to Article 212 (6) of the CPC governing arbitration in the UAE that:

“Unless otherwise agreed between the parties to the dispute, the award shall be in the Arabic language; otherwise, the award shall, at the time of filing, be accompanied by a legalized translation thereof.”

It is argued that these stipulations in the UAE CPC can be easily maintained with e-notification of the e-award, and hence there is absolutely no problem with e-notification of the e-award within current UAE legislation. It can be further posited that the current legal framework in the UAE would only have to be slightly amended in order to recognise e-notification of the e- award. It is maintained that this will be more relevant if the parties agree to this method of notification of the award. Moreover, the parties may also agree to the award being uploaded to a secure platform, which can be accessible to all parties.

9.4.2 Authority of the E-Arb Award

E-Arb systems around the world recognise that the authority of the award cannot be challenged. If the authority of the E-Arb award is challenged on any basis, it is deemed to be invalid and its authority is diminished. (An-Nimr, 2004: 7) The authority of the E-Arb award, which has been issued by an arbitral tribunal, does not have absolute authority rather it has relative authority for the parties. It is possible for either of the two parties to reject the award or resort to another arbitral tribunal if they agree just as they had an initial agreement to resort to arbitration.

9.4.3 Challenging the Arbitral Award

An arbitral award is open to challenge either directly before the body that issued it or in front of an alternative organisation. It is usually challenged in front of a judge in the country in which the award was issued. In this case if the reasons of nullification are ascertained the judge decides upon the nullification of the arbitral award or its annulment and even amendment. As for challenging and disputing an arbitral award in front of a judge of another State, in this instance if the judge certifies the existence of some reasons then herein s/he will order non-recognition and reject enforcement of the award.

Articles 42 and 52 of the Egyptian Law stipulate non-acceptance of challenging of the arbitral award in any form of appeal whatsoever set out in the Code of the Principles of Trials on the Civil and Commercial Procedure. The claim of the nullification of an arbitral award is to be raised in accordance with restricted reasons (Hasan, 2001: 200). However, the reasons for nullification do not include all that associated with the arbitral award such as defects, which lead to its nullification, such as an instance where the issuance of the ruling is based on deception or a fabricated document. (Al-'Anzī, n.d.: 293) For this reason, these reasons have to be explained in consideration that they are ways to challenge an arbitration award, with explanations that leave no room for analogy to ways for appealing judicial rulings.¹ The adjudication is based on the notion that the disputing parties possess complete freedom to decide the body to which a request to prevent the appeal can be made. Moreover, this means that they are both able to agree to the possibility of challenging the arbitration decision in front of another body other than that which issued the ruling in the first instance. In the absence of their agreement, in this case the matter is left to the provisions of the arbitration rules, which both parties choose so that the course of the arbitration process is followed. This is despite some of the foremost and recognised International arbitration provisions not stipulating specification for a particular body in front of which the arbitral award can be challenged.

An example provided to highlight this point is from the Arab Convention on Commercial Arbitration, wherein one of the parties is allowed to request from the head of the arbitration centre to revoke the decision if a reasonable reason from the law is uncovered to support their

¹Sāwī, *op.cit.*, p.225

revocation.¹ The legislator regulates the period in which the application for nullification can be submitted.

The provisions of the International Chamber of Commerce stipulate the obligation to present the draft resolution to the arbitration court and not issue a decision except after approval from a competent court.

Based on this, Article 24 of the code stipulates, under the title ‘the final enforcement decision’:

1. The arbitration decision is final.
2. Just as the two parties have submitted their dispute to arbitration of the International Chamber of Commerce, they are also both bound to the enforcement decision without delay and revoke all possible avenues of appeal.

Also worth mentioning is that International conventions bind participating States to what they stipulate, whereas International arbitration rules do not bind States to follow. As for what is related to the reasons for appealing against the arbitration decisions, then national laws differ in the number of reasons, which permit appealing. In general, it is possible to classify the reasons, which allow for appealing against arbitration decisions into four categories:

1. Reasons related to the contents of the decision: The party submitting the appeal argues that the arbitration decision is not in agreement with the law of the land in which it was issued or the procedural law which has to be implemented.
2. Reasons related to the jurisdiction of the arbitration tribunal: This body holds the authority to investigate the dispute and issue a special decision. It is invoked when the dispute is not related to the issues within the authority of the tribunal. Thus consideration is then given to the law of the land and the mandatory law of arbitration. It is possible to challenge the decision made by the body.

¹Article 34 of the Arab Convention for Commercial Arbitration

3. Reasons related to the arbitration proceedings and due process: In this instance, an appeal is based on the arbitration tribunal not respecting the procedural rules for arbitration. These rules being included in that which ensures the validity of the arbitration body and the presentation of the rights of both disputing parties during the appeal procedure. Of the matters upon which appeals can be built, the lack of notification to the parties or non-treatment of both parties on an equal footing. Within the hearings or notifications, or a failure to ensure the right of defence of one of the parties by giving it ample opportunity to make requests and pleas. This is universally utilised in International conventions to challenge the arbitral award.
4. Reasons based on violation of the principles of public policy: This where International rules and national legislation concur that opposing the decision due to a public policy principle is to be considered a valid reason for its nullification, non-recognition and non-enforcement. (Barakāt, 2003: 92) It is the court that decides its validity or invalidity in opposing the public policy. (‘Umar, 2004: 92).

Under Article 217 (1) of the UAE CPC, parties have no right to appeal against an award seated in onshore UAE. However, parties may challenge an award during the ratification process i.e. when the successful party seeks to enforce the award before the local courts. The grounds to challenge an award, set out in Article 216 of the UAE CPC, are generally limited to those connected to the arbitration agreement and arbitration procedure and similar to what was mentioned above, include circumstances where:

- There are defects in relation to the arbitration agreement and the tribunal’s jurisdiction, such as where the award was rendered without a valid arbitration agreement, where the tribunal overstepped its jurisdiction set out in the arbitration agreement or where the arbitration agreement was concluded by those not having the capacity to agree to arbitration;
- There are defects in relation to the tribunal, such as where the arbitrators were improperly appointed; or where some of the arbitrators rendered the award in the absence of the others and without their authorisation, or by arbitrators who did not

fulfil the legal requirements to act as an arbitrator; or

- There are other procedural defects, such as where: the subject matter of the dispute was not indicated to the tribunal either in the arbitration agreement or through the parties' pleadings; the award suffers from procedural irregularities; or the procedures adopted in the arbitration otherwise affect the award by, for example, not respecting the parties' due process rights.

Pursuant to Article 41 of the DIFC Arbitration Law, a party to a DIFC-seated arbitration can apply to set aside an award on the basis of grounds that mirror those found in the Model Law. In E-Arb the ways to contest and challenge an award are similar to that of conventional arbitration. Abdel Wahab (2012: 428) notes that according to the online arbitration rules of ADR.eu,¹ the award of the administrative panel is not final and legally binding. This is concerning as the complainant or the domain name holder is not prevented from submitting the dispute to a court of competent jurisdiction for an independent resolution.² Yet if after 30 days court proceedings have not been initiated, the e-award will be implemented by the .eu Registry EURid (the European Registry of Internet Domain Names), a dispute resolution procedure for matters arising from registration activities surrounding .eu domain names modelled on UDRP. EURid is a private not-for-profit organisation appointed by the European Commission to operate the .eu top-level domain. Since 12 April 2005 EURid has been facilitated by the Prague-based Czech Arbitration Court, thus complaints to EURid are to be made in writing to the Czech Arbitration Court in both hard and electronic formats. The Czech Arbitration Court will then forward that complaint to the respondent, who is allowed an opportunity to respond, after which the court will appoint a single-member or three-member panel to decide the dispute. (Hörnle, 2009: 189; Steward, 2007: 190-191) EURid works with over 850 accredited registrars and provides support in the 23 official EU languages. Its main headquarters is in Brussels and it also has regional offices in Pisa (Italy), Prague (Czech Republic) and Stockholm (Sweden).³ Christou and Simpson (2007: 163) note

¹It administers domain name disputes via e-proceedings

²The ADR procedure for domain names is outlined in the EURid website here:

<http://www.eurid.eu/en/eu-holders/domain-name-disputes>

³The official EURid website: <http://www.eurid.eu/>

that EURid plays a number of roles in the governance of *.eu*, such as promoting the domain *.eu* in the EU, liaise with the European Internet community and other relevant international organisations for Internet governance and make decisions on the rights of individuals to ownership of *.eu* domain names.

9.5 Enforcing the Arbitral Award in UAE Law and in the 1958 New York Convention, the Repercussions for E-Arb Awards

There is now a requirement for a discussion on the sources and enforcement of the E-Arb award in UAE legislation regardless of whether the awards are domestic or foreign. Additionally attention is also required to the relevance of the New York Convention and its consequences for the E-Arb award.

9.5.1 Sources and Routes of Enforcement of Arbitral Awards in the UAE

There are two sources of enforcement, which have been identified:

1. Local and National
2. Foreign

The first type entailing the local and national rulings refers to whatever has been issued from the state in which enforcement is sought. This applies to most rulings; even the use of enforcement through coercion is a possibility if the conditions and circumstances mandate such actions.

The second type focusing upon foreign rulings and legal systems implies the degree to which, agreements and documents issued from foreign States can be enforced through the local/national judicial provisions and arbitrators' provisions. This usually takes place after a competent court or enforcement administration has certified that the required conditions are all set.

(Refer to Article No's. 235-238 Emirati Procedures; Article No's. 252-255 Bahraini Law of Procedure; Article No's. 379-383 Qatari Law of Procedure; Article No's. 199-203 Kuwait Law of Procedure; Article No's. 296-301 Egyptian Law of Procedure)

The New York Convention stipulates in Article 5 (2) that there be recognition and enforcement of foreign arbitrators' provisions, stating:

“It is allowed for a competent authority in a country in which recognition and enforcement of the arbitrators’ ruling is sought, to reject recognition and enforcement if it becomes clear that: 1) the law of that land does not allow to settle the dispute via arbitration and 2) Or within the recognition of the arbitrators provisions is that which is contrary to the public policy of this land.”

This is also demonstrated in the convention made between the Arab League states regarding the enforcement of awards stipulates in No.1/28/68 on 11th/4/1390 AH, and circulated to the Office of the Deputy Chief Justice No.67/2/T on 16th/5/1390 AH, that the governments of Saudi Arabia, Jordan, Syria, Iraq, Lebanon, Egypt and Yemen have agreed on a number of issues related to the enforcement of provisions among states.

Article No.2 of the Convention stipulates that:

It is not allowed for the judicial authority in a state in which enforcement is sought to research the subject of dispute and it is not allowed to reject enforcement of the ruling except in the following instances:

1. If the Judicial body which issues the award is not competent to assess the claim due its lack of authority and competency, or due to according to the rules of international jurisdiction.
2. If the disputants did not announce in a sound manner
3. If the arbitrators’ provisions contain that which opposes public policy or morals of the state in which enforcement is sought, and likewise the authority deems this as being the case and thus does not enforce that which is contrary to public policy or morals. Or if the ruling is contrary to well-considered general international rules.
4. If a final ruling has been issued among the disputants on the subject of dispute in one of the state courts in which enforcement is sought. Or there exists in these courts a pending case between the same disputants in the same subject, which has been raised prior before the court, which issued the ruling, to be enforced.

Article 3 of the Convention mentions the importance of “safeguarding what has been mentioned in Article 1 of this Convention.” The authority to which enforcement of the arbitrators’ award is sought does not hold the power to examine the claim about which the arbitrators issued their award. It can only reject the enforcement application, and this is in the following instance:

1. If the law of the country where enforcement of the award is sought does not allow the subject of the dispute to be resolved via arbitration.
2. If the arbitrators’ award has not been issued to enforce due to a valid condition or arbitration contract.
3. If the arbitrators are not competent in accordance with the contract or the arbitration condition, or in accordance with the law wherein the arbitrators’ decision was issued.
4. If the disputants did not announce their presence in an accurate manner.
5. If the arbitrators provisions contain that which are contrary to public policy and morality within the state in which enforcement is sought, and likewise the authority deems this as being the case and thus does not enforce that which is contrary to public policy or morals.
6. If the arbitrators’ provisions are not final in the state in which it was issued.¹

Article 5 of the Draft Law of the UAE of 2010 stipulates with regards to arbitration for commercial disputes that:

1. It is not allowed to agree on arbitration except from a natural person or from one who represents the person who possesses the right to represent his rights.
2. If the law allows the parties to arbitration to choose the mandatory procedure of the specific issue, then all have to grant an allowance to the other to choose the procedure. While the third party will be considered any arbitration organisation or centre either inside or outside the country.

As for the documentation that must be attached to the enforcement request, then Article No.5 documents them in the Convention as mentioned earlier. Just as the Convention for the

¹Topical Categorisation of the Ministry Circulars, vol.3, pp.59-63

Enforcement of Provisions and Judicial Announcements and Declarations of the GCC, and as approved by the Supreme Council for Cooperation in its sixteenth session during 12-14 Rajab 1416 AH. Article No.2 states:

The enforcement of ruling will be rejected, wholly or in part, in the following instances:

1. If it opposes the Islamic Divinely Legislated (Shari'ah) rulings, the Constitution or the State apparatus in the State wherein the enforcement is sought.
2. If it was *in absentia* and the disputant was not informed of the claim or the ruling, in a valid and authentic manner.
3. If a ruling on the dispute was issued before on the subject among the disputants and in possession of the force of *res judicata* in the state in which the enforcement is sought or in another state which is a member to the Convention.
4. If the dispute about which the sought after ruling was issued and enforced is pending before one of the state courts between disputants themselves and is connected to the same rights and reasons, and had been raised on a date prior to when this dispute had been presented to the state court from which the ruling was issued.
5. If the ruling which has been issued is against the state in which enforcement is sought, or against one of its employees.
6. If enforcement of the ruling is contrary to international covenants and agreements in force in the state in which enforcement is sought.

As for the documents that have to be attached with the enforcement application then Article No.31 of the Draft Law of the UAE of 2010 stipulates with regards to commercial disputes:

1. All parties to arbitration have to attach a claim manuscript or a defence memorandum depending on the condition of the documentation. Or they make mention of all or some of the documentation and supporting proofs which he plans to submit. This will not prejudice the right of the arbitration tribunal at any stage of the proceedings when the application for documentation is made.

2. The copies of the memos, data and reports, which the parties present to the arbitration tribunal, are to be sent to the other party.

As the Riyadh Arab Convention for Judicial Cooperation was acknowledged by the Council of Arab Ministers of Justice and signed in Riyadh on 23/6/1403 AH/6th April 1983, approved by royal decree and attested, No.14 on 12th/8/1420 AH. The fifth chapter of it includes the obligation of recognising rulings issued in civil, commercial and administrative issued and personal issued, and their enforcement in accordance with well-known conditions. It is not allowed to reject them except in the instances as detailed in Article 30 in relation to judicial issues and Article No.37 in relation to arbitrators' provisions. Within these Articles it is mentioned that the enforcement of rulings will be rejected if they are contrary to the Divine Legislation of Islam (i.e. Shari'ah).

9.5.2 Enforcing Arbitral Awards, National and Foreign, in UAE Law and the New York Convention

There are a number of contentions and factors that must be determined in ascertaining the distinguishing factors between the foreign arbitral awards from the national awards. Thus questions of bias can be considered with regards to the nationality of the disputants, the territory of the 'seat' or the mandatory law applied to arbitration procedures or the 'seat' of the ruling. From a juristic and judicial perspective, the seat from where the award was issued distinguishes the criteria between national and foreign arbitration. This specific criterion was mandated within the New York Convention of 1958 (NYC) as it recognised the enforcement foreign arbitral awards. Signatures to the NYC are therefore expected to have laws reflecting this practice, whereby a foreign arbitral award is enforced in their lands.

Another perspective deems this distinction to ignore the reality of arbitration, as the issuing of judicial provisions requires the arbitrators to consider the national public policies of the territory wherein the judicial ruling will be enforced. Thus, it has been argued that all arbitral

provisions should fall under the control of a single body with little regard for the ‘seat’ of arbitration.¹

Some views uncovered through the review of literature proposed that developing countries are justified in doubting the provisions of arbitrators.² More often than not these awards have been issued in a foreign country under the supervision of an International centre of arbitration based in a Western State. The dispute could involve a single consumer or a group of companies, with a range of nationalities, the perception is that they nations themselves are discriminated against. Statistics reveal that 90% or more of arbitration cases, which have been concluded in foreign countries, have been lost by developing countries, which justifies this doubt. (Berg, 2005)³

However, the current situation is that Article 3 of the New York Convention stipulates the recognition and enforcement of foreign arbitral awards so as to ascertain justice within each member state that is a signatory to the convention.

The attempts to rebuke the accusations of bias against the developing nations is also found in a further reading of the article:

“...Should not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

Hence, there should be reciprocity arrangement between the member states that have signed up to it. The New York Convention was broadly accepted and a number of different countries have signed up to it up until 2010 when 142 countries were a part of it including 15 Arab states comprising Jordan, the UAE, Bahrain, Tunisia, Algeria, Syria, Djibouti, Oman, Qatar, Kuwait, Lebanon, Egypt, Morocco, Saudi Arabia and Mauritania.

