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Commercial Arbitration in Dubai

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Dubai is one of seven Emirates that comprise the United Arab Emirates (UAE). Dubai has long been a trading centre for the Middle East and has recently placed itself as a travel hub and a five-star tourist destination; Dubai now seeks to place itself as a centre for international dispute resolution. In Arabic culture, the preference is to settle disputes by negotiation, either directly between the parties or under the guidance of a leading citizen. The growth of international trade has brought a wider range of disputes and there is reluctance amongst international parties to submit their disputes to the Dubai courts, where proceedings are conducted in Arabic, can be lengthy and there is a perception that judges tend to protect the interests of the establishment. For this reason, international contracts generally provide for disputes to be resolved by arbitration rather than by court litigation.

The UAE's civil law system is based upon its UAE Civil Code,¹ which was itself based upon the Egyptian Civil Code,² which was based upon the Napoleonic Code to the extent that it complied with the Islamic Sharia. There is no binding judicial precedent, although decisions of the Court of Cassation (the highest court) may be persuasive. In addition to Federal law, each Emirate has laws and courts of its own and within the Emirates there are Free Zones which have their own commercial laws (UAE *criminal* law applies within the Free Zones).

The leading arbitration centre is the Dubai International Arbitration Centre (DIAC) which has its own set of Arbitration Rules (the DIAC Rules). Dubai has also established the Dubai International Financial Centre (DIFC), a financial Free Zone with its own commercial laws and courts and its own Arbitration Law,³ based on the UNCITRAL Model Law, and its own Arbitration Centre with its own DIFC-LCIA Arbitral Rules (the DIFC-LCIA Rules) administered with the London Court of International Arbitration (LCIA). The ICC Rules are most commonly used for international arbitration.

The purpose of this article is to examine the law relating to commercial arbitration in Dubai. For convenience, the masculine terms "he" and "his" include the female and, whether there is one arbitrator or three, they are referred to as "the tribunal", where appropriate.

1. Sharia Law

A basic understanding of Sharia law is helpful, both because it is the foundation of UAE law and because the Arab understanding of arbitration is drawn from the Sharia. Sharia means literally "the way" or "the path" and comprises a body of principles pertaining to moral, economic, social and political issues which Muslims regard as being prescribed by God to govern human life. There are two sources of Sharia: the Holy Qur'an, which Muslims believe was recited by God to the Prophet Mohammad (Peace Be Upon Him); and the Sunnah, which are the acts and sayings of the Prophet and his Companions while he was

¹ Law of Civil Transactions, Federal Law No.5 of 1985

² The Hanafi School is the dominant school of Islam in Egypt

³ DIFC Law No.1 of 2008.

alive. However, the Qur'an and the Sunnah are not self-explanatory and they require scholars to interpret them and adapt them for contemporary usage as society develops, in order to create a code of rules and principles that will assist people to live in accordance with God's law. This interpretation and development is achieved by the application of *fiqh* (understanding) and *ijtihad* (legal reasoning of a learned jurist). If no acceptable interpretation is readily available, one may be achieved by the application of *qiyas* (reasoning by analogy to deduct legal principles), *ijma* (consensus of the community), *urf* (custom and practice) and *maslahah* (the requirements of public interest, or the common good). Fundamental principles of the Sharia are good faith in one's dealings with other people and a prohibition on unjust enrichment.

The UAE follows the Sunni branch of Islam, within which four main schools have evolved to interpret the Sharia. By art.1 of the Civil Code, if no appropriate provision is to be found in UAE law then the judge must decide in accordance with the Sharia, having regard to the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi'i and Imam Abu Hanifa. By art.27 of the Civil Code, laws may not be applied if they are contrary to the Sharia.

2. Arbitration under the Sharia

The approach to arbitration under the Sharia differs from that in the West, where an arbitral award is generally regarded as a binding alternative to a court judgment. In England, for example, arbitration can be traced back to the early Christian period where, although the decision of a bishop was not enforceable in law, the parties' agreement to appoint him included a penalty if his decision was not obeyed, and that penalty was enforceable.⁴ The decision itself became enforceable with the introduction of the first English Arbitration Act in 1698,⁵ and today the award is binding save for a limited right of appeal.

Within the UAE, the Maliki and Hanbali Schools put great trust in arbitration and regard the arbitrator's decision as binding; indeed, under the Maliki School, the arbitrator's appointment cannot be revoked after the commencement of the arbitration. The Shafi School sees the position of an arbitrator as inferior to that of a judge and the appointment can be revoked at any time prior to the publication of the award. The Hanafi School sees the arbitrator as the agent of the party who appointed him and there is no requirement to be neutral or impartial, with the result that the arbitral award has less force than a court judgment.⁶

All four major Schools hold that there must be a dispute which the parties agree to refer to arbitration, and that the parties' mutual agreement to arbitrate forms the basis of the arbitrator's jurisdiction. Although the Holy Qur'an refers to deciding disputes at arbitration, it is silent as to arbitration clauses and therefore it has been suggested that under the Sharia parties cannot agree to arbitrate *future* disputes which have not yet arisen. However, in practice an arbitration clause in a contract is enforced and arbitration is widely used for contractual disputes. Furthermore, the Sharia does not prohibit the appointment of an arbitrator by a third party and appointing institutions are commonly named in contracts. Those Islamic scholars who regard arbitration as mere conciliation base their view upon a reference to arbitration in Verse 4.35 of the Holy Qur'an which relates to matrimonial disputes and suggests that there should be one arbitrator from his family and one from hers; this would indeed appear more akin the Western notion of conciliation. Other scholars rely upon Verse 4.58 to argue that an arbitration decision should be binding and that therefore there should be an odd number of arbitrators. Yet others say that arbitration should be binding in the same way that a contract would be binding under the Sharia.

The Arab view of arbitration has also been coloured by the recent history of its application in Arabia. Kutty argues that arbitration became discredited during the 1960s and 1970s when certain arrogant Western arbitrators dismissed "with terms of a humiliating nature" Arab law as primitive and inadequate.⁷ Kutty cites *Saudi Arabia v Arab American Oil Co*,⁸

⁴ James Behrens, "The History of Mediation of Probate Disputes" (2002) 68 Arbitration 138.

