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CHALLENGES FACING MARITIME ARBITRATION IN THE UAE; A STUDY OF UAE DECISIONAL LAW ON MARITIME ARBITRATION, WITH A SPECIAL FOCUS ON THE NEW FEDERAL LAW ON ARBITRATION

Mohammad Ibrahim Abdulrahim Abdulla
Assistant Professor, College of Law, United Arab Emirates University
Dubai, United Arab Emirates
mohammad.a@uaeu.ac.ae

Abstract

Maritime trade is a major part of the world economy; international trade would be crippled without it. Maritime trade occurs through the employment of maritime vessels and the contracts born from the use of these vessels are numerous. Predicting the number of disputes these transactions will generate is therefore difficult, but it is safe to assume that the courts cannot address all these disputes on their own. This reality highlights the important role that maritime arbitration plays in easing the load on the courts and enabling disputing parties to resolve their disputes. However, for maritime arbitration to succeed, the courts need to support it by, among other things, preventing arbitral disputes from being funnelled back into the court system. Therefore, this paper is going to examine ways to acquire a remedy for the numerous plagues that infect the maritime arbitral scene. The proposed solutions in this paper would not require a reinvention of the wheel, rather it would highlight some of the already tested remedies that are better suited to address the shortcomings of the maritime arbitral scene in the UAE.

Keywords: Arbitration, Maritime, Arab, Middle-East, United Arab Emirates, Shari'a, Islamic Law, Commerce, Commercial Law

INTRODUCTION

Combined with its historic relationship with the sea,[1] the United Arab Emirates'[2] multiple ports,[3] and unique location on one of the busiest international shipping routes in the world[4] have enabled it to become a hub of maritime commerce in the region. Nations willing to play leading roles in the highly competitive field of maritime commerce must be well equipped and more than ready to answer any challenges that could hinder their success. Such challenges include the resolution of disputes resulting from human conduct and interaction. Historically, the courts in the UAE have played a leading role in resolving all disputes; however, even if the courts are of the highest calibre, the services they can provide and the number of disputes they can resolve remain limited. This is particularly true when it comes to resolving maritime disputes in ways that fulfil the needs of merchants.

Maritime arbitration is a familiar means of resolving maritime disputes that provides disputing parties the necessary relief they seek; indeed, arbitration is generally 'fast, cheap, flexible, and confidential';[5] these attributes have led many individuals to submit their disputes to arbitration,[6] which has made arbitration a widely accepted tool of dispute resolution in commerce in general and certainly in maritime commerce. Nevertheless, arbitration cannot succeed without the support of the courts.[7] One way to determine the effectiveness of this tool and identify the challenges it faces in individual jurisdictions thus involves examining case law in these jurisdictions. Therefore, this study examines a selection of disputes that the high courts in

[1] The people of the UAE have a long history with the sea that pre-dates the discovery of the oil.

[2] Hereinafter UAE.

[3] For instance, Dubai's Jabil Ali and Rashid ports are both situated on the Arabian Gulf, while the Emirate of Fujirah has a port on the Arabian Sea and direct access to the Indian Ocean.

[4] This is a result of the UAE's unique geographical location, situated on the Arabian Gulf with access to one of the major international oil shipping routes.

[5] Russell J. Cortazzo, 'Development and trends of the lex maritime from international arbitration jurisprudence', *Journal of Maritime Law & Communication 43 (*2012*)*: 257. See also, Ahmad Hindi, , *al-Tahkeem Drash Ijrai'ah [Arbitration: A Procedural study]* (Alexandria, Egypt: Dar Elgamaa Elgadida, 2013), and Waleed Mahmood Hamoodah, *Al-Jame Al-Qanoni Fe Al-Tahkem* [*The Inclusive Legal Text on Arbitration*] (2011), 19. Both of these authors provide insight into how Arab jurists view arbitration.

[6] Moreover, maritime arbitration and certainly international maritime arbitration is a popular tool in resolving maritime disputes, *ibid*.

[7] See general Steven J. Burton, 'The new judicial hostility to arbitration: Federal preemption, contract unconscionability, and agreements to arbitrate', *Journal of Dispute. Resolution 2006 (2)* (2006): 469. Burton gives examples of judicial hostility towards arbitration in the US and England (at 473-475). He goes on to justify the changes that courts have made to support arbitration, focusing particularly on public policy favouring arbitration (at 478-485). Jan Paulsson also supports the notion that competition between arbitration and the courts is harmful: 'Competition between judges and arbitrators is indeed harmful to both. The idea of arbitration is that of freedom; judges who quash that idea and impose their power for its own sake run the risk of all despots: disaffection.' Jan Paulson, *The Idea of Arbitration* (Oxford, UK: Oxford University Press, 2013), 265.

the UAE have adjudicated.[8] The aims of this examination are as follows: first, to understand how the courts view maritime arbitration and to determine if that view requires adjustment; second, to identify the challenges that limit the success of maritime arbitration and propose working solutions; and third, to determine whether or not the outcomes of the disputes in question would have changed if they were examined under the new Arbitration Law.[9] In pursuing these aims, this study seeks to highlight the fact that the success of maritime arbitration relies substantially on two factors: first, whether or not a country's judicial system is ready and willing to accept it;[10] and second, whether or not the courts take positions that honour parties' right to arbitrate by not funnelling their disputes back into the courts system.