¹Jack Yusuf Hakeem, lecture on the recognition and enforcement of arbitrators’ provisions, delivered at the Commercial Arbitration Seminar held at the Dubai Chamber of Commerce and Manufacturing on 26th October 1996.

²Dubai Court of Cassation, Petition no.537, 1999, session 23 April 2000, *Majallat ul-Qadā’ wa’-t-Tashrī’*, no.10

³See for more details and full discussion: Berg. A. J. V. D. (2005) *New Horizons in International Commercial Arbitration and Beyond*; Kluwer Law International,

The NYC stipulated in Article 3 that:

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.¹

We can cite as an example of the application of this convention between its member states the case of the *Government of the State of Kuwait Vs. Frederick Snow & Partners* in which the House of Lords supported the verdict of the Court of Appeal to enforce an arbitral award in Kuwait on 18th September 1993 and which compelled the defendants, Sir Frederick Snow & Partners, to pay the plaintiff the equivalent of three and a half million Kuwaiti Dinars. This was application of Article 3 of the NYC and was the cause of Kuwait joining the NYC in order for the award to be enforced.² The UAE joined the NYC in June 2006 out of reciprocity between states as pertains to the enforcement of foreign arbitrators' provisions.

The Dubai Court of Cassation maintained that in the case wherein there is an application to enforce a ruling of arbitrators which has been issued in a foreign country then it is required to enforce the order without establishing a claim within the UAE via the existence of a bilateral or regional agreement between that state and the UAE. With the non-existence of such an agreement it is required to enforce the arbitrators' provisions which were issued in a foreign country and that the conditions for enforcement of these provisions are in the law of the seat where the arbitration took place, as is also relayed in UAE law. This ensured the UAE to adhere to the enforcement of arbitrators' provisions, which were issued in the States, which are signatories to the NYC such as India³ and Great Britain.⁴

An examination of the UAE's current arbitration rules found within the UAE Civil Procedures Code (CPC) reveals that Articles No's. 203-218 of the UAE CPC governing

¹See: <http://interarb.com/vl/p027755967>

Accessed Online February 2015.

²*Government of the State of Kuwait Vs Sir Frederick Snow & Partners* (Lloyds Law Reports, 1984), p.458

³Dubai Court of Cassation, Petition no.258, 1999, session 2 October 1999, *Majallat ul-Qadā' wa't-Tashrī'*, no.10

⁴Dubai Court of Cassation, Petition no.267, 1999, session 27 November 1999, *Majallat ul-Qadā' wa't-Tashrī'*, no.10

arbitration and the Code (particularly Articles 214 and 215) provide for frequent court intervention during the course of the arbitration and essentially a *de facto* examination of the arbitral award. A precursory analysis seems to suggest that the UAE CPC inclines towards recognising foreign arbitral awards since it states: “*an award rendered in a foreign country may be enforced in the UAE under the same conditions applicable under the laws of the foreign country*”.

However, Maniruzzaman and Almutawa (2013: 6) argue that from a historical perspective the UAE courts have not been too friendly to the enforcement of arbitral awards, domestic or foreign. They have refused recognition and enforcement based on technicalities. Hence, even after the UAE’s accession to the NYC in 2006, courts have been reluctant to apply the Convention. There may be a number of reasons as to why there is such apprehension such as judges not being familiar with the Convention thus continuing to apply the UAE CPC even though it contradicts the Convention.

Yet as mentioned earlier, Dubai’s highest court, the Court of Cassation made clear that foreign arbitral awards would be enforced in Dubai in accordance with the NYC without resorting to the UAE CPC. However, the UAE CPC’s ratification requirement excludes foreign awards and UAE courts continue to require ratification. A foreign arbitral award has to be filed with and approved by a local court, which may be willing to revisit the merits of the award.

Frick (2001: 274) moreover contends that from an international perspective it is not in the interests of the business community to have awards that are “floating around”, enforceable in one country yet null and void in another. While Goode (2002, 1992) argues that the concept of arbitration as an autonomous and delocalised system of law that exists independent of any national law other than the state of enforcement is “*fundamentally misconceived*”. He suggests that the theory of a ‘stateless’ award represents a disregard for the principles of international comity whilst claiming respect for party autonomy and denying the effectiveness of decisions under a *lex arbitri* by which the parties themselves have agreed to be bound. He concludes that this will cause the multiplicity of suits, risk behaviour and fragmented practices that have the potential to destabilise the International arbitration process and credibility.

The essential difference between the delocalised or ‘a national’ forms, and International arbitration is that the latter is connected to more than one national legal system while the former it unconnected to any national legal system. The reality is that this type of ruling has

become widespread in the field of International trade contracts when trying to isolate the precise legal system and apply what is known as ‘trade customs’. However, there is some reluctance to acknowledge its presence and in fact it has been strongly opposed by the judiciary and some legal experts as they argue that any relationship based on the law has to be linked to a specific legal system,¹ *‘be it national, foreign or international’*.²

Delocalisation theory in International arbitration was developed in response to the contemporary oil disputes between Arabian governments and Western oil companies. A significant case attributed to have given rise to this theory was a dispute between the *State of Saudi Arabia v Arabian American Oil Company (ARAMCO)*. The tribunal held that the law of the seat should not be applied to arbitration due to the jurisdictional immunity of foreign states. Thus, the tribunal could not hold that arbitral proceedings to which a foreign state is a party could be subject to the law of another state. As a result, it viewed that arbitration had to be governed by International law.

9.5.3 Enforcing E-Arb Awards in the UAE

Although the arbitral award represents the final stage and conclusion of the E-Arb proceedings, the enforcement of the awards is an issue. This is particularly the case with regards to the final and binding nature of the awards. There are also concerns with reconciling them with the New York Convention, as not all e-awards are regarded as final and binding on a dispute.

Kaufmann-Kohler and Schultz (2004) argue that decisions in E-Arb may not be always binding and the arbitral award may be non-binding for either of the parties, or it may be unilaterally binding. If an e-arbitration award is non-binding on either of the parties, the process cannot be recognized as ‘true’ arbitration as the decision is not the same as a court judgement, and the arbitrator does not have a judicial position. If the binding nature of arbitration depends on one of the parties’ intention, the process can be regarded as true arbitration if the party admits that the award is binding after the award has been issued. In

¹It appears that based on further discussions on this concept, the UN Conference, which resulted in the New York Convention of 1958, most of the states did not want to take the risk of this notion of the “floating award” as it could lead to the abuse of justice and also of the freedom of the parties in arbitration.

²Sharafuddeen, *op.cit.*, p.106

other judicial systems, conditionally binding arbitration can be deemed as true arbitration so long as the arbitration fulfils applicable procedural standards (Kaufmann-Kohler, 2005: 443). Abdel Wahab (2012: 428) notes that according to the online arbitration rules of ADR.eu, which administers domain name disputes via e-proceedings, the decision of the administrative panel is not final and legally binding, as the complainant or the domain name holder is not prevented from submitting the dispute to a court of competent jurisdiction for an independent resolution. Herein, an e-award does not qualify as a final and binding award, which is subject to enforcement in accordance with the 1958 New York Convention. However, if after 30 days, court proceedings have not been initiated, the e-award will be implemented by .eu Registry EURid.

It is important to mention that in regards to enforcing e-awards, the awards can be either domestic or International. If the e-award was issued locally, procedures and applicable law used by national courts will assess if it can be enforced, and this will also depend on the country in which the e-award is to be enforced and the recognition by its legislations of the enforceability of the e-awards. These e-awards may be considered as a foreign award, which can be enforced under the 1958 NYC in cross-border disputes. It is therefore argued that there exist no explicit stipulations preventing the application of the NYC Articles to e-awards. Abdel Wahab (2012: 429) also recognises that for an e-award to qualify for enforcement and/or recognition it has to meet the requirements for recognition and enforcement as per Article 5 of the NYC. Though the requirements apply to both conventional arbitration and E-Arb the issues arise for example firstly if an e-award is non-binding, as this will not qualify for enforcement or recognition under the NYC as pointed out in the previous chapters (9,10). Secondly, an e-award must comply with due process in light of public policy principles wherein parties have a fair opportunity to present their case. Yet due process is an issue in E-Arb because of the unpredictability of the users and the actual medium, the ICT infrastructure. The core problems encompass the level of technical knowledge and competence amongst disputing parties. This could result in a party being unable to adequately present their perspectives due to incompetence with ICT tools. Therefore, this aspect of E-Arb conflicts with public policy in the UAE, and so the legislature will not recognise the arbitral award as it includes elements that “*contradict public policy or morals*”. (Maniruzzaman and Almutawa, 2013: 7)

Thirdly, although the concept of arbitrability does not differ in either conventional arbitration or E-Arb, some countries may wish to exclude certain arbitrable disputes from the scope of arbitrability in e-proceedings. Advocates of delocalisation theory regard the notion of a ‘stateless’ arbitral award as being in tune with the nature of an e-award. However, delocalisation theory conflicts with the current framework of the NYC, which stipulates in Article 5 (1) (e) that the court of the country where the enforcement of an award is sought has the right to reject enforcement if the award has not become binding under the law of the country in which the award was made.

The subsequent award is considered granted at the ‘seat’ of arbitration, which has been determined by the disputing parties or at the place where the written award was signed. This understanding deems the ‘place of arbitration’ as a legal fiction, which can be determined by the parties themselves. Hill (1997: 104) therefore rebuts the notion that electronic arbitration conducted in Cyberspace presents any legal problems. Moreover, Lynch (2003) argues that the latest communications and tech developments that are utilised within electronic arbitration may assist in broadening the acceptance of delocalisation theory.

Research undertaken by Maniruzzaman and Almutawa (2013) is particularly engaging as it examines the developments in International arbitration with specific relation to Dubai. It also focuses upon the increased role of the Dubai International Financial Centre (DIFC) as a global ‘seat’ for arbitration and enforcement of arbitral awards in Dubai. They reveal that in *Al-Khorafi v Sarasin*, the DIFC Court of Appeals provided extensive details on the scope of its extended jurisdictional reach.

Furthermore, the DIFC Court can order the enforcement of arbitral awards inside and outside the DIFC zone, as long as the arbitral award was issued in the DIFC under Dubai Law No.16 of 2011. Parties are free to choose any other arbitral institution rules to govern the dispute as long as the arbitration is held in the DIFC. It is possible therefore to hold the arbitration in the DIFC but use a non-DIFC arbitral institution like the International Chamber of Commerce, and still have the award enforced by the DIFC Court inside and outside the DIFC zone.

DIFC is considered ‘offshore’ jurisdiction from the point of view of the Dubai Civil and Commercial laws. Enforcement outside the DIFC but within Dubai falls under Article 7 (2) of the Judicial Authority Law. Under this article Dubai ‘onshore’ Courts will enforce an arbitral award rendered or ratified by a DIFC Court, ‘offshore’. Recognition and enforcement of DIFC awards before the Dubai courts is facilitated by reference in the 2009 Memorandum of Understanding (which came into force on 16 June 2009) and the Protocol of Enforcement

between Dubai Courts and DIFC Courts, provided the awards are final and certified by the DIFC court.

DIFC arbitral awards recognised and enforced in the UAE, but not in Dubai Courts, are likely to be treated as a foreign judgement through a DIFC court order. (Maniruzzaman and Almutawa, 2013: 4) As a result of this, it is argued with a specific reference to the granting of the DIFC arbitral award as a foreign award, that this will have a negative impact and consequence for E-Arb and E-Arb awards in the UAE. The awards issued by the DIFC should be regarded by UAE legislation as domestic awards and not 'foreign' awards so that legislation and domestic policy can develop alongside developments in ICT. This will in the long term create an attractive robust yet efficient system of arbitration in the UAE.

A final piece of advice offered by a professor of law and former head of Department suggests that the UAE look and benefit from the experiences of those States wherein E-Arb is in practice.¹

9.6 Summary

This chapter sought to introduce a discussion upon the arbitral award by firstly introducing a definition of the arbitral award as a 'binding and decisive decision upon the issue of dispute'. The argument then focused upon the issuing of E-Arb awards and it was noted that the disputing parties in agreeing to a mutual 'seat' for arbitration have by default decides the place from where the award is to be issued. Although this is difficult to enforce with regards to the public policies of specific nations, and as vouchsafed by the 'delocalisation theory'. A solution presented suggest that E-Arb be treated as an e-contract and thus be recognised instantly under the mandate of the UN Convention on the Use of Electronic Communications in International Contracts. The chapter then introduced the requirements for issuing E-Arb awards and discovered that although parties consent to the arbitration process without coercion and enforcement, the decisions made are binding. However, the parties can in accordance to specific legislation challenge the awards in normal judicial courts. The focus upon the legal implications of the E-Arb award makes it evident that there exist issues with the enforcement of the E-Arb award immediately after its issuance. Thus the chapter introduces the core process of arbitrations such as the requirement of notification, the authorities presiding over the E-Award the methods by which the arbitral award can be

¹Interview with Dr. Imād Abū Sadd, professor of law, former head of Department , September 2015.

challenged. The final section of the chapter then introduced the concluding aspect of the E-Arb process, the ability to enforce the arbitral award with regards to the UAE legislation and the 1958 New York Convention on arbitration. It was argued that there existed two sources of enforcement that were either local/ national or foreign. Whilst the local/national award was enforced by the State, foreign awards were contingent upon the States allegiance and partnership with the issuing nation and its public policy with regards to the issue in dispute, this idea is supported by the 'delocalisation theory'. Although the NYC supports the enforcement of foreign awards, it also recognises that States must decide their own domestic policies.

In conclusion it can be stated that the UAE courts have not acted with an overt sympathy and acceptance towards the enforcement of arbitral awards, domestic or foreign. Furthermore they have refused recognition and enforcement of the awards based upon technical issues. This has subsequently had dire consequences on enforcement and/or recognition of e-awards in the UAE, which may be regarded as foreign arbitral awards under the NYC. Even after the UAE's accession to the NYC in 2006, courts have been reluctant to apply the Convention, despite Dubai's highest court, the Court of Cassation declaring that foreign arbitral awards would be enforced in Dubai in accordance with the NYC and without resort to the UAE CPC.

However, the UAE CPC's ratification requirement excludes foreign awards and UAE courts continue to require ratification. A foreign arbitral award has to be filed with and approved by a local court, which may be willing to revisit the merits of the award. Using Abdel Wahab's (2012: 428) argument it is stated that there is nothing in the NYC that does not categorically apply to e-awards, so long as it is final, binding and in line with due process as an indicator of procedural public policy. Moreover, the e-awards may be deemed as being domestic, International or foreign. While Lynch (2003: 395) suggests that NYC does not specifically require an arbitral award to be signed by the arbitrators, so theoretically an e-award with digital signatures of the arbitrators could qualify as a valid arbitral award. Thus, with the NYC recognition of electronic procedures with arbitration, along with concepts from the advocates of delocalisation theory, the e-award should sit comfortably within UAE legislation. In looking to the future recent trends in Dubai and Fujairah have demonstrated that courts are beginning to enforce awards by disregarding minor technical requirements of the UAE CPC. From the perspectives of this study it is suggested that due to the meteoric rise of the UAE as a developed nation, it is adapting to the requirements of becoming a global hub in line with its own cultural, social and economic development. The legislature will only

reflect that growth of each segment of society and as ICT evolves, new legislations will reflect its almost ubiquitous involvement in society. This means that the increasing presence of online retailers alongside a global consumer base that includes the UAE will witness an increasing number of disputes and the UAE legislature will evolve to meet the demands of this process as its implications become ever evident.

The last chapter presents the conclusions and recommendations and the key findings from this study.

CHAPTER TEN

CONCLUSIONS AND RECOMMENDATIONS OF THE STUDY

10.0 Introduction

This chapter specifically aims to present the conclusion and findings from the study by presenting the theoretical contributions made by the study in Section 10.1 and practical contributions in Section 10.2. The six key findings derived from the undertaken research are discussed in Section 10.3, whilst the barriers to the implementation of electronic arbitration within the UAE are identified in Section 10.4. This is followed by the recommendations that the study makes with regards to E-Arb and legislation in the UAE in Section 10.5. The following Section 10.6 then looks to assist UAE policy makers by offering them advice on the implications of a favourable E-Arb policy, which is followed by the limitations of the research in Section 10.7. The implications of the research are then detailed in Section 10.8 before concluding with a final reflection on the entire project in Section 10.9.

10.1 Theoretical Contribution of the Study

The theoretical aspect of this study contributes to the recognition of electronic arbitration in the United Arab Emirate (UAE) legislation, as well as to define the concept of e-arbitration alongside its potential advantages and disadvantages. The thesis further examined and explored the challenges presented to the legislatures and policy makers in dealing with the developments that result from e-commerce, as well as how to arbitrate e-commerce.

10.2 Practical Contribution of the Study

The thesis sought to identify legislative gaps in the Emirates law and subsequently proposes a number of recommendations. It is argued that these recommendations will actively initiate the process of implementing and promoting the utilization of electronic arbitration alongside the

existing thriving e-commerce market in the United Arab Emirates (UAE). An interview with prominent entrepreneur in the UAE revealed that the business community also supported this ideal as she argued that it was essential that E-Arb be utilised alongside conventional arbitration.¹ An interview with an arbitrator identified E-Arb as contributing to the development of e-commerce and enhancing confidence in electronic transactions. Furthermore he reflected that it would also ensure that traders would be able to effectively resolve any issues regarding their transactions via means that were not protracted, as is the case with the judiciary.²

10.3 Key Findings

In concluding the thesis, this chapter identifies a number of key findings uncovered through the research process and makes suggestions for future research and focus in this area.