⁵ See Lord Hacking, "Arbitration Law Reform in Europe" (1999) 65 Arbitration 138.

⁶ See Zeyab Alqurashi, "Arbitration under the Islamic Sharia"

⁷ Faisal Kutty, "The Shari'a Factor in International Commercial Arbitration" (2006) Loy.L.A Int'l Comp. L.Rev 565, 591 and 592

following which the Saudis passed a resolution prohibiting government agencies from participating in arbitration. Kutty argues that “the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration” and that many believe “that the international arbitration framework was developed without any consideration being given to their culture, values, and legal traditions”.

The position under the Sharia is therefore somewhat fluid but certainly an arbitral award is not enforceable until it has been ratified by a judge as being compliant with the law, and it may be set aside if it does not comply.⁹ Kutty points out, however, that as the Holy Qur'an provides expressly for arbitration in some form and the Companions of the Prophet used arbitration to settle commercial disputes, there is scope for the evolution of arbitration practice as interpretation of the Sharia evolves to meet modern demands.¹⁰ Indeed Ayad argues that such interpretation is necessary to Islam and is legitimate and binding.¹¹ In the modern era, many Arab nations have acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and have adopted modern domestic arbitration laws based upon the UNCITRAL Model Law, and have established their own arbitration centres with recognised international rules.

Arbitration procedural law

Arbitration proceedings in the UAE are governed by Federal Law No.11 of 1992 arts 203–218, as amended by Federal Law No.30 of 2005 (the Civil Procedure Code or CPC), which is not based on the UNCITRAL Model Law (although the DIFC Arbitration Law is). A draft Federal Arbitration Law based on UNCITRAL has been discussed but remains only a draft. The DIAC Rules are the most commonly used, although financial disputes may be referred to the Emirates Securities and Commodities Authority or the International Islamic Centre for Reconciliation and Arbitration, and some public sector bodies such as the Dubai Municipality and the Roads and Transport Authority have their own arbitration rules.

An arbitration agreement must be in writing, though it may be incorporated by reference, as in a charterparty contract,¹² and the subject of the dispute must be defined in the terms of reference or in the award.¹³ If one party seeks a stay of court proceedings to arbitration, he must raise that point at the first court hearing, otherwise he is considered to have waived his right to arbitration.¹⁴ The Dubai courts accept that the termination of a contract is separate from the arbitration agreement contained within the contract, and that the transfer of a contract includes the transfer of the arbitration agreement.¹⁵ If the parties are unable to agree the appointment of an arbitrator, or if a nominated arbitrator refuses or withdraws or is removed, either party may apply to the court to make the appointment and there is no appeal against the court's decision.¹⁶ Once appointed, the tribunal must notify the parties of the date and place of the first hearing within 30 days of the appointment and the award must be rendered within six months of the first hearing unless the parties agree an extension or grant the tribunal the power to order an extension; the tribunal must give a copy of the award to each party within five days and the court will consider ratification at the request of a party in the normal way for filing claims in court.¹⁷ An arbitral award cannot be enforced until it has been ratified by the court, which may rectify material errors in the award.¹⁸ Although UAE law does not provide for a right of appeal as such, at both the ratification and enforcement stages the party resisting enforcement may raise similar arguments to those that

⁸ (1963) 27 I.L.R 117

⁹ Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1982) p.189

¹⁰ F.Kutty, “The Shari’a Factor in International Commercial Arbitration (2006) 28 Loy.L.A. Int’l Comp.L Rev 565,597

¹¹ Mary Ayad, “Harmonisation of International Commercial Arbitration Law and “Sharia” (2009)

¹² Civil Appeal No.325 of 2011

¹³ CPC art.203(2) and (3)

¹⁴ CPC art.203 (5); Dubai Court of Cassation Case No.228/2007, judgment dated February 24,2007.

¹⁵ Dubai Court of Cassation, Petition No.40/2004, judgment dated September 26, 2004

¹⁶ CPC art.204

¹⁷ CPC arts 208 (1), 210 and 213 (3) respectively

¹⁸ CPC art.215 (1)

might be raised if there was a right of appeal. Ratification and enforcement are considered below.

Parties to court proceedings may agree to submit their dispute to an arbitrator appointed by the court to hear that dispute and not anything other than that dispute¹⁹; the court will supervise and control the arbitral proceedings²⁰; the tribunal must lodge the award with the clerk of the court within 15 days of making the award and must provide copies to the parties within 5 days of that, and the court should fix a hearing within 15 days to consider ratification of the award.²¹

Beyond that, arbitral proceedings are flexible and largely unconstrained by legal procedures other than those agreed by the parties,²² and any institutional rules that they adopt. Redfern and Hunter point out that: "National courts could exist without arbitration, but arbitration could not exist without the courts",²³ because the assistance of the courts is required not only to supervise the arbitral process but also to enforce any ensuing award.

UAE law makes no express provisions for confidentiality of arbitral proceedings, but in practice arbitration is considered confidential. Express provisions are contained in the DIAC and DIFC-LCIA Rules²⁴; they may be included in the underlying contract and it is prudent also to include them in the terms of reference, which the parties should sign to confirm their acceptance. Under both sets of Rules, the claimant makes a Request for Arbitration to the institution and the respondent submits its Answer to the Request, but if there is no Answer the institution will nonetheless proceed to appoint the tribunal in accordance with the arbitration agreement and transfer the file to the tribunal. The parties submit their Statement of Claim and of Defence (and Counterclaim if there is one) in the customary way.

As for corporate transparency, there is no general public access to land registry data or corporate information such as accounts and names of shareholders, which can hinder the gathering of evidence. Indeed, it can be difficult to discover exactly what the law is, given that there is no binding judicial precedent and the civil law system provides a code rather than a set of firm rules, although Court of Cassation judgments tend to be followed.

Translations of court decisions into English are often unintelligible and translations of the CPC can be misleading; it is advisable to obtain several translations and sit down with an Arab colleague to consider to what extent the translations accurately represent the Arabic original.