The findings are however all related to the understanding that the rules of private international law, which seek to determine the place and time of a contract may be seen as a hindrance to the advancement of e-commerce. This is due to the restrictions and obstacles, which are imposed therein, such as the determination of jurisdiction and the applicability of law.

Primarily due to these broad issues, the review of literature alongside the field study suggests that new and innovative ways of alternative dispute resolution are required. These must be flexible, efficient, easily accessible and in synch with the pace at which electronic commerce and trading is developing. It is argued that E-Arb has the potential to fulfil these generic yet crucial requirements. The research demonstrated that the nature of e-commerce is

¹ Interview with Maryam Al-Sharif, Businesswoman in the UAE , October , 2015.

² Interview with Ahmed Rāshed Al-Neyādī, credible Arbitrator in the UAE, August 2015.

commensurate with E-Arb and shares a symbiotic relationship, whereby E-Arb will aid the growth and development of e-commerce as appropriate dispute resolution processes are in place.

10.3.1 Key findings unearthed through the thesis

1. Electronic Arbitration eliminating physical barriers:

E-Arb is similar to conventional and traditional arbitration and is based upon the same three core foundations of: the arbitral agreement, the arbitration process and the issuance of a decisive award in regards to the dispute between the two parties.

However, the primary difference between the conventional and electronic is also the most distinctive feature and that that E-Arb occurs in cyberspace, virtually over the Internet. Therefore, throughout the various stages of E-Arb, the disputing parties are not required to travel or be present physically before the arbitrators. Rather the parties can participate in the arbitration sessions via electronic communication. The review of literature demonstrates the popularity of the arbitral award, mandated by E-Arb centres. Awards are issued in short periods of time with easy procedures, which are based on the electronic exchange of data regarding the dispute.

2. E-Arb an additional component of E- Commerce:

Electronic-contracts constitute a significant proportion of international trade, which means that, e-commerce represents an advanced stage of commerce in which ICT is pivotal to the production and distribution of goods, merchandise and services on a global scale.

Therefore, E-Arb has become a practical means, outside of judicial proceedings and

litigation, to resolve disputes, which occur online via electronic commercial transactions.

The fieldwork revealed that the professionals interviewed perceived a greater number of global trade deals to be conducted electronically and therefore, arbitration would also have to follow.¹ In addition they argued passionately that not only does E-Arb contributes to the development of e-commerce and enhance confidence in electronic transactions, but it also ensures that traders will be able to effectively resolve any issues regarding their transactions via means which will not be protracted, as can be the case with the state and national judiciary systems and processes.²

Another pertinent point to this finding deciphered from both the review of literature and the field study was with regards to the traditional impact of culture and faith.

Respondents noted how e-commerce had eliminated those barriers and thus E-Arb had the potential to do the same through virtual technological means.

This it has been argued is because e-commerce has acquired the trust of the users and the technology is therefore becoming a normalised part of modern day life. Therefore, commentators and professionals observe that the natural step is for E-Arb to become an extension of the e-commerce service and trade model. As E-Arb offers an efficient and low cost alternative to the traditional method the research suggests it will be implemented globally in the very near future. Thus UAE has the opportunity to build upon its existing world-class e-commerce structure by offering a world class E-Arb service.

¹See Appendixes: (1) Interviews, (2) Discussion of Interviews, (3) Findings

²Ibid

3. Ideal opportunity for the UAE as a global hub for commercial enterprise to enhance their services portfolio:

This finding reveals as per Finding 2 (above) that due to the existing e-commerce infrastructure and the culture that has developed alongside it, E-Arb should be considered an evolution of e-commerce. The implications of this for the UAE are global businesses with a presence in the UAE will further their operations in the nation and new businesses may become attracted to establish a presence in the UAE as a major global hub. Additionally as the e-commerce market evolves to encompass major e-services such as E-Arb it gives the UAE an edge over other competing global cities, hubs and nations for commercial transactions.

4. E-Arb compatible with UAE domestic policies and International arbitration agreements:

UAE as a signatory to the New York Convention already demonstrates its ability to adhere to international standards and has a proven track record. E-Arb is subject to general legislations and regulations for arbitration as outlined in international and regional conventions and agreements. Likewise, E-Arb is subject to legislations, which have been specifically put in place for the electronic environment. In the same way as how the Model Law and the e-signature is applied to e-commerce as per the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). This is also represented in WIPO, which is based on procedures outlined in ICANN's 'Rules for Uniform Domain Name Dispute Resolution Policy'.

The stipulation for arbitration agreements to be committed to writing pre- arbitral hearings has become a prerequisite for hearings to be deemed valid in accordance to contemporary domestic and international legislations. This has subsequently raised many questions about E-Arb's capacity for fulfilling the written requirements and thus validating the arbitration policy requirements.

However, the general acceptance of the ‘e-Signatures’ and ‘e- writing’ in terms of legislation implies that they have become acceptable modes of actions for agreements which are conducted electronically and thereby have legal standing akin to agreements in conventional arbitration. As a result of this, the definition of conventional writing has become broadened to include ‘e-writing’. There are national and international legislations in place related to electronic transactions such as: the Model Law for E-Commerce (1996), the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, the 2006 UAE E-Commerce Law and Article No.2 of the 2002 Dubai E-Commerce Law that discusses the definition of a signature. The structure of the arbitral process in conventional arbitration is the same as that with E-Arb. However, E-Arb has some aspects, which distinguishes it fully from conventional arbitration, such as speed, easing the pressure and burden of travel from the parties, the presentation of paper documents etc. The fieldwork study revealed that the interviewed professionals believed E-Arb to not only be faster but also be able to remove the burdens usually associated with arbitration. E-Arb will also ensure privacy and confidentiality (this will benefit society, moreover, people do not like going to arbitration centres).¹ As the electronic field of business transnational legal structures have been developed into a set of rules termed *Lex Informatica* or the *Lex Electronica*, these may include rules such as: general principles of law; arbitration case law; Model contracts; international treaties and conventions and trade usage. However, the *Lex Electronica* may be open to corruption due to the intertwined interests of business and legal actors. The notion of

¹Interview with “Maataz”,management associate in e-commerce trader at the Islamic Bank of Abu Dhabi,August , 2015.

Lex Informatica/Lex Electronica however is still in the early stages, although there is a drive to further develop it in future.

However, although the UAE CPC does not contain any stipulations regarding confidentiality and privacy, the DIFC Arbitration Act, and the proposed UAE Arbitration Act does stipulate that arbitration procedures and decisions are to be confidential. The Dubai International Arbitration Centre requires that all data submitted by the parties is to be confidential and such information cannot be disseminated except with the agreement of the parties or by the decision of a competent judicial authority. In addition the parties are free to choose arbitration over litigation, and they are also free to choose E-Arb over conventional arbitration.

5. Serious concerns over the impact of E-Arb upon the traditional heritage and cultural practices:

This proved to be a significant finding in terms of presenting an alternative perspective on the effect of implementing E-Arb upon the social culture.

The fieldwork uncovered a major perspective, which recognised the importance of the Islamic and cultural heritage of the region and it's people. They respondents parlayed their society to be founded upon the virtues of solidarity and camaraderie that was attained via human face- to- face contact in a communal setting over a protracted period of time to resolve differences.

They observed that it would drastically reduce the personalism required to overcome adversity and conflict and had the potential to create an impersonal automated rules based system that would not be able to differentiate between individual cases and circumstances.

As the UAE nationhood is based upon this foundation it is an extremely pertinent finding.

Furthermore it was discovered that a certain segment of policy makers and legalists felt that their established system and culture of arbitration was under threat.

6. Education, Trialling and Evaluation:

The final key finding entails the undertaking of three primary stages before E-Arb can be implemented and promoted as a viable alternative to the current traditional methods of arbitration.

This encompasses:

- A comprehensive education and training package for academics, arbitrators, consumers, traders and the general public. This would allow the potential users of the system to become more informed about the technicalities, the functionality and the operability of the system.
- The system should be trialled over a significant period of time before its fully implemented. The system is tested in both controlled conditions and in a limited format.
- An evaluation of the existing E-Arb systems in place, through a full spectrum analysis that encompasses a full study, evaluation and monitoring of the E-Arb systems that have been implemented globally. Thus specialists in arbitration, cyberspace technology, software engineers, legal specialists, electronic traders alongside business personal and consumerists are actively involved in the process and teams organised that encompass these experts to evaluate these systems and present their findings over a period of time. Furthermore a view provided by the Legal Specialists suggests that current traditional arbitration processes in the UAE also be examined with a feasibility study conducted to decipher the areas required for reformation and the methods by, which the process can slowly transition from the traditional to the electronic.

10.3.2 THE KEY FINDINGS OF THE INTERVIEWS

The key findings derived from the interviews conducted with professional groups in the UAE. The Findings derived from the Semi Structured Interview schedules are categorised in accordance to the responses provided by the four identified groups:

- Academics,
- Legal Specialists,
- Electronic Traders,
- Business and Consumerists,

Key Findings	Discussion of Findings
<p>1. Electronic Arbitration is coming together of actors in dispute over a virtual platform without the barriers of a physical location.</p>	<p>The general consensus derived from the four major groups was that E-Arb entailed the coming together of actors in dispute, over a virtual cyberspace platform without the barriers of a physical location.</p> <p>The respondents from the four groups were unanimous in stating that in principle there was no difference between E-Arb and conventional arbitration. However, they identified the obvious difference of the use of a virtual cyberspace electronic medium to have altered the jurisdiction and methods by which arbitration is both governed and practiced.</p>
<p>2. E- Commerce platform already exists so its viable as infrastructure exists</p>	<p>The responses derived from the four groups were unanimous in identifying the existing e-commerce platform in the UAE to provide an ideal and invaluable platform upon, which E-Arb can be developed.</p>
<p>3. UAE hub for global businesses so ideal opportunity to enhance the services available to them to retain their presence and to attract</p>	<p>This finding can be considered an extension of finding 2 (above). All the respondents from the four groups were</p>

<p>new business</p>	<p>unanimous in observing that due to the existing e-commerce infrastructure and the culture that has developed alongside it, E-Arb should be considered an evolution of e-commerce. The implications of this for the UAE are that its already thriving e-commerce market has the potential for further growth and opportunity to become a market leader. This means that global businesses with a presence in the UAE will further operations in the nation and new businesses may become attracted to establish a presence in the UAE as a major global hub. Furthermore as the e-commerce market evolves to encompass major e-services such as E-Arb it gives the UAE an edge over other competing global cities, hubs and nations for commercial transactions, which may encompass third parties not based nor currently trading in the UAE to utilise the UAE for its arbitration and e-commerce trading activities.</p>
<p>4. UAE as a signatory to New York Convention already demonstrates its ability to adhere to international standards and has a track record. Furthermore the religious, historical and social culture of UAE inherently imbues the practices stipulated by the international conventions and so there is no conflict between national and international policies.</p>	<p>Although all the respondents from all the groups identified this key finding, their perspectives on delineating the point differed.</p> <ul style="list-style-type: none"> • The ‘Academics’ in the main were very methodical and sought to explicate the finer details of the New York convention of Arbitration and explained how there were certain contentions in the clause such as the physical writing of contracts and clauses prior to arbitration etc.... which were subject to much controversy and required greater attention to detail and resolution. • The Legal Specialists were also in agreement and sought to describe

	<p>in detail the major and minor clauses as per the academics.</p> <ul style="list-style-type: none"> • The Electronic Traders however although acknowledging the minor contentions did not perceive it as a problem and merely sought to translate the understanding of the early convention to the modern day and actually criticised the legalist and academic perspectives for causing delays and unnecessary shenanigans by nit-picking at details, which were relatively easy to understand. • The Business/ Consumerists were less aware of the technicalities of the conventions but demonstrated a general awareness and were generally in agreement with the Electronic traders in that they perceived no real problems other minor details, which authorities had used to wrest the development of the e-commerce and E-Arb market. • However, all the groups were in unison in identifying their own heritage through culture and religion to have already encompassed the requirements of the convention. The fact that all stipulations were to be stated before commencing a business and trade transactions were requirements mandated by the Noble Quran and commanded by Prophet Muhammad (s) himself. Plus this had been the tradition of the Arabs in the Gulf and Al-Jazeera region for centuries.
<p>5. However serious concern over the effect it would have on the human relationships that are established from personal physical contact.</p>	<p>Although this key finding was derived from the responses from all the participants in the four groups, the intensity and pertinence given to the argument varied with each</p>

<p>Plus its affect upon the social culture that entails a coming together of people a personal service with all players present and for little room for misunderstanding. Electronic arbitration appears to be too impersonal</p>	<p>group.</p> <ul style="list-style-type: none"> • Academics: In general the information derived from this group presented a balanced yet nuanced perspective. They recognised the importance of the Islamic and cultural heritage of the region and it's people. They observed that the fabric of their society was founded upon the importance given to the notion of solidarity and camaraderie that was attained via human face- to-face contact. This entailed having meals, drinking tea etc. ... Together in a communal setting over a protracted period of time to resolve differences, come to agreements and make or renew tribal alliances. The entire UAE nationhood is based upon this foundation. • Legal specialists: This was the most vociferous group in terms of intensity. They highlighted the negative effects of E-Arb by arguing in essentially the same vain as the academics but also elaborating upon the fact that an established system and culture of arbitration that they were a part of was also under threat. Although they acknowledged that they would also have to adapt and although they would do that successfully, they questioned the true value of this technology. They observed that it would erode the personalism required to overcome adversity and conflict and had the potential to create an authoritarian rules based system that would not be able to differentiate between individual cases and circumstances.
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	<ul style="list-style-type: none"> • Electronic Traders: Although this group also noted the negative points highlighted by the previous two groups, they were more open to the change and welcomed it. They cited the traditional methods and practices to have been successful and to have contributed to the development of the nation and this very existence. However, as with the adoption of e-commerce to conduct business transactions, arbitration would also have to adapt to the new methods in order for the UAE to maintain its advantage in the market place. • Business/Consumerist: The perspective of this group was similar to the Electronic Traders and recognised the threat posed to the cultural heritage of the nation and its traditional practices. However, they cited that as with commerce and trade adopting new technologies to maintain a market advantage, arbitration would also have to do the same and they sooner that occurred the better it would be both for their business and their populace whom would learn to utilize the system more efficiently before the competition in other parts of the world.
<p>6. Suggestions for future are that education and better understanding of the system are required through trials of the system and to analyse how system has fared so far in other places where its been implemented.</p>	<p>In the main the responses garnered from the four groups were similar and suggested:</p> <ul style="list-style-type: none"> • Education Program: A comprehensive education and training package for academics, arbitrators, consumers, traders and the general public. This would allow the potential users of the system to become more informed about the technicalities, the

	<p>functionality and the operability of the system. Furthermore it would eliminate any ignorance or misgivings associated with the adoption of E-Arb.</p> <ul style="list-style-type: none"> • Trialling: The proposition presented suggests that the system should be trialled over a significant period of time before its fully implemented. Here the system is tested in both controlled conditions and in limited format. A full systems analysis is conducted, which effectively monitors and analyses the system to provide continuous feedback. The relevant changes to enhance the system can therefore be made and updated versions of the system can be systematically rolled into operation under trial conditions, until it has reached a level of maturity deemed to be suitable for public implementation and use. • An evaluation of the E-Arb systems in place elsewhere. This entails a full study, evaluation and monitoring of the E-Arb systems that have been implemented globally. Thus specialists in arbitration, cyberspace technology, software engineers, legal specialists, electronic traders alongside business personal and consumerists are actively involved in the process and teams organised that encompass these experts to evaluate these systems and present their findings over a period of time. Furthermore a view provided by the Legal Specialists suggests that current traditional arbitration processes in the UAE also be examined with a feasibility study conducted to decipher the areas
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	required for reformation and the methods by, which the process can slowly transition from the traditional to the electronic.
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10.4 Barriers to the Implementation of Electronic Arbitration in the UAE

It can be argued that although the arbitration process in the UAE has been developed and evolved to a much greater standard than the other Middle Eastern and Gulf States, there are however still a number of barriers to the implementation of E-Arb in the UAE:

1. E-Arb has still not acquired the credibility and popularity to become a significant method by which e-commerce disputes are resolved.
2. Legislative procedures in the UAE have yet not matured to the level whereby they can adequately take account of the growth and development in the e-commerce market and its supporting infrastructure and technology.
3. There still exist many trust issues in the UAE that are directly associated with the veracity and confidentiality of data transfer and exchange in the e-commerce process.
4. There still One of the most important obstacles in the use of e-commerce from the consumer side which is the difficulty with identifying the source of the products and to determine the product are as advertised in terms of quality, compatibility or adequacy for its intended use.
5. A significant concern uncovered during the fieldwork relates to the effect of E-Arb on the human relationships that are established from personal physical interactions. This is an overarching perspective, which suggests that the overt move towards electronic trading and arbitration will cause and inevitable erosion of the native social culture. Critics argue that their society has been founded upon the collaboration of people through a collective process that eventually becomes an occasion to be

celebrated. Here the mutual meeting of disputing parties alongside the respected elders and third parties act as arbitrators and mediators in resolving conflicts and thus erodes the possibilities for misunderstanding and suspicion. The respondents to the field study although acknowledging the benefits of E-Arb thus observe that it is too impersonal when dealing with such sensitive issues as major civil and trade disputes.

10.5 Recommendations

The recommendations presented by this thesis are specifically formulated to overcome the existing barriers and to activate the process of e-arbitration for e-commerce in the United Arab Emirates (UAE).

1. Given the paucity of literature and data regarding E-Arb in the UAE, the researcher recommends that more research be conducted into this field for the benefit of parties to arbitration, arbitrators, judicial authorities and other interested parties.
2. The requirement for the drafting and eventual implementation of regulation, which is competent and rigorous enough to meet international convention standards on E-Arb, much in the same way as the Convention on International Commercial Arbitration.
3. The UAE has to provide the necessary infrastructure for the e-commerce boom along with liberalisation of the telecommunications sector.
4. The UAE has to incorporate the e-signature on all commercial agreements in line with public policy so as to activate e-commerce in the country.
5. The legislation of provisions, which regulate E-Arb in the UAE, is too similar to what has been enacted for conventional arbitration in the UAE. As a result, the legislation has to be updated to keep in line with modern technological developments, particularly in regards to online virtual technology

6. The importance of implementing provisions, which mandate the authority of the arbitral award through official public policy. This will legitimise the arbitral award and prohibit actors from ignoring its authority and primacy in accordance to binding legislative actions.
7. The contents of the Draft UAE Arbitration Law need to be enhanced, in terms of its vocabulary and its numerous important features, such as facilitation of the implementation of arbitral provisions.
8. The need for channels of communication with arbitration centres in neighbouring countries. This will not only build international relationships but also provide E-Arb with International credibility through the sharing of experiences and useful working practices.
9. There is a requirement for the dissemination and active production of educational material and training based upon the digital culture within a broad plethora of UAE society. This will aid the development of knowledge and awareness amongst the general and professional populace and inevitably establish the credibility for the utilization of E-Arb as a dispute resolution method.

Furthermore seminars and conferences need to be held on the development of E-Arb in the UAE as well as understanding of the obstacles facings its implementation. This is along with offering proposals and solutions to these barriers. The purpose of these conferences is not only to provide greater information but also establish specialised committees that are able to focus specifically on all aspects of E-Arb development in the UAE.

As a result, the researcher recommends the formation of a working committee including individuals from the Ministry of Economics, the International Centre for

Reconciliation and Arbitration and the Institute of Training and Judicial Studies. This is in order to take on board any other proposals for a draft UAE arbitration law.

The study has a number of implications for theory, policy, practice and research:

10.6 Policy Implications

Over the last fifteen years there has been a progressive and modernising drive to enhance arbitration in the UAE. The UAE has made significant efforts to amend and modernise its arbitration legislature, which recognises that arbitration is itself an effective dispute resolution procedure that should be given the utmost acknowledgement in the country.

The evidence of this study suggests that the absence of specific codified legislature for electronic arbitration for e-commerce in the UAE was perceived to be a hindrance to e-commerce development in the country. Even though there has been an e-commerce boom in the UAE, there has been little reflection of this within UAE legislature.

Singh (2014) argues that e-commerce in the UAE is expected to reach \$10 billion by 2018. E-retail in the UAE is increasing as can be witnessed from the UAE's status as one of the five foremost countries for purchasing power of luxury goods, accessories and clothing (Smith, 2004; Ahmed, 2013). Consumers also shop Online, spending around \$480 per annum, with 30% of users making purchases via their smartphones (Rajeskar and Marickar, 2014). UAE is the Gulf's biggest shopping and trade centre with retail revenues in 2011 at \$51 billion and expected to double by 2020. Throughout 2012 Internet retailing in the UAE developed rapidly and sales in 2013 were 19% up from 2012.

The data suggests that with a growing e-commerce sector there will be increased cases of disputes. Therefore the findings of this study suggest the need for an electronic dispute resolution process that takes account of this trend towards electronic commerce, trade and eventually dispute resolution. The exponential expansion of the e-commerce market justifies

the UAE's ambitions to become a fertile territory for the development of an electronic trading culture. Hence an increasing number of policy makers and e-commerce entrepreneurs perceive themselves to be pioneers in seeking to provide and facilitate the services of electronic arbitration in the UAE.

Another implication of the study is regarding the impact of current legislature on electronic arbitration.

For example Dubai passed legislation (Law No.2) in 2002 to regulate electronic transactions and commerce, which was further supported by the Federal Government of the UAE's legislation in 2006 on (Law. No.1) Electronic Transactions and Commerce. However, despite these demonstrations of commitment to legislation the UAE has never implemented these policies and lacks the ability to support these policies. The laws themselves are underdeveloped in areas concerning the public policy on the development of electronic arbitration and the technological systems and apparatus required to support it.

The perspectives of the professionals interviewed for the field study suggest that although the UAE is open to electronic arbitration, the notion of the 'e-award' demonstrates the inadequacy of the policies in place. As even though in theory, the UAE can explore the notion of the e-award due to the UAE being a signatory to the New York Convention, and the notion of the floating award is addressed in Article 7, it may cause problems due to UAE public policy and the enforcement of such awards.

The UAE courts have largely taken a rather formalistic line in their examination of awards in order for them to comply with the mandatory requirements of the CPC and assessment of the grounds of annulment under article 216 of the CPC. The enforcement of foreign arbitral awards has been common in the UAE since the ratification of the 1958 New York Convention yet this has been after a fair degree of difficulty. Moreover, the lower courts in the UAE often apply the pre-Convention enforcement regulations. Furthermore, arbitral

awards, which have been annulled in their countries of origin, are unlikely to be enforced in the UAE.

However, as the NYC recognises electronic procedures with arbitration the e-award can be easily incorporated into current UAE legislation. Moreover, in the UAE there have been recent examples in both Dubai and Fujairah wherein courts have favoured arbitral enforcement and disregarded minor technicalities as required by the UAE CPC. This provides a positive future for the recognition of E-Arb awards in the UAE.

The legal professionals interviewed as part of this field study stated that E-Arb has a legal basis within the UAE¹ and that there are no risks associated with E-Arb implementation in the UAE, as it is essentially the same as conventional arbitration² and that the infrastructure for E-Arb is already present in the UAE.³

As a result, this study seeks to assist the UAE government and its policy maker's in deriving a succinct comprehension of the growing relevance of electronic arbitration and to develop legislature that will work in tandem with the growing e-commerce market.

10.7 Research Limitations

The limitations experienced and realised with this study can be categorically listed as follows:

1. The present study was focused upon the specific geographical locale and context of the UAE in the Al Jazeera Gulf region. As a result, it will be difficult to generalise the finding to other regions, contexts and milieus, as the study is context-specific.

¹Interview with Dr. Al-Wāthiq 'Attā Al-Manān, Professor of commercial Law, October 2015.

²Interview with Dr. Imād AbūSadd, professor of law, former head of Department, September 2015.

³Interview with Dr. Abdullāh al-Khateeb, Professor of commercial Law at the UAE University, October 2015.

2. There was inadequate contact initiated with some of the larger arbitration centres in Dubai such as the DIAC and the DIFC-LCIA. It would have been highly useful to gauge the perceptions from these centres in regards to electronic arbitration.
3. The existing practice of E-Arb by e-commerce enterprises and businesses in the UAE was not explored in any depth.
4. As the data collection involved semi-structured interviews, largely face-to-face, data was subject to a degree of recall bias. The possible incorporation of a mixed methods approach could have mitigated this limitation.
5. Non-response bias was also a limitation in the qualitative stage of the study and even though efforts were made to maximise responses, it was sometimes low. In the UAE context, potential participants might consider it rude to give a blatant refusal or they may feel as though they were letting the researcher down by refusing to participate. Thus, they will use euphemisms to indicate their lack of time, busy schedules or preoccupation with other affairs.

10.8 Research Implications

The conclusions of this research, and the limitations of this particular study, suggest some possible areas for future research:

1. Further studies into E-Arb in the UAE, which incorporate detailed case studies of arbitral institutions in the UAE and major e-commerce enterprises. Moreover, a variety of methods can be utilised to study the field, quantitative as well as qualitative. Quantitative studies could look at the number of consumers who would consider using electronic arbitration, numbers of arbitrators in the UAE who consider electronic arbitration as relevant in the country and e-enterprises and businesses who would

benefit from electronic arbitration. Thus ‘mixed research’ based methods could also be utilised to gain a deeper in depth understanding of the issue.

2. Further studies and interviews with arbitrators and employees based in Dubai at the DIAC and the DFIC-LCIA.
3. Interviews with policy-makers in order to gauge their reflections on electronic arbitration in the UAE.

10.9 Final Reflections

The UAE has a thriving economy that benefits immensely from a diverse number of sectors such as energy, tourism, finance, construction, property, health and communications.

Furthermore, the UAE possesses a legal structure and system, which takes into account modern electronic developments such as ‘e-writing’ and the ‘e-signature’. These are used when online agreements are contracted amongst parties that could potentially be based in cities across the globe. Any disputes emerging from these electronic transactions, will encourage consumers to also seek electronic resolution.

For this reason, the researcher recommends that the arbitration centres and tribunals of the UAE (such as the major arbitration centres in Dubai and Abu Dhabi) work to establish E-Arb regulations along the same lines as the regulations for conventional arbitration centres in the European Union, the US and Canada.

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APPENDIX 1 – TABLE OF ARTICLES

Table of Articles designed for consumer protection in the UAE

CPC Article Number	Description of Article (Translated by Whelan and Hall, 1987)
Article 543	<p>(1) A sale shall be deemed to be concluded on the basis that the goods sold are free of any defects, save such as are within the customary tolerance.</p> <p>(2) The general rules relating to the option for defects shall apply to the contract of sale, subject to the provisions of the following Articles. If any defect becomes apparent in the object being sold then the purchaser has the choice to either return it or accept it for a price.</p>
Article 544	<p>(1) If an old (pre-existing) defect appears in the goods sold, the purchaser shall have the option as he wishes either to return the goods or to accept them at the stipulated price, but he may not keep them and claim for any reduction in value caused by the defect.</p> <p>(2) The defect shall be deemed to be old if it was present in the goods sold prior to the sale, or if it arises thereafter while the goods are still in the hands of the seller prior to delivery.</p> <p>(3) A new defect (which arises while the goods are) with the purchaser shall be regarded as an old defect if it is attributable to an old cause which</p>

	<p>existed in the goods when they were still with the seller.</p> <p>(4) For a defect to be regarded as old it must have been latent, and a latent defect is one which cannot be observed by an external inspection of the goods, or which would not be apparent to the ordinary man, or which could not be discovered by any person other than an expert, or which would only be apparent upon testing.</p>
Article 546	<p>If the seller behaves with the goods as if he owns them, after becoming aware of the old defect, his choice shall be dropped.</p>
Article 547	<p>If goods with an old defect are lost in the hands of the purchaser, or if he consumes them prior to his knowledge of the defect, he shall have a right of recourse against the seller for any reduction in the value caused by the defect.</p>
Article 548	<p>(1) If a new defect arises in the goods in the hands of purchaser, he may not return them on the grounds of an old defect, but he shall be restricted to a claim against the seller for the reduction in price, unless the seller agrees to take the goods back with the new defect.</p>

	<p>(2) If the new defect is removed, the purchaser shall again have a right to return the goods to the seller on the grounds of the old defect.</p>
<p>Article 549</p>	<p>(1) If an addition is made to the property sold which prevents its being returned, and an old defect in it subsequently becomes apparent to the purchaser, he shall have a right of recourse against the seller for the reduction in the value caused by the defect, but the seller shall not have the right to recover the property sold.</p> <p>(2) An addition preventing return is any object from the property of the purchaser, which becomes joined with the property sold.</p>
<p>Article 550</p>	<p>(1) If several things are sold under one agreement and a defect appears in part of them prior to delivery, the purchaser shall have the option either to accept them at the stipulated price, or to return the whole of them.</p> <p>(2) If several things are sold under one agreement and an old defect becomes apparent in part of them after delivery, and no loss would be caused by dividing them, the purchaser may return the defective part for an appropriate portion of the price, but he may not return the whole of the goods without the consent of the seller, but if loss would be caused by dividing them, he may either return the whole of the goods or accept them at the full price.</p>

<p style="text-align: center;">Article 551</p>	<p>(1) If the property sold has a defect whereby it may be returned, and the purchaser has created a third party right prior to his knowledge of the defect, but the property still remains within his ownership, he may return it to the seller with that defect free of such third party right if the property has not been altered during that period.</p> <p>(2) If the purchaser creates a third party right after becoming aware of the defect, he shall lose his right to return the goods, and if the property has been altered it shall be treated as a new alteration to property with an old defect.</p>
<p style="text-align: center;">Article 552</p>	<p>The right of the purchaser to return the property on the grounds of a defect shall not be dropped due to a change in the value.</p>
<p style="text-align: center;">Article 554</p>	<p>Liability for property returned on the grounds of a defect shall pass from the purchaser to the seller as soon as the seller agrees to take it back from the purchaser notwithstanding that he has not in fact taken it back, or immediately upon proof in a court of law of the defect in the property sold giving a right to return the same, notwithstanding that there is no order that it be returned, in the event that the seller is present, and if he is absent the liability shall only pass to him upon the issue of a judgment for the return of the property.</p>

Article 555

(1) A claim of liability for a defect shall become time barred upon the expiration of six months from receipt of the property unless the seller has undertaken to be responsible for a longer period.

(2) The seller may not rely on that time limit if it is approved that the concealment of the defect was by a fraud on his part.

APPENDIX 2

TEMPLATE FOR CONSENT AND FORMAL ACCEPTANCE BY INDIVIDUALS FOR POTENTIAL PARTICIPATION IN THE SEMI STRUCTURED INTERVIEW PROCESS

2.1 TEMPLATE FOR CONSENT TO INTERVIEW

Dear...

Firstly I would like to begin by thanking you for your interest in my research upon the role of E-Arbitration in the UAE.

In response to your interest I would like to ask you whether you would be willing to be interviewed by me for the purpose of helping me explore the role, impact and procedural viability of E-Arb in the UAE.

The interview would consist of a one to two hour sessions at a place and time suitable for you, and the information you provide will only be available for me to use.

As a potential interviewee in my research I will treat your presence, and whatever you say, with the strictest anonymity and confidentiality. I also wish to assure you that you are absolutely free to withdraw consent and to discontinue participation in the research investigation at any point without prejudice.

Should you have any questions regarding the nature, purpose and procedure of the

Interviews then please do not hesitate to ask me.

Regards

MOHAMMED AL HAMED

APPENDIX 2 (CONT...)

TEMPLATE FOR CONSENT AND FORMAL ACCEPTANCE BY INDIVIDUALS FOR POTENTIAL PARTICIPATION IN THE SEMI STRUCTURED INTERVIEW PROCESS

2.2 EXAMPLE OF FORMAL ACCEPTANCE FOR CONSENT TO INTERVIEW

Dear Muhammad,

In reply to your request for the use of my information for your thesis, I would like to give you permission to use our interview discussion provided that my name and my institution is not mentioned by name.

Regards

APPENDIX 3 – INTERVIEWS

This appendix presents the full transcript of the Semi Structured Interviews conducted with ten participants from the UAE.

Appendix 3 presents the list of the ten interviewees followed by the questions listed in the English language and then the Arabic language script. This is then followed by the ten interviews.

APPENDIX 3.1 – INTERVIEWS TRANSCRIPTIONS

Ten interviews were conducted:

- ❖ 3 with Academics,
- ❖ 3 with Legal Specialists & arbitrators,
- ❖ 2 with Specialists in Electronic Traders,
- ❖ 2 with Business and Consumerists,

The questions are as follows:

Q1: What is the difference between E-Arb and conventional arbitration?

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

Q4: What are the barriers to its implementation? What are the risks, if any?

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

Q6: What are your suggestions and recommendations?

The same questions (as above in English) in the Arabic language and script:

أسئلة المقابلات :

- 1- ماهو الفرق بين التحكيم التقليدي والتحكيم الإلكتروني ؟
- 2- هل تعتقد أن تطبيق التحكيم الإلكتروني سوف يساهم في تطوير نظام التحكيم في دولة الإمارات ؟
- 3- ما هي العلاقة بين التحكيم الإلكتروني والتجارة الإلكترونية ، وما هي الفوائد المحتملة للتجارة الإلكترونية في حال تطبيق أو تنفيذ التحكيم الإلكتروني في دولة الإمارات ؟
- 4- ما هي العقبات أو الحواجز التي تمنع تطبيق أو تنفيذ التحكيم الإلكتروني في دولة الإمارات ، وما هي المخاطر التي سوف تنتج عن هذا التطبيق أيضا إن وجدت ؟
- 5- في نظركم ما هو مدى اعتماد وتنفيذ أحكام التحكيم الإلكتروني الأجنبية في دولة الإمارات بإعتبار أن دولة الإمارات عضو في إتفاقية نيويورك للتحكيم ؟
- 6- ما هي إقتراحاتكم وتوصياتكم ؟

Here the researcher will now relay the transcripts of the ten interviews conducted:

Interview no.1

Name: **Dr. Al-Wāthiq 'Attā Al-Manān**

Position: **Professor of Commercial Law**

Date of Interview: **25/10/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: So the rise of this new phenomenon called electronic arbitration or online arbitration is what is called an 'Alternative Dispute Resolution method'... ADR and what you can say exactly to be an Online Dispute Resolution technique (ODR).