The DIFC courts

The DIFC has its own Court of First Instance, Court of Appeal and Execution Judge. Proceedings are conducted in English, procedure is based on the English Civil Procedure Rules, the principles of binding judicial precedent are recognised, and a Power of Attorney (see below) is not required. The DIFC Court has jurisdiction over claims involving DIFC companies or contracts which were made or performed within the DIFC area, or which the parties agree to refer to the DIFC Court.²⁵ A decision of the DIFC Court is executed *within* the DIFC area by the DIFC Execution Judge and *outside* the DIFC area through the local courts, subject to certain formalities, and the Dubai Court Execution Judge may not question the merits of the DIFC Court decision.²⁶

The DIFC Court of First Instance may ratify domestic and foreign arbitration awards,²⁷ even when the underlying dispute has no connection with the DIFC, and there is only one level of appeal. This may become the preferred method for enforcement of foreign awards without the numerous challenges that are so common in the Dubai courts. Indeed, it may be possible to seek ratification of a domestic arbitral award in the DIFC Court, even when

¹⁹ Dubai Court of Cassation, Case No.133/2007, judgment dated September 23,2007.

²⁰ Dubai Court of Cassation, Case No.273/2006, judgment dated February 4,2007.

²¹ CPC art.213 (1); art 213 (2) relates to arbitrations arising in appeal cases

²² CPC art.212 (1)

²³ Nigel Blackaby et al, Redfern and Hunter on International Arbitration, 5th edn

²⁴ DIAC Rules art.41, DIFC Arbitration Law art.14 and DIFC-LCIA Rules art.30

²⁵ Dubai Law No.16 of 2011 art.5A

²⁶ Under the terms of a 2009 Protocol of Enforcement between Dubai courts and DIFC courts, and confirmed in Dubai Law No.16 of 2011 art.7(3)(c)

²⁷ DIFC Court Law No.10 of 2004 art.24 (1)

the dispute has no connection with the DIFC, and then seek enforcement of that decision in the Dubai courts, or indeed any Gulf Cooperation Council (GCC) country.²⁸ Some Arab lawyers complain that the DIFC courts are not compliant with the Sharia, but the process may be effective given that the Dubai courts may not question the merits of a decision of the DIFC courts.

Domestic arbitration

A few words are required in relation to domestic arbitration. For the most part, the DIAC Rules meet the expectations of international lawyers: the parties exchange their respective pleadings, including a comprehensive statement of the facts and legal arguments, all the relevant documentary evidence and a statement of the relief sought.²⁹ This works well where the parties' lawyers are familiar with international arbitration proceedings, but there can be difficulties when a party's lawyers are not so familiar. Often they expect the process to be similar to UAE court proceeding: frequently their pleadings contain only generalised statements and no supporting documentation, because they expect the judge to know and to apply the law and to make enquiry to discover the facts; a judge hearing a technical claim will appoint an expert to assess the claim and report as to what sum should be awarded, and it is not unusual for a claimant to apply to DIAC for an arbitrator to appoint an expert to tell the arbitrator how much to award, while the claimant makes no attempt at all to quantify or support its claim. Sometimes a party has clearly fed its pleadings through internet translation software in which the Arabic words have been translated literally into English.

This can produce statements such as:

"The Counter Respondent cannot facilitate but twirl its back at the reliance of grandeur of the 1st Counter Claimant in the case at bar and the incomprehensible idea is demonstratively sprawled and all told in truth and in fact the causes were significantly and religiously complied."

The tribunal may find it challenging to ensure that each party has a fair opportunity to present its case and to respond to the case of the other party, without creating the impression of assisting a party with its case. Where problems relate to the use of the English language or inexperience with English proceedings, the tribunal should exercise patience and explain matters clearly and grant extensions of time where necessary. However, the tribunal should guard against a manipulative respondent seeking to employ wrecking tactics to hinder or prevent the reference from proceeding.

The arbitrator

The traditional application of the Sharia imposed restrictions on who could serve as an arbitrator: he had to have the same qualifications as a judge and be of mature age, wise, free, male and Muslim. The prohibition on women appears to have derived from the lesser weight given to the testimony of women based upon the proposition that they were weaker than men and their testimony was less credible,³⁰ although other Islamic scholars say that there were female arbitrators. The prohibition on non-Muslims was based upon the principle that only a Muslim could properly apply the Sharia in judging between two other people. This attitude is changing and today there are excellent arbitrators in Dubai who are not Muslim and are not male. As for "free", slavery was abolished in the UAE in 1963. The present requirements for an arbitrator in the UAE are set out in the CPC art.206: he must not be a minor or legally incapacitated or under a guardianship or be a criminal who has been deprived of his civil rights or an undischarged bankrupt. The number of arbitrators must be uneven, the arbitrator must confirm in writing his acceptance of the appointment

²⁸ See GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications art. 1

²⁹ See DIAC Rules arts 23 and 24

³⁰ Faisal Kutty, "The Shari'a Factor in International Commercial Arbitration" (2006) 28 Loy.L.A Int'l Comp.L Rev.565, 608

and if he then withdraws without good reason, the court may order him to pay compensation.³¹

Under the DIAC Rules, the parties may agree how many arbitrators there should be, but if there is no agreement the default position is one arbitrator unless DIAC decides that three would be more appropriate for the particular dispute; an arbitrator must be impartial and independent, and a sole arbitrator or chairman of the tribunal may not be of the same nationality as one of the parties unless the other party agrees.³² The DIFC-LCIA Rules have similar provisions.³³

Claims against the Government

There is no sovereign immunity as such in Dubai, but no claim may be brought (whether in court or in arbitration) against the Ruler or the Government of Dubai or any government department, institution or corporation without first obtaining consent from the Ruler's Court.³⁴ Written details of the claim must be deposited with the Legal Adviser at the Department of Legal Affairs, who should notify the relevant government authority within one week and the authority should respond within 15 days. There is then a two-month period for amicable settlement and if that fails, the claimant may then proceed to court or arbitration.

The purpose of this provision is not (as cynics might suggest) to prevent such claims being brought but to allow amicable settlement, in the Arab way. Note, however, that a judgment or award may not be enforced by seizing or attaching public property³⁵; Article 247 of the CPC lists the types of property that may not be seized. These provisions may hinder the successful claimant from enforcing any award that he may be fortunate enough to receive, but common practice is for a senior member of one party to have a quiet word with a senior member of the other party and reach agreement between themselves.