So instead of a normal situation where you have the two parties sitting face to face in a physical location and having the evidence usually in the form of documentation and other paperwork's in front of them and with a judge or some person who is going to act as the arbitrator... instead... the electronic arbitration process means that although there is an arbitration panel, which has been appointed and given authority to conduct the process, the entire matter is done virtually using the Internet. So the parties and the panel of arbitrators or arbitrator do not have to be in the same physical location.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: Look first and foremost you have to remember that the culture of the Gulf and UAE is centred upon Islam and then our own asabiyyah, so we prefer that people should be meeting and then doing business and of course resolving their differences. But things are changing fast and we in the UAE have only been able to be so successful because we have kept up with

the modern changes. OK not everything is so good but you must recognise what is required when and where. So now we have so much business here from the outside... the information and communication technology is central for us to trade and operate. This means from our view that electronic arbitration is an essential tool.

So the electronic arbitration as an ODR means that each party submits evidence to the arbitrator by some form of communication means such as e-mail, completing an online application on virtual platforms and then the arbitrator decides the final result...

So with the fast pace of International Trade electronic arbitration is a good tool for us here in the UAE in resolving the growing number of international disputes in a confidential, non-judicial but legally enforced manner, which means we stay on course and even ahead of our competitors not only in the region but globally.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: The move to what is called the paperless world and the growth of E-commerce in creating this globalization of trade has led to disputes and arguments, which some great thinkers on this matter say, "Conflicts arising online should be resolved online". So if we talk about the e-commerce as given that is already in place and the merits and negatives are already discussed everywhere, here we can argue that as its now in place then we must also have a system that resolves the issues and problems arising from it... the benefits then include cost effectiveness because of the quick processing of disputes, the reduced costs, and the sharing and minor operating costs by the parties...

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: Again I will say that you need to remember that our heritage and culture is one which is based upon human-to-human relations and that will suffer. I am in no doubt about that because we cannot just think that by clicking buttons we are going to have the same effect upon our human compassion and reason. It's a very cold way of doing things but at the same time it's a reality because we have so much e-commerce now it has to be brought into play. Furthermore, I think personally that it will undermine the state and national courts that usually deal with these things. This is because when the parties agree electronically to an arbitral clause, the UAE agents cannot bring the cases before a court in the UAE. So there are a lot of consequences that we have to address.

At the same time this does not mean that we completely reject this because it's a challenge to us... instead we embrace it by adapting it to suit our culture and heritage.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: Here there are a number of issues that we can address relating to this convention but it's a huge topic in itself and I am not sure we can discuss this in too much detail. However I will address what I think is the crucial aspect on this issue and that relates to the point that international arbitration agreements are more and more conducted through electronic transmission instead of traditional written forms.

The New York Convention of 1958 was established before the age of e-commerce, the Internet etc.... and so its language is referring to the medium that has been relied upon for thousands of years, writing. So yes there is an argument that questions the validity of E-arbitration agreements conducted by e-mail or on online platforms under the NY Convention rules but I all I will say is that the article 2(1) stating that all contracts should be agreed in

writing is the same as The Quran's commandment that all transactions between two parties must be committed to writing and before a credible witness and that came 1400 years before the New York convention... does that mean that we cannot read The Quran through an electronic device? No it means the writing part that all conditions and stipulations are put into place before the deal or arbitration is to take place.

So I don't think its really a foreign policy or law but one that is balanced with our heritage and faith.

Q6: What are your suggestions and recommendations?

A6: From my perspective I would say that education is the key to implementing the electronic arbitration, as was the same with e-commerce. We must understand what this is and what impact it will have upon our ability to make decisions and resolve them. Ok at the moment we are talking about arbitration at an international level involving big businesses etc..... but in time as with e-commerce it will come into the home and then be part of our lives. Can you dispute a road ticket fine, a case with a consumer and a business both big and small? The point is we need to really understand what this means in terms of taking the legal process away from the courts and into effectively the hands of society. As an Islamic country how does this effect our implementation of the Sharia and how we can create the harmony? How can we establish the laws and policies that will be in harmony with the Sharia and the process of Shura and not just allow ourselves to be dictated to by foreign governments and their liberal or non Islamic rules and regulations. So I say education for all people in government, business, universities and the general public in the UAE is very important before we embrace this completely but one thing is for sure we will have to sooner or later accept that it is here and we have to adopt it but on our own terms.

Interview no.2

Name: **Dr. Abdullāhal-Khateeb**

Position: **Professor of Commercial Law at the UAE University**

Date of Interview: **15/10/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: E-Arb is the arbitration process for the 21st century. It is conducted via modern technology, arbitration sessions are held over video conferencing, the disputing parties do not have to be in the same physical location or space and the speed at which things are done increases as there are already predefined rules and regulations set into place that ensure that human factors such as time keeping, emotional appeals and other diversionary factors are negated. So although this is an electronic method in that it occurs in a virtual space there has been a great deal of thought and debate with regards to what aspects of the process can effectively be conducted over the virtual networks? In the UAE we are still discussing whether issues such as the agreement, tribunal, submission of evidence and issuance of the arbitral award should all be conducted over the Internet or can some aspects of it be electronic and others done physically or even through an agreed third party mediators. However, the point is we are moving towards eliminating the physical requirements, the number of people involved and although it has not replaced the conventional arbitration process it seems, as we are moving towards that stage.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: In many respects the implementation of E-Arb will have many positive and negative effects upon the arbitration system in the UAE. If we focus on the positives then it can be

states that with the growth of e-commerce and the regulations that we have established around those in the UAE can also be utilised for E-Arb. So there exists an infrastructure for E-Arb that is easily transferable. The business community is also very familiar with how modern day technology works and so it's not a new conception that people have to learn how to use. The process exists and people are actually using it so it's not a new idea so to speak. Furthermore we can see that Dubai, Abu Dhabi and Sharjah are already leading zones for business and they have a completely modern infrastructure as good as any in the world. This means that by adopting these technologies and processes we can as a nation really compete and stay ahead of the world and in fact I would say be a model for development. So its good for us in terms of innovation and it will also help us up date our old practices which may or may not be compatible with the emerging technological world that we are very much a part of.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: There is an obvious link and relationship between the two. I would go further and state that one without the other may not work if e-commerce completely dominates our modes of practice and operations. As I said before the e-commerce infrastructure is the prerequisite for E-Arb and in the UAE we already have that. It's really a symbiotic relationship and one that allows both parties in the market place an equal platform to resolve their disputes. In the past we have cases where one party due to some links and connections could control to an extent the proceedings in the courts but now the arbiters are completely neutral and a fair assessment on their behalf increase their credibility in the global virtual online world, as they are more open to scrutiny. Also the conditions and terms of the arbitration process are

completely defined beforehand so everyone is on a level playing field. In the long term this will definitely allow the UAE to become a major example to the nations in the region and become a leading player and ideal place of operation for global firms.

Q4: What are the barriers to its implementation? What are the risks, if any?

A: The common point noted by my colleagues and respected scholars is that we in this region are very much based upon our social interactions and much of the disputes that arise are resolved by our ability to sit down over a meal and to come to an agreement. A process such as this does in many people's eyes threaten our way of life and culture. So a major barrier I would say is the attitude of the general populace but our leaders have proven that they are very enlightened and have managed to maintain a healthy balance between the modern day world and our traditional heritage, culture and faith. The risk therefore of it eroding our lifestyles and culture is a possibility but so was the threat when e-commerce came in and now this is more of an aspect of e-commerce it is an inevitability that we must either use or adopt to fit in with our lives. The only thing I can say is that our policy makers must ensure that we are not swept into accepting and mandating such policies that contradict our faith and cultural values, otherwise if the process may work in principle but may not be enforceable legally on the ground as it won't carry favour with key decision makers and thus become something that works maybe on the macro level but hard to enforce on the micro.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: From a personal perspective I do not see any contradictions between what has been stated in the New York Convention and what we believe to have come from The Quran. The idea is to commit to writing all predefined arrangements before conducting any business or

social transaction. This is an established practice here in the UAE and we would argue that this practice has been here long before the western world developed its policies. So in reality there are no problems because we conduct our business in such a fashion anyway. Just because we are now doing this electronically does not change anything.

Q6: What are your suggestions and recommendations?

A6: I would recommend that the process is embraced and made available as soon as possible so that we can actually learn from it and develop it. The idea is that from practice one learns far more than merely theorising or speculating about it. We have already implemented e-commerce on a grand scale and this merely an add-on to that system. Of course we need to iron out many legislative and accountability issues and this will take time because we must consider the place of Sharia and its impact upon making decisions without the physical presence of parties. We need to therefore have a period of several years where it's tested in a limited capacity and learn from that. From a legislative and policy perspective we need to start to examine how the established arbitration laws are working and how they may have to be either modified or new processes brought into play and their potential impact. Lastly though we need a broad perspective from a variety of players across society to establish their current understanding of it and either encourage the correct approaches or dispel any obviously negative and erroneous views.

Interview no.3

Name: **Dr. Imād Abu Sadd**

Position: **Professor of Law, Former Head of Department**

Date of Interview: **09/09/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: Speaking broadly and in principle there is no substantive difference between conventional arbitration and E-Arb. However, the major points to note when trying to understand the difference between the electronic and the traditional is that electronic commerce operations are based on contracts concluded electronically between “absent” co-contractors (so they are not physically present). When this has been concluded, the contract must be executed electronically and so takes a bit longer, as you have to deal with the software systems, the databases and then submitting the necessary information. Whilst in a situation where you are face to face everything can be done directly and questions that’s need to be addressed can be done there. So in principle yes it’s the same idea but in practice there are differences as the way it is conducted is not in a direct human-human relationship.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: Although UAE has not yet implemented E-Arbitration as a matter of official policy; the past experience with e-commerce suggests that the Emirati culture is open to swift changes and technical developments. The Emirati consumer it can be argued feels fairly comfortable in using soft copy documents and electronic communication devices, although face-to-face transactions are preferred and part of our heritage, the nation has adapted to modern technology rather well. So although we can identify many barriers and risks associated with

this form of arbitration such as the threats posed to the state courts, the loss of actual human face to face contact and our cultural practices in resolving such issues... the opportunities it presents us will allow us to enhance our business and trade experiences and make our region and state extremely attractive to global businesses...this can only enhance the nation and bring greater investment and knowledge... thus in the future this will help us becoming a leading state that is not only known for its production of oil or tourism but a leading player in the financial and services industry.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: There is a significant connection and as said before I think it's obvious that E-Arb is not possible without e-commerce simply due to the infrastructure, the policies in place and the culture it has generated... Due to this its obvious that E-Arb will be a natural evolution of the system and people especially in the business community will find it a useful and time efficient tool. It will also bring down the costs they face with traditional arbitration and it crosses barriers such as language and individual attitudes that could exist in one place and not the other. So I think e-commerce and E-Arb are really one and the same thing from a big grand perspective. Of course there will be many technical issues such laws and policies of the UAE that must be addressed but as whole it is compatible and I would say already here.

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: Of course these electronic transactions can and will cause disputes, just like the traditional methods. A customer may find that the other party has not honoured its contract, or that the goods and services promised have not been delivered to the standards required and

promised or that the time taken may have exceeded the one agreed upon etc. ... Also there could be faults with the mechanism in terms of the technology failing during the arbitration process. So there are many technical issues, which will take time but are not significant enough for the project to be deemed unviable. The major contention I see however is simply to do with the human side of things and people will have to take time to getting used to that. However, the past has demonstrated with e-commerce, social media etc. ... That this is a barrier that will be overcome relatively easily with the new generation who are used to doing things electronically and therefore will find it a natural process.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: I am not sure that there exists many issues because all the requirements of the convention state is that we conduct everything in writing before we begin the process of arbitration. In accordance to the Quran and the Sharia this is the policy of the UAE anyway. So there is no major obstacle to be discussed here other than to state there could be issues that are actually present in the conditions before the arbitration begins and this has nothing to do with the convention at all. We are signatories to the convention because it adheres to what already know and agree with in the Quran and the Sharia. This is that all conditions are fully detailed before the process begins and both parties are fully aware of the conditions stated in writing. As I said this is our natural cultural and religious practice and so we see this as a positive aspect of the system to create the credibility for the users.

Q6: What are your suggestions and recommendations?

A6: I would say that there is need to make sure that the understanding of the process is there... Before marketing the whole thing as a new process there needs to be a policy that makes sure the UAE public understands that the thing is an extension of the e-commerce process. Legally and practically it does create some problems with regards to certain standards and to what extent they are applicable. So this is an area that has to be looked at but that is the case with all new technology and with the implementation of social media and e-commerce we have the basic fundamental platform to develop new legislation and policies. So for scholars and policy makers the motivation should be to start conducting feasibility studies alongside designing potential scenarios for the system that can identify its strengths and weaknesses.

Interview no.4

Name: **Yūsuf Al-Matrūshī**

Position: **Deputy Secretary of Dubai Arbitrators**

Date of Interview: **19/08/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: The difference is clearly in the fact that the traditional system involves the parties to be present in a physical location with an arbitrator so that the dispute can be resolved there and then if possible. With the growth of e-commerce and mass electronic communication the possibility for conducting electronic arbitration has also become available. Here the two parties and the arbitrators do not have to be in the same physical location and the process can be done remotely or virtually.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: I think there is a case for electronic arbitration to enhance the process of arbitration in the UAE due to its universality and open approach. It allows for a degree of freedom in the arbitral process we have not witnessed before. So from that perspective it's an attractive prospect for businesses especially because it will be cost and time effective.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: I think it's pretty obvious that the electronic arbitration can only be developed on top of the e-commerce infrastructure and this already exists. So there is clear relationship there and

so there are many benefits to the e-commerce market especially when you can offer electronic arbitration. The electronic market place has exploded so to speak and if it's possible to resolve the inevitable conflicts that will come up then that's only good for the customers and the providers. It gives the e-commerce market more credibility and accountability if it also can resolve a problem that is created within its system.

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: From an arbitrators' perspective there are some obvious barriers that basically involve our culture and religion. The Sharia states that a qualified individual that is knowledgeable in the fiqh must preside over all decisions and judgements made in accordance to the laws of Islam and the process must involve Shura or mutual consultation between parties. With electronic arbitration is this possible, I am not sure because if the arbitrators are not qualified to deal with issues involving Islamic principles even in business then some parties from the UAE or the Gulf and other Islamic nations may not accept the decisions being made by the arbitrators. This is a question of trust and faith, which will take time to overcome. Also the loss of human face-to-face dealings is a huge barrier as our culture is completely based upon that. If we just resort to electronic dealings then we will lose a huge part of our heritage and culture. So I know that a lot of people have reservations about this in the UAE and there is a growing resentment against this policy to just leave everything to technology without thinking of its consequences.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: ...In being a signatory to the New York convention, the UAE is following the international standards and as a major global hub for business and tourism this means that it has the trust of the global population. We are I think naturally very proud of this fact but it must also be remembered that we have been following this type of conventions for a long time. You will find this type of convention in The Quran, Sunnah and the Sharia and I think good practice anyway is universal, although some things are specific to particular nations and we must respect those. So as long as foreign conventions do not seek to impose those conditions that harm our national and religious policies then I think there is no real concern...

Q6: What are your suggestions and recommendations?

A6: ...Firstly we need to take some time to really examine this electronic arbitration process and maybe investigate how it has done so far... when it has been implemented in the other places. I would like to see our government conduct the test run of it before any decision is made on how much of it will be implemented and how much of the arbitration can be done online. Plus we must consult with our courts and senior peoples who are actually in the system and have acted as arbitrators for a long time on their experience and seek their guidance as to what is best and to what extent this can be done.

Secondly I would say that it's a new process but one that is in place because of e-commerce and so we cannot ignore it... So we need to educate our existing arbitrators about the online and e-commerce world and ensure that they are fully involved and understand what is required.

Interview no.5

Name: **Ahmed Rāshed Al-Neyādī**

Position: **Accredited Arbitrator in the UAE**

Date of Interview: **06/08/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: Well with the traditional method you have to have all the different people in the same room or court at the same time... But now with electronic arbitration that is not the case. You can have one party in Dubai or Abu Dhabi and the other in London or New York and the arbitrator in Jeddah or Istanbul. It's really a global way of doing things that means the process is not dependent on physicality or even time.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: I cannot say that it will contribute to the system in place as we have a system that has been developed in accordance to our culture and heritage. This system is basically taking away the control over the arbitration process and placing it into the hands of people who are not specialised or familiar with our policies and customs in the UAE... Yes there are some benefits to the system such as it will allow businesses to reduce their costs in terms of travel and having to be in one place with many members alongside not having to cross time barriers they can log on from their own work places and still be part of the arbitration process. So although we see potential problems with this system it does have its advantages, which are and will be attractive to big businesses both from the UAE and outside.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: The electronic arbitration system is naturally linked to the e-commerce platform. The electronic arbitration depends to some extent upon the e-commerce platform otherwise its own purpose can be questioned. It's the method by which e-commerce disputes can be resolved. However, that may not be the case all the time as other issues may also be conducted electronically that has nothing to do with e-commerce but simply utilise its tools. How this is connected technologically seems obvious but as I am not technically informed I can't describe it... what I can say however is that by offering a service to resolve the disputes that occur online with online tools you provide the users with an easy and direct method to go through the arbitration process. People are only using e-commerce because it's direct, fast and easy and so it will naturally attract them to use this...if it also allows them to do the same.