Public policy

Islamic jurisprudence is the reference point for interpretation of UAE law and includes "public order", which comprises the rules and foundations upon which society is based, in such a manner as not to conflict with the Sharia.³⁶ As a matter of public policy, "Arbitration shall not be permitted in matters in which settlement is not permitted"³⁷: this includes commercial agency agreements³⁸; labour disputes³⁹; disputes relating to deferred debt⁴⁰; issues such as forgery and criminal activity, which must be referred to the court and the arbitration must be suspended until the court has reached a final decision⁴¹ (a respondent can claim that a document has been forged and thereby cause the arbitration to be suspended for sometimes up to a year). Insurance disputes can be arbitrated, but an arbitration clause in an insurance contract is void "unless contained in a special agreement separate from the general printed conditions in the policy of insurance".⁴²

The Court of Cassation recently nullified an award on the ground that the arbitrator had found the respondent to be in breach of a law requiring the registration of contracts for the sale of land which the Court deemed was a matter of public policy that could not be resolved through arbitration.⁴³ Blanke argues that this decision is flawed and questions its

³¹ CPC arts 206 (2), 207 (1) and 207 (2)

³² DIAC Rules arts 8, 9 and 10

³³ DIFC-LCIA Rules arts 5 and 6

³⁴ Dubai Law No.10 of 2005, which amended Dubai Law No.3 of 1996 Concerning Government Claims.

³⁵ Law No.10 of 2005 art 3. Also UAE Civil Code art 103

³⁶ UAE Civil Code arts 2 and 3

³⁷ CPC art 203 (4)

³⁸ Federal Law No.18 of 1981 (as amended), the Commercial Agency Law art.6

³⁹ Federal Law No.8 of 1980, the Labour Law

⁴⁰ UAE Civil Code art.733

⁴¹ CPC art 209 (2)

⁴² UAE Civil Code art.1028 (d)

⁴³ Baiti Real Estate Development v Dynasty Zarooni Inc Cassation Appeal No.14/2012

compliance with the Sharia,⁴⁴ but in any event the tribunal should endeavour to ensure that its award is enforceable and is well advised to base its decision on breach of contract (i.e. that one party did not do what it agreed to do in the contract) rather than upon breach of a statutory provision which a judge may view as encroaching upon his own jurisdiction. The provisions of the New York Convention art.V(2), by which the enforcement of an arbitral award may be refused, include that the subject matter of the difference is not capable of settlement by arbitration under the law of that country⁴⁵ and that enforcement would be contrary to the public policy of that country.⁴⁶ Such provisions are of particular importance in the UAE, where the judge will consider not only the terms of the contract but also broader principles of public policy and the common good.

Interim measures

If a party makes an application to the court after the arbitration has commenced, the court is likely to refer that application to the tribunal, although the court will retain jurisdiction in relation to measures that require the court's input, such as attachment orders and injunctions to preserve evidence, and any agreement to the contrary is void.⁴⁷ The tribunal may seek court assistance, for example to penalise a witness who fails to attend or refuses to answer, or for third parties to produce necessary documents, or for "legal assistance".⁴⁸ There are no specific provisions in UAE law for the *tribunal* to grant interim relief or conservatory measures and it has been suggested that such provisions would conflict with the CPC art.220, by which the executive judge alone has jurisdiction "to rule in all disputes concerning urgent provisional implementation". Possibly this article relates to the enforcement of final decisions rather than to interim measures taken by the tribunal, but in any event in practice tribunals routinely order interim measures where such provisions are included in the institutional rules which the parties choose to adopt. Under the DIAC Rules, the tribunal can order interim measures, including injunctions and measures for the conservation of goods involved in disputes.⁴⁹ The DIAC Rules have been interpreted as encompassing orders for security for costs and anecdotally such orders have been made.

The DIFC Arbitration Law contains similar provisions and the DIFC-LCIA Rules provide expressly for orders for security for costs.⁵⁰

Challenging an arbitrator's appointment

An arbitrator's appointment may be challenged on the same grounds as a judge's, but the application must be made within five days of notification of the appointment or the date on which the applicant became aware of the grounds for challenge.⁵¹ The grounds are⁵²:

- A disqualifying marriage or family or business relationship or inheritance matter between the arbitrator and one of the parties.
- Conflicting interests as counsel, witness or expert in other proceedings.
- The arbitrator has previously brought a claim against one of the parties.
- One of the parties has worked for him or he has been feeding or housing them or has received a gift from them.
- One of the parties chose him as an arbitrator in a previous case.
- A relationship which makes it probable that he will be unable to rule without bias.

⁴⁴ Gordon Blanke, "Public Policy in the UAE" (2013) 79 Arbitration 98

⁴⁵ New York Convention art V(2) (a)

⁴⁶ New York Convention art V(2) (b)

⁴⁷ CPC arts 22 and 24.

⁴⁸ CPC art.209 (2) (a), (b) and (c) respectively

⁴⁹ DIAC Rules.art 31.

⁵⁰ DIFC Arbitration Law art.24, DIFC-LCIA Rules art.25.2

⁵¹ CPC art.207(4)

⁵² CPC arts 114 (1) and 115.

Alternatively, the parties may agree to remove the arbitrator, or the court may remove him if he deliberately neglects his appointed task after it is brought to his attention in writing.⁵³ In DIAC arbitration, a prospective arbitrator is required to provide a Statement of Independence disclosing any circumstances that may give rise to justifiable doubts as to his independence or impartiality.⁵⁴ Either party may object to a proposed arbitrator and DIAC will be strict in withdrawing the proposal if there is any hint of conflict of interest. An appointment may be revoked if the arbitrator violates the arbitration agreement or does not act fairly and impartially as between the parties or fails to proceed with reasonable diligence, or if either party subsequently discovers circumstances that give rise to justifiable doubts as to his impartiality or independence.⁵⁵ Similar provisions appear in the DIFC-LCIA Rules.⁵⁶

Challenging the tribunal's jurisdiction

UAE law does not provide for the principle of *Kompetenz-Kompetenz*, by which the tribunal has jurisdiction to decide its own jurisdiction. The parties may agree in their arbitration agreement or in the arbitration rules they adopt that the tribunal may rule on its own jurisdiction, otherwise a party must raise a jurisdictional challenge before the court. In DIAC arbitration, the Executive Committee will refer a jurisdictional challenge to the tribunal if it is satisfied *prima facie* that there is a valid arbitration agreement (if not, the arbitration will not proceed) and the tribunal will normally rule on its own jurisdiction as a preliminary issue.⁵⁷ The DIFC Arbitration Law uses similar terms.⁵⁸

Terms of reference

The subject of the dispute must be defined in an arbitration document,⁵⁹ which is taken to mean a terms of reference document separate from the award itself, setting out the nature of the dispute and the parties' arguments and evidence, signed by all the parties and initialed on every page. By signing the terms of reference the parties should not afterwards be able to claim that the arbitration was invalid, unless the tribunal's decision strays beyond the terms of the arbitration agreement. It is arguable that UAE law does not actually require such a document and that it is sufficient to state the relevant information in the award itself, or that there is no requirement that the terms of reference be signed in Dubai (as the award must be), but best practice is to produce a terms of reference document and sign it in Dubai.