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: There are always many barriers to anything that is new and especially something, which is going to change the way people are behaving and conducting their business. In this region we have our own way of doing things and it has worked for hundreds if not thousands of years. It's also the basis of our faith and religion, to come together to decide and resolve our differences. Our entire society is built upon that, this very nation is built on the coming together of people who sat down together and decided that the best thing for their collective interest was to come together. But it happened by them coming together in person not over some email or online application. I understand that social media is supposed to be revolutionising the world but is it really bringing us closer in terms of understanding and appreciating...? Just the other day I read that although people now have more friends on

Facebook then in real life they are also very lonely and the rate of depression and suicide is going up. So I am not against this new technology but trust me a lot of traditional people are really questioning what we are doing to our society by just implementing everything that comes along. Ok it has its place and it can work for certain things but I don't think the majority of powerful serious Emirati business people will accept it completely for everything... We still have courts and our traditions... are we just supposed to now abandon them because we have a new app? Although I accept it has a place and can be used but not for every dispute and every arbitration... Because the human judgement on the ground with the people present cannot be beaten and it's the way of our people and it defines our very existence.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: I personally don't see a problem with this, as it does not really contravene any of our own policies or regulations. In fact our Islamic tradition specifically informs us to follow what the New York Convention states in that we should actually create the criteria before commencing the transaction or deal. Also this shows that we as a country are ready and willing to follow the rules and regulations at the international level. However, there are several issues that seem to favour some nations because of their historical power and status but Insh'Allah that is now changing as we ourselves develop and are able to demonstrate our ability to attract some of the best people and companies to our cities. So no I don't think this is a problem and it has never really been a problem for the UAE because it's a normal standard that we expect all civilised people to follow.

Q6: What are your suggestions and recommendations?

A6: I think that you need more information with this electronic arbitration and how it will work and effect the actually arbitration process. The rules for online business and arbitration will naturally be different and so we need to really understand that. Also here in the UAE we have a good infrastructure for social media and information technology so people will use but to what extent is the question and what type of arbitration can take place has to also be decided. I would also like to see how the electronic arbitration has been working in other places and what issues they are having and what they doing to correct the problems they have. This cannot just be brought in as a new way of doing things because it is new and we need to understand its impact on our society and how we do things traditionally.

Interview no.6

Name: **Dr. Abdullāh al-Jad'ān**

Position: **legal specialists & Accredited Arbitrator**

Date of Interview: **10/09/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: The conventional arbitration requires you to have the parties in dispute in the same place and at the same time in the presence of the arbitrator. So this is the old classic method where you have to be in a specific place with the specific people at the specific time to resolve the issue. Now with technology, e-commerce and social media the possibility is there for the disputing parties to be completely in different places and times and to still be in the arbitration process all at the same time. This is the virtual or online method of resolving disputes that allows the people to be involved without having to commit to traveling.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: It will contribute to some aspects of arbitration as the UAE has been developed on its ability to keep up with the modern day world... So many internationalists will want to see the UAE adopt those policies and technologies that keep it abreast of the latest trends. As there are a lot of global companies here in UAE it is important that we can offer them the opportunities that they expect... Of course the benefits will be then that they will be attracted to doing business here in the Emirates and not maybe go to say other places in the Gulf, Hong Kong, Singapore, Europe... So this is a major benefit we will have in retaining and attracting more global players. Of course the service itself will cut a lot of costs and save people the trouble of travelling and arbitration costs...

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: Electronic commerce and electronic arbitration is not the same thing but I would say the electronic arbitration depends on e-commerce for its credibility. If people are using the e-commerce and find it a good system, which they obviously do as its very popular here in the UAE then they will most likely be happy to use electronic arbitration as they trust the electronic technology. It gives them speed and ease of access to what they want without having to deal with a middle- man and this is very attractive to the customer especially here in the UAE. For businesses and governments I think it will also allow them to engage with a wider audience who didn't want to deal with them before due to too many rules and regulations. Now everything is on the Internet and it's very clear what you have to do. So in the main there will a good impact I think because e-commerce is already very popular but at what cost is another question...

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: The number one factor that I can say that will present a problem is that it will challenge the traditional methods and way we already have established in this nation and region. Although we have accepted e-commerce and social technology and use it a lot, we also value our traditions and the place reserved for some important things in our traditions. Arbitration is a historically sensitive yet very important part of our history and culture. It allows people to come together in a single physical location to meet as human beings and to resolve their differences. Over the Internet or virtually does not really fit in with our way of doing things. So I can see it has a place and it should be implemented along with the e-commerce but to what level and degree is a matter of question and debate. I think the attitude of the people will

determine its success and they will accept it but only if they have some degree of control over it. With the way technology is going and how fast it is developing this is a serious issue and I think the obstacle is that its too much to ask us to trust something which has yet to be proven successful over a great period of time.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: I would say that this is not enforcing foreign provisions but the UAE becoming a part of global initiatives that are healthy and good for the nation. The convention is about ensuring that all business is done with the right procedures and that all parties are aware and agree with the conditions before the arbitration begins. So in truth this is a good thing and we have been part of it for a long time because it actually is the same as our own practice in accordance to our religion and what the Quran say about business or any kind of arbitration... Ok I agree... if the conditions ... presented by the foreign body are not in our favour like they contradict our policies and our rules and go against our religion then we have a serious issue and problem... this is what I was saying with the electronic arbitration... in principle it is good but when say two Muslims or even a Muslim is dealing with non-Muslims and you have an arbitrator that is biased against the religion or the people of the region then what you can do? If the arbitrator is not from the UAE and he or she is not familiar with our laws, customs and our religion then how can they decide upon a matter from another part of the world? So maybe we have to ensure the arbitrator for matters of our country are only from the UAE and we not saying that they be favourites for our business or people but they should have the understanding of this culture and practice.

Q6: What are your suggestions and recommendations?

A6: I would say that what is required is more time to do the research and fact-finding on how this system will impact our culture and society. We have an established arbitration process and this must not be undermined by any electronic medium that basically gives the power to make decisions to those people who do not have the right qualification or understanding of the tradition and society of the UAE.

Also I would add that we need to find out if this thing has worked in other places and to test it on a small scale here in the UAE for some time before it can be fully introduced to everyone.

Finally if this is something, which will happen just like the social media, e-commerce and information technology then we should spend some time getting ready for it by educating our people on how this going to work.

Interview no.7

Name: **Noura Nāsser Al-Sāedi**

Position: **Manager of the Islamic Bank of Abu Dhabi Securities**

Date of Interview: **06/09/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: The simple answer is that the traditional method is simply where you have all the disputing parties in the same location and place with the arbitrator there to resolve the issue... With electronic arbitration the disputing parties can be anywhere in the world along with the arbitrator and just like e-commerce, where the customer and the business do not have to be in single physical location to conduct the transaction the disputing parties can also be anywhere but meet on the same platform electronically.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: Naturally I think this will be a great thing and will only enhance our arbitration system... You can see already how our e-commerce infrastructure has grown and been developed due to our open mind and acceptance of the new technology... so we already have the building block or platform on which the electronic arbitration can be developed... The impact of this will be that more global businesses will want to do business with us and we attract more investment into the country as our arbitration practices allow people to feel comfortable due to an open and fair process that is universal and available to them anywhere where they are... Really with this we are going to can make the business of business much more easy and I think this can only be a good thing.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: Ok we need to make a slight distinction that electronic commerce is really the business end whilst electronic arbitration is what may have to come at the end if the business does not go so well... However, I would also say that electronic arbitration could only really occur if the e-commerce market is fully operational because then people will have the trust to utilise it... We have that situation here in the UAE and so it can be seen that they go hand in hand and people are attracted by the speed, the efficiency and the control they have over the entire process... In the old days you had to rely so much on many bodies and people who may or may not help your cause and the process was not easy for everyone to understand but now with everything available on-line I can say its very easy and as people are so familiar with the e-commerce process this will be easy and ideal and I think inevitable...

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: The obvious barriers that we can foresee are related to the traditional methods and of course those who may want to retain such a practice. So I would say the attitude of the people will be very important. We already have an established e-commerce market so the trust is there and that should not be a problem... so the only real issue I see as I said is the attitudes and the knowledge about this way of working... The risks are of course related to it not working and people not really trusting what we are doing but as I said this has not been the case in the past and I don't see why it should be any different in this case.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: I think that as part of a global society and especially as a major business hub we are going to be subjected to these international agreements. So far we have not had any issues

and the New York Convention on Arbitration you mention has not really had any negative impact upon our own public policy... if anything it has merely confirmed and attempted to enforce what we do anyhow naturally as a cultural practice. Of course any provisions that seek to take control over our markets and business are not ideal and we would not really welcome those but operating globally we need to have universal standards that are acceptable to all and our government has been very good at ensuring that we have a level playing field to play on... so I am not too concerned to be honest with you... ours is a growing sector and it requires regulation to an extent but one that we are comfortable with and in line with our natural cultural practices and identity...

Q6: What are your suggestions and recommendations?

A6: I think what is required is greater awareness about what electronic arbitration is and how it will benefit not only our ability to resolve issues faster and at less cost but how it will allow people to build trust into the system. This is key and it will only happen if we in the industry begin to discuss it and actually start to play with the tools on a micro level in a testing environment to prove its efficiency and how beneficial it can be on a macro level.

Interview no.8

Name: **Maataz Abdullāh**

Position: **Project Administrator, Management Associate, Islamic Bank of Abu Dhabi**

Date of Interview: **05/08/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: The traditional system is where two or more disputing parties have to be together in a single space with the arbitrator to manage the dispute... However with the e-commerce and social media etc.... the possibility is for electronic arbitration, where the parties seeking arbitration on their matter do not have to be together but can be anywhere and they meet in an online situation with the arbitrator to resolve their problems.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: I think it will contribute... this is obvious because in the UAE we have really worked on building our technological capabilities so that we are a viable place for businesses to come and set up and trade. It also gives us more credibility and people begin to trust the services we provide, as any problems that come up can then be resolved.

... There are many benefits with this electronic arbitration as we can take a lead to become a leader in this field, as I don't see many other countries doing this to a great level. This could be an opportunity for us to become the market leaders in e-commerce and with electronic arbitration we offer the complete package.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: The link is that electronic arbitration must have the existing culture and infrastructure of the E-Commerce or information communication technology for it to work and be accepted... We in the UAE have this already and so the benefits are really many... it's really a complete service package that you are offering the consumers at the end of the day because you allow them to trade and then have the mechanism for them to resolve any unfortunate issues that happen due to the business... this can only make us an even better place to be for businesses and consumers because we show that we are in the business of making it work for them... right now I don't see any other place like Dubai for example that can offer such extensive service end to end.

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: There are some barriers to its implementation such as the policies in place at the moment, which deal with arbitration itself. But having said that they are something which can be changed and adjusted just as we have seen with the e-commerce and other technological changes in the UAE. Other than that we have a different culture in the Gulf that likes to deal with issues and problems by sitting down in a communal setting such as an arbitration court to settle disputes... As this is a well established system we really need to work with that to make sure it transitions and manages the new ideas with an open heart and mind... but other than that I can't think of many significant problems or risks associated with this... of course it may not work but if the groundwork is done beforehand then any problems with it can be resolved and when it comes into effect we will be ready to handle the way it runs...

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: As a signatory to the convention we understand that the basic principles of business and trade along with arbitration are universal and so there are no issues there... However, if policies are created elsewhere that undermine our public policies here in the UAE then we would have to really counter those because at the end of the day our interest is in maintaining our national policies to benefit us in the sense that we don't want to lose out and compromise our standards because it does not work for another major player in the market... I would say our success as a nation is that we have abided by the globally accepted rulings whilst having also maintained our strong sense of individual identity and standards and this is only fair... we are a major business centre of the world and only by protecting the good practices we have in place can we continue to grow and all those who do business here also benefit from our fair injunctions and favourable policies.

Q6: What are your suggestions and recommendations?

A6: I genuinely believe that some research is required that demonstrates the benefits of this system and a period of trailing that identifies all the aspects of the system so that both its good and bad points are noted. This will help people trust the system and actually want to use it... so greater information and knowledge and education is required and then I think people will use it and want to use it when they see the benefits of a process that is easy, convenient, cheap and effective and most importantly allows them to control and be involved in it fully.

Interview no.9

Name: **Maryam Al-Sharif**

Position: **Businesswoman & Consumer**

Date of Interview: **13/10/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: The traditional conventional arbitration is when you have two or more parties in dispute and they are attending a central location with the arbitrator. With modern day technology the possibility is there for the parties to be anywhere in the world and still take part in the arbitration. So with online technology all of the peoples can really be in a single place but not physically and this is the beauty of modern day technology.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: What I can say from my personal experience with e-commerce is that the UAE environment is very ready for such additions. We are very open and looking to become the number one place for business and as the technology is developing we want to embrace all aspects of it. Our consumers really get what the whole online technology is about and have been the main reason why it has grown... Now to offer the consumer whether it's a business or an individual the opportunity to directly deal with the arbitration process as and when it is required without the involvement of government and courts etc.... is a fantastic opportunity and demonstrates to the world that we in the UAE are actually far more advanced than the so called self championing democracies and free market... because we offer what the consumer wants from start to finish.

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: I am not an expert on this topic but what I can suggest is that electronic arbitration would require the technology to be in place... so like the e-commerce platform. As we already have this I would say that it provides a good solution to dealing with problems that arise from business dealings... Although I am aware of this electronic arbitration my focus is more on e-commerce and so I cant say too much as I don't know the full details ...but from what I do know it can be very useful and help us cut down the costs ... like courts and travel and time of course because its electronic and maybe this will help our e-commerce grow and even attract more customers to the region and UAE... as global consumers find this to be a good deal compared to the other places.

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: The barriers I think are relating to the fact that it's a new approach to do things, which is different from the old ways and so will require a lot of work in terms of education and getting people to trust the system. There could be risks with trying to bring the process in straight away without the due diligence and testing... So I am excited about this but also understand that we need some work before it can be ready as was the case with e-commerce and social media... you need to understand its effect upon not only business but society so there are challenges but also opportunities to grow and evolve our method of doing things and whilst no-one knows how it will work... one thing is for sure that here in the UAE we are ready to embrace change and make it work for us and become a model for others to follow.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: Well I can't talk too much about the New York Convention, as I don't know the full details... I am aware of it and it is about us writing down the conditions before the event... but this is normal to us anyway and so not a big deal... All I can say about foreign provisions being forced upon the UAE is that it must only be possible if they are compatible with our public policies and cultural practices. Although we are open to becoming part of the global market place we must still protect our national heritage otherwise we will be reduced to being used and open to abuse. So in the main I know that we adhere to many global standards and that's fine because they are universal and make sense and actually are compatible with our own practices... So although we need to be careful with the foreign policies I am also very confident that our governments are more than capable enough to manage the situation and ensure that we are not subjected to anything that will contravene our heritage and national interest.

Q6: What are your suggestions and recommendations?

A6: I would say that from a business consumerist perspective we need some research and a time period that shows the system works so that people will buy into the idea. I also feel that it's a good thing and will eventually become the normal method of arbitration so we should embrace it but with a degree of caution... However it can be said that we also have the opportunity to maybe set the standards for the online arbitration as per the New York Convention on the traditional form of Arbitration.

Interview no.10

Name: **Abdurahmān al-Hashimī**

Position: **Businessman & Consumer**

Date of Interview: **10/08/2015**

Q1: What is the difference between E-Arb and conventional arbitration?

A1: ...Basically conventional arbitration and E-Arb aim to do the same thing. Resolve disputes between two or more parties... But the major difference is that electronic commerce operations are done electronically between people who are not present. The entire process is conducted electronically including signing contracts and agreeing to the arbitration rules and regulations whilst the parties could be anywhere in the world.

Q2: Do you think that the application of E-Arb will contribute to the arbitration system in the UAE?

A2: There is no doubt in my mind that the electronic arbitration will only increase the value and quality of services here in the UAE. I am not seeing many other nations doing this at the moment and we have the opportunity to become the leading nation in this market. Our e-commerce is one of the best in the world and companies from all across the world are doing business here because we have the environment that facilitates the growth of trade and business.... So yes the benefits are many both to our nation and the people that do business here because we provide them with the opportunity to not only trade with us but to resolve any issues they have from anywhere in the world...

Q3: What is the link between E-Arb and e-commerce and what are some of the potential benefits of e-commerce in the event of the implementation of E-Arb in the UAE?

A3: I would say that the E-Arb and e-commerce is related as they both rely on the electronic technology and online platforms to function. To what degree they depend on each other

technically I don't now but certainly I think if the people are using e-commerce then it makes sense to also have the E-Arb functionality available... so that any transaction that requires to be resolved through arbitration can be done but at the convenience of the users... and not maybe some courts... plus I can see that by doing this online the costs would be lower as people don't have to travel and be in the one single place. So there are many benefits that can help the UAE grow its e-commerce market and make it more attractive... it has this potential for introducing this service to make things better without more cost or trouble for them... instead making it easier for the business community.

Q4: What are the barriers to its implementation? What are the risks, if any?