Although the DIAC Rules contain no express provisions in relation to a terms of reference document, advice from DIAC is that if one of the parties does not sign the terms of reference (it is always the respondent) then the tribunal in its award must set out the steps it took to obtain signature and explain why signature was not obtained. The Dubai Municipality Rules and the identical Roads and Transport Authority Rules state that if one of the parties does not sign, the tribunal must set a time limit for signature and on expiry of that time limit "the arbitration shall proceed and the award shall be made". Clearly, it cannot be the case that the arbitration is invalid if the terms of reference document is not signed by both parties, because if that were the case then any respondent could void the arbitration by failing to sign.

Power of attorney to bind a company to arbitration

There are no provisions in UAE law, as there are in other legal systems, whereby a party contracting with a company in good faith is entitled to assume that the contract is validly executed, and therefore in the UAE a person who signs a contract must prove that he is

⁵³ CPC art.207(3).

⁵⁴ DIAC Rules art.9.8

⁵⁵ DIAC Rules art 13.

⁵⁶ DIFC-LCIA Rules art.10. See Also DIFC Arbitration Law art.18

⁵⁷ DIAC Rules arts 6.2 and 6.4

⁵⁸ DIFC Arbitration Law art.23 (1) and DIFC-LCIA Rules art.22(1)

⁵⁹ CPC art.203(3)

entitled to do so.⁶⁰ A limited liability company may appoint up to five managers who may bind the company,⁶¹ or the articles of association may name a manager who can bind the company, but any other person is required to have a valid power of attorney (POA). A POA may be "general" or "special".⁶² An arbitration clause is recognised as being distinct from the contract in which it is written and therefore a person who signs a contract that includes an arbitration agreement must have a special POA expressly entitling him not only to sign the contract but also to agree an arbitration clause,⁶³ because that will exclude the jurisdiction of the court. A company manager may delegate to a third party the right to agree an arbitration clause provided that right is specifically mentioned in the third party's POA. ⁶⁴Without a valid POA granted by someone entitled to grant it, no person may bind a company to arbitration and the court may refuse to ratify the award.⁶⁵

The UAE Civil Code art.925 sets out criteria which determine whether a POA is valid:

- (a) The principal must have the right to act in relation to the particular matter.
- (b) The agent must not be prohibited from acting in the matter entrusted to him.
- (c) The subject matter of the agency must be capable of being performed by an agent.

A POA must be typed in Arabic and must be notarised by a public notary. Both the grantor and the grantee or their agents must attend the notary, they must produce the POA itself and their identity cards and, in the case of a company, the trading licence and the articles of association. If the POA is issued outside the UAE, it must be notarised in the country of issue and at the UAE embassy of that country and then translated into Arabic by a certified translator and legalised at the Ministry of Foreign Affairs in the UAE. It is common for a POA to have English on the left of the page and Arabic on the right.

The courts take this procedure literally and it is common for the unsuccessful party to argue at the enforcement stage that the award is invalid because the person who signed the contract was not authorised to agree an arbitration clause. The common law doctrine of estoppel has no place in UAE law and arguments based upon waiver of the right to object are unlikely to succeed. It may be possible to convince a judge that there is an injustice when the claimant who initiated and lost the arbitration then claims that the award is invalid because the person who signed the contract on his behalf was not authorised to agree an arbitration clause. In general, however, the courts insist that a contract must be signed by someone who was authorised to sign not merely the contract but also an arbitration agreement.

Power of attorney to act as counsel

An advocate may only act on behalf of a party in court if he has a valid special POA, otherwise his acts will not be valid.⁶⁶ A foreign principal should appoint an agent within the UAE and the principal will be bound by the legal submissions of his agent.⁶⁷ If an advocate does not provide his POA at the first court hearing, and the client is represented by a different advocate at the second hearing, the client has not lost the right to request that the case be stayed to arbitration, because the first advocate was never acknowledged by the court.⁶⁸

This has been taken to mean that in arbitration too an advocate must hold a valid POA. The Court of Cassation held recently that this requirement does not apply to arbitration, because by the CPC art.212, arbitrators are bound only by the provisions of the CPC Ch.3 (i.e. arts 203–218) and any specific procedures agreed upon by the parties; the grounds

⁶⁰ CPC art.58(2)

⁶¹ UAE Federal Law No.8 of 1984, the Commercial Companies Law arts 235 and 237

⁶² UAE Civil Code art.926

⁶³ CPC art.203(4) see also Dubai Court of Cassation Petition No.164/2008, judgment dated October 10, 2008; Dubai Court of Cassation, Petition No.273/2006, judgment dated February 4, 2007

⁶⁴ Dubai Court of Cassation, Petition No.220/2004, judgement dated January 17, 2005.

⁶⁵ CPC art.216 (1) (b)

⁶⁶ CPC arts 55(2) and 58(2); Dubai Court of Cassation, Case No.28/2009, judgment dated April 4, 2009

⁶⁷ CPC art. 58(1)

⁶⁸ Dubai Court of Cassation, Case No.38/2009, judgment dated April 4, 2009

upon which an arbitral award may be annulled are set out in the CPC art.216 and they do not include the invalidity of the advocate's POA.⁶⁹ Best practice, however, is for the tribunal to require the advocates to provide copies of their POAs at the preliminary meeting and to check that the arbitration agreement and the POAs of the advocates were signed by someone who was authorised to do so and to record in the terms of reference that the parties acknowledge that each other's POAs are valid.