A4: There are from my perspective very little barriers in the UAE for those who are seriously thinking about introducing new types of business opportunities because this nation has been developed upon innovation and enterprise... You could say that because it's such a new idea there maybe some challenges from those who practice the traditional arbitration perspective but even then I think they have a huge role to play... From a business view I think I need the support of the businesses and consumers who understand this thing and therefore support it and that will come from more education and understanding of it.

Q5: What is your view on the scope of enforcing foreign E-Arb provisions in the UAE, Considering that it is a signatory to the New York Convention on Arbitration?

A5: The convention is about creating the right environment and fair conditions for all the parties before the arbitration process begins... I would say that we are signatories to the convention but have those policies in place anyway because of our Islamic heritage and

culture in the Gulf... so I don't think that is a problem at all... As far as foreign conditions trying to control us and making anything unfair for us in the arbitration process it cannot work because we are very well informed and our governance is based upon looking after our interests... We will challenge anything that is unfair as a business community because the world is becoming more dependent upon our region and what it has done to help trade and business not only in this region but globally... So yes it is a worry if that happens but we are aware of it and by being ready for it we can influence and control the process so that the rules and regulations are fair and just.

Q6: What are your suggestions and recommendations?

A6: We need more research and actual use of this electronic arbitration in the field and only then can we make some concrete judgements. Otherwise anyone can speculate and make theories about what could or could not happen and there is no fact behind it... The business community needs to become more open to it also by using it for minor arbitration matters and that way it will get more credibility and its use can grow slowly without trying to do it all at once.

APPENDIX 3.2 - DISCUSSION OF THE INTERVIEWS

This appendix section discusses the dialogical narrative of the interviews through a critical reflective lens. The discussion is organised to reflect the perspectives of four groups of experts upon arbitration from the UAE. The dialogue takes the form of each group addressing the identified five key themes derived from the individual semi structured interviews.

Academics:

Understanding the difference between E-Arb and conventional arbitration

“So the rise of this new phenomenon called electronic arbitration or online arbitration is what is called an ‘Alternative Dispute Resolution method’... ADR and what you can say exactly to be an Online Dispute Resolution technique (ODR).

So instead of a normal situation where you have the two parties sitting face to face in a physical location and having the evidence usually in the form of documentation and other paperwork’s in front of them and with a judge or some person who is going to act as the arbitrator... instead... the electronic arbitration process means that although there is an arbitration panel, which has been appointed and given authority to conduct the process, the entire matter is done virtually using the Internet. So the parties and the panel of arbitrators or arbitrator do not have to be in the same physical location. .” (Dr. Al-Manān)

The data derived from the academics demonstrates that in essence they don’t perceive there to be a major difference between the E-Arb and conventional arbitration in terms what is to be achieved, the end goal.

However, Dr. Al-Manān alongside Dr. Abū Sadd observe that E-Arb refers to arbitration which is conducted via modern technological means, whilst Dr. Al-Khateeb explains that although E-Arb refers to the arbitral agreement being conducted electronically, there is some

contention as to what aspects of the arbitration should be considered 'electronic'. He notes that there is much debate within the academic community at present as to whether all of its stages have to be electronic such as the agreement, tribunal, and submission of evidence and issuance of the arbitral award? Or is it sufficient for at least one stage to be electronic? The academics acknowledge that although there exists a definitive understanding of E-Arb, it has yet to be fully detailed and thus argue that there is a further requirement for defining and developing it to a greater level of detail.

The impact of the application of E-Arb upon the arbitration system in the UAE

"... Of course the E- Arb will contribute to the arbitration system in the UAE... Although there are challenges such as the lack of trust people have with it and the scope of people's acceptance of the idea.... However the infrastructure...it is already present in the UAE."

(Dr. Al-Khateeb)

There is a wide-ranging consensus from the academics that although there may be some contentions over E-Arb, primarily relating to its technological precedence over direct human relations, the UAE is ready and willing to implement the system.

"Look first and foremost you have to remember that the culture of the Gulf and UAE is centred upon Islam and then our own asabiyyah, so we prefer that people should be meeting and then doing business and of course resolving their differences. But things are changing fast and we in the UAE have only been able to be so successful because we have kept up with the modern changes."(Dr. Al-Manān)

Dr. Al-Manān identifies the inherent Islamic culture and faith of the UAE to have an overriding influence upon the behaviour and attitudes of the people in the region, so naturally he identifies along with the other academics the immediate impact of the system to be upon the actual ‘trust’ of the end users in the UAE. If it works well then he observes the users will be readily converted to the idea as the UAE has a great history thus far in implementing and adjusting to the demands of modern technology. Dr. Al-Khateeb concurs that the UAE already possesses the infrastructure and capability to not only implement E-Arb but to significantly develop it and maybe even establish new standards for electronic arbitration not only in the Middle East but globally. Whilst Dr. Abū Sadd poignantly observes that E-Arb will be a reason for the development of arbitration in the UAE:

“...Its obvious that E-Arb will be a natural evolution of the system and people especially in the business community will find it a useful and time efficient tool. It will also bring down the costs they face with traditional arbitration and it crosses barriers such as language and individual attitudes that could exist in one place and not the other...” (Dr. Abū Sadd)

Identifying the potential benefits and risks of implementing E-Arb in the UAE

“The common point noted by my colleagues and respected scholars is that we in this region are very much based upon our social interactions and much of the disputes that arise are resolved by our ability to sit down over a meal and to come to an agreement. A process such as this does in many people’s eyes threaten our way of life and culture.” (Dr. Al-Khateeb)

All the academics note this to be a point of contention in that the wholesale implementation of the technology will impede the natural customs of the nation and its Islamic faith.

“It’s a very cold way of doing things but at the same time it’s a reality because we have so much e-commerce now it has to be brought into play. Furthermore, I think personally that it will undermine the state and national courts that usually deal with these things. This is because when the parties agree electronically to an arbitral clause, the UAE agents cannot bring the cases before a court in the UAE. So there are a lot of consequences that we have to address.”(Dr. Al-Manān)

In addition to the impact upon the socio-cultural tradition of the UAE the academics note that there may also be technical issues to contend with:

“...A customer may find that the other party has not honoured its contract, or that the goods and services promised have not been delivered to the standards required and promised or that the time taken may have exceeded the one agreed upon etc. ... Also there could be faults with the mechanism in terms of the technology failing during the arbitration process...”

(Dr. Abū Sadd)

However, they are also quick to observe and make the point that as the e-commerce infrastructure is becoming a part of the fabric of their society electronic arbitration has the potential for providing for a quick and relatively efficient method of dispute resolution alongside the trading platforms in operation.

Although Dr Al-Khateeb accepts that is a risk associated with the overt reliance upon an electronic platform such as the use of contentious evidence and fixed dates for submitting evidence without taking into account the human condition and circumstances.

However, Dr. Al-Khateeb and Dr Al-Manān argue that the e-commerce platforms already in place are accounting for such mitigating factors and furthermore will allow for “*speed in resolving disputes*” thus making the “*arbitration process easy and less complicated*”. They predict that the users will find the electronic method to be a more suitable and viable process, as it will allow them to avoid the antiquated and bureaucratic culture of the courts and arbitrational hearings. The users know exactly what is required and when as opposed to the whims of a judge or an individual arbitrator. The conditions are already stipulated and the process is fair and thus cannot be questioned or biased towards any one party.

Perspectives on enforcing foreign E-Arb provisions in the UAE with consideration to its signatory status to the New York Convention on Arbitration

“The New York Convention of 1958 was established before the age of e-commerce, the Internet etc.... and so its language is referring to the medium that has been relied upon for thousands of years, writing... there is an argument that questions the validity of E-arbitration agreements conducted by e-mail or on online platforms under the NY Convention rules... but article 2(1) stating that all contracts should be agreed in writing is the same as The Quran’s commandment that all transactions between two parties must be committed to writing and before a credible witness and that came 1400 years before the New York convention...”

(Dr. Al-Manān)

The academics are unanimous in their perspective that the convention does not in fashion contravene their actual cultural or faith based practices and therefore do not perceive any issues with it. They note that the New York Convention on Arbitration has only aided the

arbitration process in the UAE in so far as giving a sense of credibility to the nation internationally but in practice they have already been conducting business in such a fashion. Dr. Abū Sadd observes that in enforcing E-Arb provisions, which contain the same factor and requirements as is deemed essential for the UAE then policy makers should adopt such practices but in case of major discrepancies then the policy makers should challenge them.

Suggestions and Recommendations from a professional capacity

“...Education is the key to implementing the electronic arbitration, as was the same with e-commerce. We must understand what this is and what impact it will have upon our ability to make decisions and resolve them... As an Islamic country how does this effect our implementation of the Sharia and how we can create the harmony...?”

(Dr. Al-Manān)

The academics again argue in unison that education and a greater policy of understanding over a period of time is essential in ensuring that the system is harmoniously implemented. Dr Al-Manān is extremely keen to stress the importance of a systematic educational policy that is aimed at discovering the essentials of the process and its impact upon UAE society in terms of its use and potential for abuse.

“I would recommend that the process is embraced and made available as soon as possible so that we can actually learn from it and develop it. The idea is that from practice one learns far more than merely theorising or speculating about it.”

(Dr. Al-Khateeb)

This point is then further developed and vouched for by Dr Al-Khateeb who perceives the sensible policy to be in a number of feasibility studies and programs that encompass a detailed analysis upon the legislative requirements alongside existing experiences from a broad array of case studies:

“We need to therefore have a period of several years where it’s tested in a limited capacity and learn from that... From a legislative and policy perspective we need to start to examine how the established arbitration laws are working and how they may have to be either modified or new processes brought into play and their potential impact... Lastly though we need a broad perspective from a variety of players across society to establish their current understanding of it and either encourage the correct approaches or dispel any obviously negative and erroneous views.”

(Dr Al-Khateeb)

Although the Emirati academic perspective suggests that E-Arb is a viable alternative to the conventional arbitration process and adheres to the New York convention on arbitration, they recognise however that special and new laws are required that account for the new procedural behaviour and medium. The academics reveal that they have already initiated the process of exploring the possible legal frameworks and regulations that would be required to govern this new approach to arbitration.

“So for scholars and policy makers the motivation should be to start conducting feasibility studies alongside designing potential scenarios for the system that can identify its strengths and weaknesses.”

(Dr. Abū Sadd)

Legal Specialists & Arbitrators

Understanding the difference between E-Arb and conventional arbitration

“...The traditional method you have to have all the different people in the same room or court at the same time... But now with electronic arbitration that is not the case. You can have one party in Dubai or Abu Dhabi and the other in London or New York and the arbitrator in Jeddah or Istanbul. It’s really a global way of doing things that means the process is not dependent on physicality or even time.”

(Ahmed Rāshed Al-Neyādī)

The general understanding of E-Arb demonstrated by the legal specialists and arbitrators as per the other group is that the parties ‘do not have to be present in-person’. Dr. Abdullāh al-Jad’ān and Yūsuf Al-Matrūshī observes that it’s a simple process that allows for two or more parties to negotiate and arrive at a decision without the requirement of them having to travel to a single location.

The impact of the application of E-Arb upon the arbitration system in the UAE

“It will contribute to some aspects of arbitration as the UAE has been developed on its ability to keep up with the modern day world... So many internationalists will want to see the UAE adopt those policies and technologies that keep it abreast of the latest trends...”

(Dr. Abdullāh al-Jad’ān)

There is a mixed response and approach towards E-Arb as Yūsuf Al-Matrūshī and appears to concur with Dr al-Jad’ān in that he accepts that it will contribute to the arbitration system in

the UAE. He foresees the implementation of the system to be attractive to global firms and the business community at large. Whilst Ahmed Rāshed Al-Neyādī cautions against the wholly optimistic approach by noting that:

“I cannot say that it will contribute to the system in place as we have a system that has been developed in accordance to our culture and heritage. This system is basically taking away the control over the arbitration process and placing it into the hands of people who are not specialised or familiar with our policies and customs in the UAE...”

(Ahmed Rāshed Al-Neyādī)

Again as per the argument made by the academics there is an awareness of the impact this will have on the traditional cultural practices of the UAE and demonstrates that the broad professional opinion is fully engaged with the intellectual and social impact of the system.

Identifying the potential benefits and risks of implementing E-Arb in the UAE

“...There are some benefits to the system such as it will allow businesses to reduce their costs in terms of travel and having to be in one place with many members alongside not having to cross time barriers they can log on from their own work places and still be part of the arbitration process. So although we see potential problems with this system it does have its advantages, which are and will be attractive to big businesses both from the UAE and outside.”

(Ahmed Rāshed Al-Neyādī)

However, despite his reservations Ahmed Rāshed Al-Neyādī is also aware of the benefits of the system and its inevitability due to the change and growth of e-commerce and information technology in the market place.

The legal specialists further observe that the benefits are the speed and ease of the E-Arb process and Yūsuf Al-Matrūshī argues that due to the link between E-Arb and e-commerce, the implementation of E-Arb in the UAE will strengthen and broaden e-commerce in the UAE. Whilst Dr. Abdullāh al-Jad’ān states that e-commerce in the UAE will also greatly advance with the knowledge and understanding that disputes can be resolved quickly via E-Arb. This suggests that these specialists perceive the E-Arb to be a supplementary process to enhance the entire e-commerce market in the UAE.

However, in identifying the risks that are posed to the implementation process they all identify the challenge it presents to the existing system:

“...Arbitration is a historically sensitive yet very important part of our history and culture. It allows people to come together in a single physical location to meet as human beings and to resolve their differences... So I can see it has a place and it should be implemented along with the e-commerce but to what level and degree is a matter of question and debate. I think the attitude of the people will determine its success and they will accept it but only if they have some degree of control over it...” (Dr. Abdullāh al-Jad’ān)

As per the academics the legal specialist recognise the potential benefits of the system but also caution against its potential to erode their culture and effect the social traditional methods by which arbitration has been conducted in this region. Furthermore they argue the inherent influence of the Islamic faith upon their arbitral conduct:

“...The Sharia states that a qualified individual that is knowledgeable in the fiqh must preside over all decisions and judgements made in accordance to the laws of Islam and the process must involve Shura or mutual consultation between parties... Some parties from the UAE or the Gulf and other Islamic nations may not accept the decisions being made by the arbitrators...” (Yūsuf Al-Matrūshī)

Clearly this is a question of trust and faith, which will take time to overcome. The specialists also observe the loss of human face-to-face dealings and the over reliance on resorting to electronic dealings. Hence there major contention is centred upon the complete reliance on technology without taking into account of its eventual consequences.

Perspectives on enforcing foreign E-Arb provisions in the UAE with consideration to its signatory status to the New York Convention on Arbitration

“...In being a signatory to the New York convention, the UAE is following the international standards and as a major global hub for business and tourism this means that it has the trust of the global population.”(Yūsuf Al-Matrūshī)

There is an overriding consensus that suggests that as the UAE is a signatory to the New York Convention on Arbitration it provides it with a certain degree of credibility.

Furthermore the specialists argue that:

“...In fact our Islamic tradition specifically informs us to follow what the New York Convention states in that we should actually create the criteria before commencing the transaction or deal...”

(Ahmed Rāshed Al-Neyādī)

A link is again made to cultural and religious heritage of the nation signifying its importance and relevance to all aspects of social and cultural life in the UAE. The specialists note the role of Islamic legislation and its preceding commandments to have already encapsulated the latter rulings made in the 20th century.

However, the specialists recognise that not all of the provisions and rulings will be in line with Islamic and national practices:

“...If the conditions ... presented by the foreign body are not in our favour like they contradict our policies and our rules and go against our religion then we have a serious issue and problem...”

(Dr. Abdullāh al-Jad’ān)

The concern demonstrated by the subjects is with regards to any international provisions that may contravene the national UAE public policies and although these would also effect the previous system, the electronic provisions may in the future create the requirement for new legislations that have yet to be addressed by public policy makers in the in the UAE.

Suggestions and Recommendations from a professional capacity

“...We must consult with our courts and senior peoples who are actually in the system and have acted as arbitrators for a long time on their experience and seek their guidance as to what is best and to what extent this can be done...”

(Yūsuf Al-Matrūshī)

There is an explicit value added to the existing system in place and the experience garnered by those practising. Thus the specialists argue that this must not be ignored as it will provide them with a wealth of information upon which the new system can be implemented. They then suggest that further investigation would entail the study of what already exists:

“I would also like to see how the electronic arbitration has been working in other places and what issues they are having and what they do to correct the problems they have. This cannot just be brought in as a new way of doing things because it is new and we need to understand its impact on our society and how we do things traditionally.”

(Ahmed Rāshed Al-Neyādī)

Here there is a clear recognition that the existing system must be fully analysed before the implementation of the E-Arb system. This alludes to the fact that the UAE agencies have yet to conduct a significant feasibility study into the existing structure and so major oversights can be mitigated if this is conducted sooner than later.

Furthermore they note that there is a requirement for visiting and investigating the existing arbitration centres in Abu Dhabi and Dubai to gain a thorough in-depth understanding of how they work, their efficiency and their current modus-operandi. In addition international experiences must also be investigated and lessons derived from them taken into consideration in formulating future policies.

“...We should spend some time getting ready for it by educating our people on how this going to work...”

(Dr. Abdullāh al-Jad’ān)

Finally as per the academic recommendation there is a need for education and retraining that would get the users ready and familiar with the process.