It is possible for a POA to be ratified retrospectively,⁷⁰ although ratification of a contract may not amount to ratification of an agreement to arbitrate unless the ratification says so.⁷¹ Thus if an attorney has a POA to represent a client in court but no special POA to represent the client in arbitration, the client will be precluded from relying on the absence of a special POA to arbitrate if he has impliedly conferred authority, for example by giving the attorney documents to submit in the arbitration.⁷² For the sake of completeness, note also that it is not permitted to appoint an attorney who is an enemy of the opposing party.⁷³

Evidence

In court proceedings, witness testimony may not contradict documentary evidence, witnesses are questioned by the judge, they must sign the court's record of their statement and although there is no general disclosure a party may be required to disclose documents upon which he relies.⁷⁴ Arbitration procedure is more flexible and the law of evidence does not apply unless the parties agree or the tribunal directs.⁷⁵ The tribunal determines the extent of any disclosure and often the IBA Rules on Taking Evidence are adopted. Oral evidence must

be given on oath, ⁷⁶which is usually, "I swear by Almighty God that I shall tell the whole truth and nothing but the truth" but may vary according to the custom of the particular witness's religion. Tribunals generally adopt common law procedures whereby cases are presented by advocates and witnesses are cross-examined by the other party. UAE law does not recognise the English concepts of legal professional privilege or "without prejudice" communications and any such documents may be disclosed without the other party's consent (the DIFC Court does recognise these concepts).

There is no requirement in the CPC that an expert must be impartial or independent, although there is in the DIAC Rules when the expert is appointed by the tribunal, and similar provisions appear in DIFC arbitrations.⁷⁷

The award

The domestic award should be made in Dubai; it must comprise a copy of the arbitration agreement, a summary of the parties' cases and their evidence, together with the reasoning, place and date of the award; it must be signed by all the arbitrators (this is taken to mean that the decision and its reasoning must be signed on every page, the remainder of the award should be initialled),⁷⁸ any dissenting opinion must be included and if one arbitrator refuses to sign, that fact must be mentioned in the award; if the award is not in Arabic, then for enforcement purposes a translation is required; the award is deemed made on the date it is signed; a copy must be given to each party within five days⁷⁹; the award must be rendered within six months of the preliminary meeting unless the parties agree

⁶⁹ No citation given but see article by Al Tamimi & Co, "No need for a POA in UAE Arbitrations"

⁷⁰ UAE Civil Code art.930

⁷¹ Dubai Court of Cassation, Petition No.220/2004, judgment dated January 17, 2005; Petition No.51/2005, judgment dated May 28, 2005.

⁷² See Dubai Courts of Cassation, Petition No. 273/2006, judgment dated March 5, 2007

⁷³ UAE Civil Code art.939

⁷⁴ Federal Law No.10 of 1992, Law of Evidence in Civil and Commercial Transactions arts 36, 44 and 18

⁷⁵ By virtue of CPC art 212

⁷⁶ CPC art.211

⁷⁷ DIAC Rules art.30.1; DIFC Arbitration Law art.33, the DIFC-LCIA Rules art.21

⁷⁸ Dubai Court of Cassation, Petition No.233 of 2007, judgment dated January 13, 2008

⁷⁹ CPC arts 212 (4)-(7) and 213(3), respectively

explicitly or implicitly to extend that period or grant the tribunal the power to extend it, or the court extends it.⁸⁰

At the ratification stage, the court may return the award to the tribunal to address omissions or make clarifications, in which case the tribunal must issue its decision within three months, or alternatively, the court can itself correct material flaws.⁸¹ Often the recipient of a favourable award is well aware of the difficulties he will face in achieving enforcement of the award and he uses it to leverage a favourable settlement by agreement. This reflects the Arab desire to settle matters between themselves and their notion that arbitration is not binding but is an aspect of conciliation.

Under the DIAC Rules, the six-month period commences on the date the tribunal receives the file from DIAC but the tribunal can extend the period by six months on its own motion and the Executive Committee of DIAC may extend it further.⁸² It is advisable to include such a provision in the terms of reference. The DIFC Arbitration Law does not impose a six-month requirement and the DIFC-LCIA Rules are silent as to a situation in which the arbitration is conducted under those Rules but under UAE law and has been running for six months but the award has not been made.

Costs

Under the CPC, the tribunal may “assess their fees and the costs of the arbitration and they may rule to impose all or part of this on the losing party”, although the court may amend this assessment in a manner appropriate to the effort expended and the nature of the dispute.⁸³

In DIAC arbitration there is a fee (currently AED 5,000)⁸⁴ payable to DIAC for registering a claim or a counterclaim. DIAC will then require an “advance on costs” based upon the value of the claim in accordance with a table attached to the appendix to the Rules, which is intended to cover the anticipated fees and expenses of the tribunal and of any expert appointed by the tribunal, although the amount may be increased if the arbitration proves more complex than anticipated. The advance on costs should be paid in equal shares by both parties but if (as commonly happens) the respondent fails to pay its share, the claimant will be obliged to pay the respondent’s share in addition to its own, or the claim will not proceed, and the same applies if the claimant fails to pay its share of the advance on costs in relation to any counterclaim. If (as commonly happens) the respondent fails to mention in its Answer to the Request for Arbitration that it has a counterclaim, and then includes a counterclaim with its defence, the tribunal should inform DIAC, who will notify the parties of the increased advance on costs required in relation to the value of the counterclaim; the tribunal may continue with the arbitration while payment is sought, but may not issue its award until payment has been made in full. If the amount of the claim or counterclaim is increased during the arbitration, the tribunal should inform DIAC, who will require an increased fee.