Specialists in E-Traders:

Understanding the difference between E-Arb and conventional arbitration

“...The traditional method is simply where you have all the disputing parties in the same location and place with the arbitrator... With electronic arbitration... just like e-commerce... the customer and the business do not have to be in single physical location to conduct the transaction...”

(Noura Nāsser Al-Sāedī)

As per the other interviews the specialist in electronic trading exemplify the obvious understanding that E-Arb being a process where ‘the parties seeking arbitration on their matter do not have to be together but can be anywhere and “*they meet in an online situation with the arbitrator to resolve their problems...*” (Maataz Abdullāh)

The impact of the application of E-Arb upon the arbitration system in the UAE

“The impact of this will be that more global businesses will want to do business with us and we attract more investment into the country as our arbitration practices allow people to feel comfortable due to an open and fair process that is universal and available to them anywhere where they are...”

(Noura Nāsser Al-Sāedī)

The e-traders agree that E-Arb will bring great benefit to the arbitration system in the UAE as it will make the system more efficient and as identified by other professionals it will actually help the e-commerce system in place. Although the e-traders fail to discuss the impact of E-

Arb on the current arbitration system in the UAE in great detail they acknowledge that it will benefit their profession.

“It also gives us more credibility and people begin to trust the services we provide, as any problems that come up can then be resolved.”

(Maataz Abdullāh)

They identify the opportunities for the ease of decisions thus enhancing the market and the region for business opportunities especially for foreign investors and corporations.

Identifying the potential benefits and risks of implementing E-Arb in the UAE

“... There are many benefits with this electronic arbitration as we can take a lead to become a leader in this field, as I don't see many other countries doing this to a great level. This could be an opportunity for us to become the market leaders in e-commerce and with electronic arbitration we offer the complete package.”

(Maataz Abdullāh)

There is an over optimism that perceives E-Arb to be a revolutionising force that will effectively optimise the e-commerce infrastructure and provide the UAE market place with greater credibility and advantage over the other major financial global hubs.

“You can see already how our e-commerce infrastructure has grown and been developed due to our open mind and acceptance of the new technology... so we already have the building block or platform on which the electronic arbitration can be developed...”

(Noura Nāsser Al-Sāedī)

They argue that because the UAE has built its technological capabilities it's become a viable place for businesses to set up in and trade.

They observe that because electronic arbitration requires an established culture and infrastructure for e commerce and information communication technology that UAE already possesses it has an advantage over other global hubs.

“... Its really a complete service package that you are offering the consumers at the end of the day because you allow them to trade and then have the mechanism for them to resolve any unfortunate issues that happen due to the business...”

(Maataz Abdullāh)

However, both the professionals interviewed note that there are some barriers to the implementation of the electronic arbitration such as the policies in place at the moment, which deal with arbitration itself. They also cite the cultural and traditional practices that could form a potential but legitimate obstacle to the implementation process.

“We have a different culture in the Gulf that likes to deal with issues and problems by sitting down in a communal setting such as an arbitration court to settle disputes... As this is a well established system we really need to work with that to make sure it transitions and manages the new ideas with an open heart and mind...”

(Maataz Abdullāh)

Noura Nāsser Al-Sāedī concurs with this perspective and adds the issues of trust and knowledge of the system.

“...The risks are of course related to it not working and people not really trusting what we are doing...”

(Noura Nāsser Al-Sāedī)

However, they recognise the point that as with all new technological changes and implementations there are initial problems and issues of trusts and knowledge and since the UAE has undergone great changes in such a short period of time they are as a society ready for such challenges. Furthermore there is a clear recognition that E-Arb not only enhances the current system in place but also adheres to the globally extant norms, practices and policies.

Perspectives on enforcing foreign E-Arb provisions in the UAE with consideration to its signatory status to the New York Convention on Arbitration

“As a signatory to the convention we understand that the basic principles of business and trade along with arbitration are universal and so there are no issues there...”

(Maataz Abdullāh)

“...As part of a global society and especially as a major business hub we are going to be subjected to these international agreements...The New York Convention on Arbitration... has merely confirmed and attempted to enforce what we do anyhow naturally as a cultural practice...”

(Noura Nāsser Al-Sāedī)

There is again as per the other interviews, promulgation to the fact that even though the UAE is a signatory to the New York convention, the treatise merely conforms to the traditional cultural practices of the UAE. This is in fact neither adding nor detracting anything from the norms, practices and ethos of the nation.

However, again as per the other interviews the respondents argue against any provisions seek to hinder the levels of control the UAE has over its own policies.

“...If policies are created elsewhere that undermine our public policies here in the UAE then we would have to really counter those because at the end of the day our interest is in maintaining our national policies to benefit us in the sense that we don’t want to lose out and compromise our standards because it does not work for another major player in the market...”

(Maataz Abdullāh)

The professionals here make some points that are not as easy to translate in a verbal sense in that they communicate a respect for the international standards and perceive them to be essential. However they also highlight through certain linguistic nuances in the Arabic language that states that the standards are only acceptable if all the players are willing to make compromises and not just some. Here they are referring to their own religious and cultural heritage, which they effectively state cannot be subjected to the norms and practices of others not familiar with it. It’s a point that other subject interviews have also made and thus presents us with a viable concern, which has not been fully explored through this interview schedule and study in general.

Suggestions and Recommendations from a professional capacity

“...Greater information and knowledge and education is required and then I think people will use it and want to use it when they see the benefits of a process that is easy, convenient, cheap and effective and most importantly allows them to control and be involved in it fully...”

(Maataz Abdullāh)

The obvious recommendation suggests that there is an immediate requirement for educating the users to the benefits of the system.

This will then lead an increased awareness amongst the users with regards to the potential and importance of electronic arbitration therefore helping them to become more attuned to it and subsequently developing their trust in it.

“...Awareness about what electronic arbitration is and how it will... build trust into the system...It will only happen if we in the industry begin to discuss it and actually start to play with the tools on a micro level in a testing environment to prove its efficiency and how beneficial it can be on a macro level.”

(Noura Nāsser Al-Sāedī)

Effectively how this can be achieved is through a testing and trialling process, which begins in a simulated format on a miniscule scale in a limited capacity before the results of that are utilised to grow its capacity and potential testing environment to more complex cases with a greater number of variables over a given period of time. This they argue will help develop a systematic research history and knowledge base of the system in practice, which can be utilised to enhance the prototype system and then used as a reference when the system is made ready and available to the public on a grander scale.

Business Personal & Consumers:

Understanding the difference between E-Arb and conventional arbitration

“...Basically conventional arbitration and E-Arb aim to do the same thing. Resolve disputes between two or more parties... But (with) ... electronic commerce operations... The entire process is conducted electronically including signing contracts and agreeing to the arbitration rules and regulations whilst the parties could be anywhere in the world.”

(Abdurahmān al-Hashimī)

The data derived from across the board appears to be extremely consistent with regards to the broad comprehension of E-Arb as an evolution of conventional arbitration due to the growth and development of technology. For example both Abdurahmān al-Hashimī and Maryam Al-Sharif identify and equate E-Arb as a necessary if not obvious extension of the e-commerce system already in place in the UAE.

“...So with online technology all of the peoples can really be in a single place but not physically and this is the beauty of modern day technology...”

(Maryam Al-Sharif)

The impact of the application of E-Arb upon the arbitration system in the UAE

“...Electronic arbitration will only increase the value and quality of services here in the UAE... We have the opportunity to become the leading nation... Companies from all across the world are doing business here because we have the environment that facilitates the growth of trade and business....”

(Abdurahmān al-Hashimī)

The business personal and consumers are in complete agreement that the UAE will benefit greatly from this new arbitration system. The business consumerist perspective suggests that the implementation of the electronic system will entail greater transparency and fairness as new rules and regulations specifically designed for E-Arb develops the professional arbitration system in the UAE.

They claim that their consumers have not only adjusted to the advent of technology but are now reliant upon it and are completely informed about the latest developments. So they argue that consumers as businesses or individuals will have the opportunity deal directly with the arbitration process as and when it is required without the involvement of government and courts etc....

“...It's is a fantastic opportunity and demonstrates to the world that we in the UAE are actually far more advanced then the so called self championing democracies and free market... because we offer what the consumer wants from start to finish...”

(Maryam Al-Sharif)

Identifying the potential benefits and risks of implementing E-Arb in the UAE

“...The benefits are many both to our nation and the people that do business here because we provide them with the opportunity to not only trade with us but to resolve any issues they have from anywhere in the world...”

(Abdurahmān al-Hashimī)

There is again a strong belief that there exist very little barriers in the UAE for the introduction and initiation of new business opportunities in the UAE. They cite the fact that the entire UAE nation has been developed upon the principles of innovation and enterprise.

“Any transaction that requires to be resolved through arbitration can be done but at the convenience of the users...Plus I can see that by doing this online the costs would be lower as people don’t have to travel and be in the one single place.”

(Abdurahmān al-Hashimī)

However, they recognise that due to the novelty of the idea there maybe some challenges from those who practice the traditional arbitration perspective but even then they admit they will have a huge role to play. Furthermore they observe that the business community must support the venture for it to succeed.

“There could be risks with trying to bring the process in straight away without the due diligence and testing...”

(Maryam Al-Sharif)

The barriers cited are related to the new approach required to do things, which is different from the traditional and classical methods. So they argue that a process of education is required to gain the trust of the people and the system. Furthermore they observe that a systematic and organised process is required, where the foundations and groundwork conducted gains an understanding of the impact upon the socio-political culture of the nation. This they note was what transpired with the implementation of e-commerce and social media. But ultimately they point out that this is an opportunity for growth and evolution

“ ... One thing is for sure that here in the UAE we are ready to embrace change and make it work for us and become a model for others to follow.”

(Maryam Al-Sharif)

Perspectives on enforcing foreign E-Arb provisions in the UAE with consideration to its signatory status to the New York Convention on Arbitration

“The convention is about creating the right environment and fair conditions for all the parties before the arbitration process begins... I would say that we are signatories to the convention but have those policies in place anyway because of our Islamic heritage and culture in the Gulf... so I don't think that is a problem at all...”

(Abdurahmān al-Hashimī)

As per the other interviews the response is universal in the sense that they respondents perceive there to be no problem with the New York Convention as it complies fully with their Islamic heritage and culture. This proves that there is a strong association and requirement for balancing their own religious cultural norms with any international provisions and if there is

no conflict then they are ready to embrace those regulations in order to comply and harmonise global business and trade.

However, they also observe that with foreign provisions:

“...It is a worry if that happens but we are aware of it and by being ready for it we can influence and control the process so that the rules and regulations are fair and just.”

(Abdurahmān al-Hashimī)

The respondents are perfectly honest in revealing their trust in their governance in order to deal with any foreign conditions that undermine their own national arbitration process.

“... We will challenge anything that is unfair as a business community because the world is becoming more dependent upon our region and what it has done to help trade and business not only in this region but globally...”

(Abdurahmān al-Hashimī)

They admit that they are extremely enthusiastic and willing to become a part of the global market place, but must still protect their national heritage otherwise it could be subjected to abuse.

“... So although we need to be careful with the foreign policies I am also very confident that our governments are more than capable enough to manage the situation and ensure that we are not subjected to anything that will contravene our heritage and national interest.”

(Maryam Al-Sharif)

Suggestions and Recommendations from a professional capacity

“...The business community needs to become more open to it also by using it for minor arbitration matters and that way it will get more credibility and its use can grow slowly without trying to do it all at once...”

(Abdurahmān al-Hashimī)

Abdurahmān al-Hashimī suggests that more research is required and the actual potential of the electronic arbitration system can only be deciphered once some preliminary research has been conducted.

“...I would say that from a business consumerist perspective we need some research and a time period that shows the system works so that people will buy into the idea...”

(Maryam Al-Sharif)

Maryam Al- Sharif observes that electronic arbitration will eventually become the normal method of arbitration and should be embraced but with some prudence. Furthermore she states that they have the opportunity to possibly establish the standards for the online arbitration, just as the New York Convention established regulations on the traditional form of Arbitration.

It is evident that the Emirati business community desires the authorisation of E-Arb but also recognises that needs to learn from existing experiences across the globe and thus suggestions are for trialling the system before it is implemented.

APPENDIX 4

FORMS OF E-COMMERCE

Business-to-Business (B2B) E-Commerce

This is the oldest and most original type of e-commerce that exists. Since the emergence of EDI system wherein business was conducted via private networks and exchange of data was solely amongst business units. The Internet provided the medium for increased trade and became the ideal choice for the exchange of electronic documents, as business units would submit purchase orders to other units. This later developed to include not only the exchange of data and information but agreements between exchanging parties in the form of electronic contracts for the supply of goods, services, invoices and payments electronically. Delivery could also be conducted electronically or physically depending upon the agreement or the nature of the goods and services.

This is the most widespread e-commerce manifestation at present today accounting for about 80% of its revenues. Goldman Sachs estimated that e-commerce between business projects globally increased and could rise from \$39 billion in 1998 to \$1.5 trillion in 2004, six times the value of e-commerce between businesses and consumers (Mann et al., 2000: 22-23). Walden and Hörnle (2001: 31) state that businesses have capitalised on offering a number of services electronically and this has brought opportunities that were unimaginable thirty years ago.

While Shaw (2000: 12) notes that companies are purchasing their computers, raw materials, and other supplies from one another as never before over the Internet. An example of e-commerce for work projects between companies is the direct trade over the Internet in commodities such as steel, plastics and chemicals.

There are two types of B2B EC markets. One is related to the management of material flows in production-oriented supply-chain networks, while the other is related to the procurement of maintenance, repair and operations (MRO) items, referred to as the *indirect items*. Purchases of direct items needed for the production of a business' commodity are usually planned long in advance and their procurement is under stringent controls.

Moreover, the procurement of indirect items is more feasible than production-related processes, which have already been greatly improved by reengineering efforts in the past decade. Shaw (2000: 12) observes that for either the direct or the indirect procurement processes, electronic data interchange (EDI) has been used to forge automated linkages between the buyer and supplier to transmit orders, receipts, and payments all electronically. The indirect procurement process typically consists of selecting products and vendors, filling out requisition forms, getting approvals, sending out purchase orders, receiving the goods, checking the content, matching the invoices, and sending out the payment. This process has been carried out traditionally either manually with paper-based documents or electronically by EDI. The use of EDI for linking with channel partners can help reduce processing cycle-time, improve accuracy, and create strategic value, however it relies on the need for private lines or value-adding networks (VANs) and relies on specialists types of software.

Business-to-Customer (B2C) E-Commerce

It can be argued that the interaction between business units and customers has increased with the advent of virtual shopping centres and online electronic markets and various trading platforms.

These virtual trading markets have the advantage of attracting global audiences, presenting a wide variety of products and services; provide information on the companies that produce them along with binding International conventions and national consumer laws and regulations. For examples of this include the E-Commerce Complex in Sri Lanka which displays different types of tea, clothing and precious stones, which the country is famous for.¹ Customers can usually browse or visit through these different online complexes and look through the commodities, products and available services as part of the online shopping experience.

However, as Hörnle (2003: 25) notes, in a B2C e-commerce situation, where the supplier includes an arbitration clause in the standard form contract, the consumer is in a far inferior bargaining position. To the extent that the consumer is in no bargaining position at all as the contract is offered on a 'take it, or leave it' basis.

¹See: <http://www.kaymu.lk/research/for> details on the Sri Lankan E-Commerce Complex. Also refer to Mann et al., p.28

Customer-to-Customer (C2C) E-Commerce

This type of e-commerce is conducted between users with each other via the Internet. These individuals buy and sell directly on the Internet and then sell to other consumers so as to make a profit. There are many examples of such online auction websites which host this type of commerce, the most famous being eBay, in the UK Gumtree and in the UAE there are Souq.com, Tejari.com, BurjMall.com and Brownbag.ae. While in other parts of the Arab world there is the Ewaseet.com. This began as a newspaper and then established its own website wherein users could sell items and products to other users openly and freely online akin to the Loot advertisement newspaper in the UK.

Customer to Business (C2B) E-Commerce

This type of e-Commerce is represented in customers presenting products and services to companies through their own online portals such as websites. Here they offer products and services and provide a point of interaction with potential buyers and even sellers depending on the aims and focus of the customers.

Inter-business E-Commerce

This type of e-commerce includes all internal organisational activities, which are usually hosted on an internal network that is connected to the Internet and thus accessible globally, regionally or locally. This is usually guarded by a Firewall to regulate the levels of access and the types of users to specific information requests. This has become a significant and routine part of every corporation, institutions and governmental agencies and bodies operating on a global, national or even regional level.

Governmental Business in E-Commerce

Many developed countries were quick to take advantage of the technological advances made in the arena of telecommunications and ICT services in order to establish what has been termed as 'e-Government'. To reach this goal, governments adopted a basic rule which holds that all services or operations not outside the remit of the exchange of documents, data or

official documents and provide information that can be successfully be achieved in the scope of e-services.

Of the most important services that governmental agencies offer on the Internet are the payments of taxes, fees and subscriptions, or to obtain private documents of a general nature of individuals seeking identity documents such as passports, driving licences etc. (Ridwān, 160-167).

Thus it can be suggested that e-commerce has already pervaded the core practises of general society and what must now be considered is how it will further develop and what impact it may have in the future.