Under the DIAC Rules, the tribunal may decide in its final award which party shall bear the costs and in what proportion,⁸⁵ and this will include DIAC’s fee and the advance on costs, but the Rules are silent specifically as to the successful party’s *legal* costs. Generally these are awarded in accordance with “the English Rule” that costs should follow the event. In DIFC arbitration, the fees are set out in the schedule of arbitration costs appended to the DIFC-LCIA Rules and the successful party may be awarded its reasonable legal costs to reflect its relative success and failure in the arbitration, unless the parties have agreed otherwise and provided they were claimed in the arbitration.⁸⁶

However, a setback occurred in 2013 when the Court of Cassation held that under the DIAC Rules, “costs” include the DIAC fee and the advance on costs, but not the attorney’s fees; if a party chooses to be represented by an attorney he does so at his own cost, which

⁸⁰ COC art.210, Dubai Court of Cassation, Case No.222/2006, judgment dated February 25, 2007

⁸¹ CPC arts 214 and 215

⁸² DIAC Rules art.36.3 and 36.4 respectively

⁸³ CPC art.218

⁸⁴ The UAE dirham is pegged to the US dollar at 3.67; there are currently six dirhams to the English pound

⁸⁵ DIAC Rules art.37.10 and Appendix to the Rules art.4

⁸⁶ DIFC Arbitration Law art.38(5) (f) and DIFC-LCIA Rules art.28

is why the Rules do not include legal costs; pursuant to the CPC art.216(1), the arbitrators exceeded their jurisdiction by awarding costs of AED 110,000 whereas general practice in the court is to award nominal attorney's fees of AED 500–2,000.⁸⁷ The order for AED 110,000 in attorney's fees was severed and AED 1,000 was substituted; the rest of the award was confirmed. This decision does not accord with normal practice in DIAC arbitrations and does not address the common situation where both parties apply for their costs, thereby arguably as a matter of contract granting the tribunal jurisdiction to award costs.

Interest

The Sharia prohibition on payment of interest might suggest that an arbitral award could be unenforceable for public interest considerations under the UAE Civil Code art.3, but in practice this is not the case. As with most Arab jurisdictions, the UAE has legalised the payment of interest and in those Arab states that have not, the part relating to interest may be severed and the rest of the award enforced. In the UAE, in relation to commercial debt, if the contract does not stipulate a rate of interest the rate may not exceed 12 per cent.⁸⁸ However, in arbitration as in court proceedings interest is usually awarded at 9 per cent unless the contract proscribes a rate, either as a figure or as a percentage above the prevailing EIBOR rate.⁸⁹ In the DIFC Court, interest is awarded at 1 per cent above the three-month EIBOR rate. Unlike courts, arbitral tribunals can award compound interest, which is likely to be enforceable in Dubai, although possibly not in Abu Dhabi.

Anecdotal, where the respondent has refused to pay its share of the advance on costs or has otherwise sought to delay or wreck the arbitration, and the tribunal's final decision goes against the respondent, some tribunals have been known to hit the respondent with 12 per cent interest as a punishment. Twelve per cent is indeed a punishment, but such a practice may be frowned upon by a judge at the enforcement stage and a rate of 9 per cent is considered more appropriate.

Ratification of domestic awards

Commonly the losing party will refuse to honour the award and the winning party must seek to enforce it through the courts, which involves a two-stage process of ratification (because a *domestic* arbitral award must be ratified by the court before it can be enforced) followed by execution⁹⁰; *international* arbitral awards are dealt with separately below. At the ratification stage, the court should not consider the merits of the award,⁹¹ but whether it complies with legal requirements and if it does not comply the court may refuse to recognise it or may return it to the tribunal for clarification within three months.⁹² There is no right of appeal as such against an arbitrator's decision,⁹³ and the court will not hear the case *de novo*, but commonly the unsuccessful party will raise at the ratification stage the same arguments that it would have raised if the right of appeal had been available. Any decision of the Court of First Instance can be appealed to the Court of Appeal and then to the Court of Cassation unless the parties have expressly waived the right of appeal or the value of the dispute does not exceed AED 200,000.⁹⁴ When ratified, the award can be taken to the Court of Execution (see below), where this process starts again, with the result that, in extreme cases, the ratification and execution process can take several years to achieve. A recent case held that a domestic arbitral award can only be set aside under the CPC art.216 on grounds linked: (1) to the arbitration agreement; or (2) to the proceedings:

(a) no proper arbitration agreement or it had lapsed or the tribunal exceeded its

⁸⁷ Real Estate Objection for Cassation, Claim No.282/2012, judgment dated February 3, 2013

⁸⁸ UAE Federal Law No.18 of 1993, the Commercial Transactions Law art.76

⁸⁹ Emirates Interbank Offer Rate

⁹⁰ COC arts 214 to 216 related to court ratification of arbitral award; arts 235 to 238 relate to implementation of foreign judgments and arbitral awards; and arts 239 to 243 relate to execution

⁹¹ Dubai Court of Cassation, Case No.273 of 2006, judgment dated February 4, 2007

⁹² CPC art.214

⁹³ CPC art.217

⁹⁴ CPC art.173, see also Dubai Court of Cassation, Case No.278/2008, judgment dated April 14, 2009

jurisdiction;

- (b) the tribunal was not properly appointed, or the subject of the arbitration was not stated, or a party was not competent to agree to arbitration or an arbitrator did not fulfil the legal requirements; or
- (c) there is an invalidity in the award or in the procedure.⁹⁵

From a summary of all the provisions of the CPC, it appears that an award may be challenged on the following grounds:

- The arbitration agreement was not in writing (art.203(2)).
- The subject of the dispute was not defined in the arbitration document (art.203(3)).
- The award was rendered with no or an invalid arbitration deed (art.216(1)(a)).
- The tribunal exceeded its jurisdiction under the arbitration agreement (art.216(1)(a)).
- The tribunal considered matters that by law may not be arbitrated (art.203(4)).
- The tribunal was not properly appointed (art.216(1)(b)).
- The tribunal did not decide in accordance with the law (art.212(2)).
- The tribunal did not issue its decision within six months, without a valid extension (art.210(1) and (2)).
- The arbitrators were not properly appointed (art.216(b)).
- An arbitrator was a minor or under a guardianship or was deprived of his civil rights because of some criminal penalty or was an undischarged bankrupt (art.206(1)).
- The person who signed the arbitration agreement lacked capacity (art.203(4)).
- Witnesses did not swear the oath (art.211).
- Some form of procedural irregularity, such as failure by an arbitrator to sign both the reasoning and the *dispositive* (i.e. the substance) of the award (art.216(1)(c)).
- Public policy considerations.⁹⁶

The unsuccessful party commonly resists enforcement on whatever grounds come to hand (there is no disincentive, because awards of costs in the courts are nominal) and appeals any adverse decision as far as the Court of Cassation, in order to delay payment for so long that the other party is willing to accept a compromise settlement rather than continue trying to enforce the award for its full amount. Other common tactics are for a recalcitrant respondent to ignore procedural requirements, for example by filing submissions out of time so that they are rejected, or to refuse to accept delivery of documents, and then rely upon this apparent injustice to argue that he was denied a fair opportunity to present his case.

Enforcement of foreign arbitral awards

The CPC art.235 sets out conditions for the enforcement of foreign *court orders* and art.236 applies this to foreign *arbitration awards*. The conditions are:

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

By the CPC art.238:

“The principles stipulated in the preceding articles shall be not-withstanding any rulings

⁹⁵ Dubai Court of Cassation, Petition No.270 of 2008, judgment dated March 24, 2008

⁹⁶ See Petition No.146/2008, judgment dated November 9, 2008

or pacts between the State and any other state in this regard".

The UAE has entered into a number of treaties and conventions for the enforcement of arbitral awards, including the New York Convention⁹⁷ and the ICSID Convention, and some 38 bilateral treaties, particularly with other Arab states, some 28 of which are actually in force.

A common reservation made by states ratifying the New York Convention is that recognition of foreign awards is confined to those rendered in states that recognise and enforce judgments of the ratifying state. There are six official languages of the New York Convention and Arabic is not one of them; confusion was caused when this mutual recognition reservation appeared on the New York Convention website in relation to the UAE, but it is now accepted that the UAE did not in fact make any such reservation when it signed the Convention.

The grounds upon which enforcement of foreign arbitral awards may be refused are almost identical under the New York Convention art.V, the UNCITRAL Model Law art.36 and the DIFC Arbitration Law art.44(1):

- (i) a party was under some incapacity, or the arbitration agreement is invalid under the law to which the parties have subjected it or, in the absence of any indication thereon, under the law of the state or jurisdiction where the award was made;
- (ii) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- (iii) the award deals with a dispute that does not fall within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission (although it may be possible to sever those parts);
- (iv) the composition of the tribunal or the procedure was not in accordance with the parties' agreement or, in the absence of such agreement, with the law of the state or jurisdiction where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which the award was made; or
- (vi) if the court in the country where recognition is sought finds that:
 - (a) the subject matter of the dispute would not have been capable of settlement by arbitration under the laws of that country; or
 - (b) enforcement of the award would be contrary to the public policy of that country.

The New York Convention art.VII(1) envisages enforcement under an available bilateral or multilateral treaty if that is more favourable. As for enforcement of an ICSID award, by the Washington Convention art.54:

"each contracting state must recognise an ICSID award as if it were a final judgment of its own national courts and enforce the obligation imposed by that award".

It is fair to say that the Dubai courts have in the past been suspicious of arbitration and reluctant to enforce arbitral awards which they felt impinged upon their own jurisdiction. In the well-known *Bechtel* case,⁹⁸ an international arbitration award against a government department was set aside on the ground that witnesses had not given evidence under oath as required by the CPC art.211. The Court may have been seeking to shield the government body from an unfavourable award, but the decision sent a negative message to the international legal community.

The Dubai courts have recently been more willing to respect international arbitration, although they remain protective of their own jurisdiction in relation to domestic arbitration. In one 2012 case, the losing party resisted enforcement of a foreign arbitral award on various grounds including: the person who signed the arbitration clause lacked capacity to sign; the formation of the tribunal was invalid; the arbitrator applied English rather than UAE law;

⁹⁷ Decree No.43 of 2006 of June 13, 2006, which came into force on November 19, 2006.

⁹⁸ *International Bechtel v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Petition No.503/2003, judgment dated May 15, 2005.

there were no terms of reference; the witnesses were not sworn in properly; a copy of the arbitration agreement was not appended to the award; and the award was not rendered within six months. The Court of First Instance held that this was an international arbitration award and therefore the court's supervisory role was limited to ensuring that the award did not breach the terms of the New York Convention, because the provisions of the CPC do not apply to the enforcement of foreign awards. This decision was upheld by the Dubai Court of Cassation, which held that the CPC applies to domestic arbitration awards, while the New York Convention applies to international arbitration awards.⁹⁹

Execution

The successful party must now seek to have the award enforced by the Execution Court, although the unsuccessful party may already have taken steps to conceal his assets. The executive judge will ask the losing party to make payment within 15 days, failing which he will decide whether to enforce the award by attaching any assets or enforcing against assets which have previously been attached and selling them through public auction to settle the award amount. If property is located in the area of another court, the judge may transfer the matter to the executive judge of that court to supervise the sale of the property, but it is the first judge who distributes the proceeds between the creditors.¹⁰⁰

The losing party in the arbitration may seek to resist execution on the same grounds that he sought to resist ratification. In addition, the decision of the executive judge may itself be appealed on grounds that¹⁰¹:

- (a) The executive judge lacked jurisdiction to execute the award.
- (b) The particular property should not have been seized or sold.
- (c) Persons other than the adversaries participated in the seizure.
- (d) Issues relating to the order of priority between the creditors.
- (e) There are grounds to defer implementation.
- (f) A person seeks to avoid imprisonment for failure to pay the sum ordered.
- (g) Deferment of payment by the debtor or payment in instalments.

3. Conclusion

The Dubai courts are coming to terms with international arbitration and are less jealous of their own jurisdiction and more willing to enforce arbitration awards provided they comply with Sharia principles of fairness and good order. The DIFC Court may become the obvious venue for the enforcement of international arbitration awards, but if Dubai hopes to become a major centre for dispute resolution it requires a modern legal structure which is recognizable to the business community, which supports the arbitration process swiftly and which enforces domestic as well as foreign awards. English is the language of international business and parties resent the expense and variable quality of translations of documents and convoluted procedure. Dubai has a new Company Law and a proposed new Insolvency Law; a modern Arbitration Law based upon the UNCITRAL Model Law is urgently required to carry the legal system into the twenty-first century, so that modern business people may feel confident to use Dubai as a venue to resolve disputes.

⁹⁹ Dubai Court of Cassation, Case No.132/2012, judgment dated September 18, 2012

¹⁰⁰ CPC arts 219 and 220

¹⁰¹ CPC art.222 (1)