To achieve these goals, this study is structured as follows: the first part focuses on how the courts in the UAE view maritime arbitration, assessing this practice to derive insights regarding how the courts function in the UAE, while referring to the new Arbitration Law when necessary; the second part highlights the challenges facing maritime arbitration; and the third part seeks to develop solutions to these challenges, while highlighting the advantages of having a functioning arbitration system when it comes to promoting the UAE as a maritime commercial hub in the region.

THE UAE COURTS' VIEW OF MARITIME ARBITRATION[11]

Maritime commerce and the UAE are inextricably linked; indeed, even before the discovery of oil, maritime commerce was a crucial part of the country's identity.[12] However, the discovery of oil helped to solidify this relationship[13]—highlighted by the fact that most goods entering and

[8] It should be noted that this study focuses more on the decisions issued by the Dubai Court of Cassation, which can be used as an example of how the courts in the UAE address the issues discussed in this paper.

[9] Federal Law no.6 /2018 on Arbitration, issued 3/5/2018.

[10] Cortazzo explains that three factors have contributed to the growth of maritime arbitration—the encouragement of the judicial system, the parties' respect, and the enforcement of awards, Crotazzo *supra* note 5 at 257.

[11] See general, Dubai Court of Cassation appeal no. 92/2007 issued on 19 June 2007, and Dubai Court of Cassation appeal no. 261/2002 issued on 2 November 2002 to better understand how the courts in the UAE view arbitration in general. In those decisions, the court defined arbitration as an exceptional means of resolving disputes, which in their view is an exception to the parties right to seek their natural judge.

[12] See general, Norah Saqer Al-Flahi, *The Judicial System in the Trucial Coast from 1890 AD–1971 AD*, (Dubai, UAE: Hamdan Bin Mohammed Heritage Center, (2014). In this study, the author describes the political scene in the region during the British colonial period at (16-28) and discusses how disputes were resolved in the coastal areas and the main commercial activities of the area at (54-63).

[13] One of the UAE's famous oil arbitration disputes occurred between the Sheikh of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd. See Asquith of Bishopstone, 'Award of Lord Asquith of Bishopstone'. *International and Comparative Law Quarterly, 1*(2), (1952): 247. Online at: https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/award-of-lord-

exiting the UAE are currently transported on maritime vessels.[14] Examining how the courts address maritime arbitration is therefore crucial.[15] This examination will shed light on the following points: 1) how the courts support arbitration; 2) the effects of slow justice; 3) the effects of recognizing foreign arbitral awards on maritime arbitration; 4) the agent powers and their effects on arbitration agreements; and 5) the effects of having translators in arbitration hearings.

How the Courts Support Arbitration

Understanding how the courts view arbitration requires a chronological approach.[16] We start with a decision by the Court of Cassation[17] that highlights the relationship between the oil industry and maritime arbitration in the UAE. The case revolved around a dispute concerning Calcined Petroleum Coke shipped from the United States to Jabil Ali port in Dubai.[18]

The court's response to the appellant's argument warrants examination. The court's decision, on the surface at least, appears to support arbitration. It arrived at its decision after a thorough examination of the merits of the dispute[19] and justified its acceptance of the appeal

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asquith-of-bishopstone/9051FC1B548D6DAD03A0A8CE79ACBCB0, accessed on 1/5/2018. See general Edwin J. Casford Jr., 'The continental shelf and the Abu Dhabi award*', McGill Law Journal 1* (1953): 109. Online at: http://lawjournal.mcgill.ca/userfiles/other/2058317-1.2.Cosford.pdf, accessed on 1/5/2018.

[14] A report by UNCTAD emphasizes the connection between oil and maritime trade, stating: 'over 80 percent of the volume of global merchandise trade [is] carried by sea' Cosimo Beverelli, 'Prices and maritime freight rates: An empirical investigation', in proceedings of the United Nations Conference on Trade and Development—United Nations (New York City, 2010). Online at: http://unctad.org/en/docs/dtltlb20092_en.pdf, accessed on 5/1/2018.

[15] Thomas E. Carbonneau, *Toward a New Federal Law on Arbitration* (Oxford, UK: Oxford University Press, 2014): 115. In this book, Carbonneau states: 'Given the specialty of maritime arbitration, maritime arbitral awards are subject to an even more circumscribed form of enforcement scrutiny.' He thus emphasizes the role that the courts play in advancing the cause of maritime arbitration.

[16] This order will show how the thinking of the courts has evolved through the years.

[17] Dubai Court of Cassation appeal no. 49/2003 and 96/2003, issued on the 18th of May 2003, pages 607-610.

[18] A key ingredient in the production of aluminium, see online at: https://www.oxbow.com/Products_Industrial_Materials_Calcined_Petroleum_Coke.html, accessed on 1/5/2018. The claimant asserted that once the shipment arrived at the port they found the goods to be defective, which forced them to initiate court proceedings. The court decided to dismiss the case based on the existence of the arbitration clause. See Dubai Court of First Instance, Case no. 485/2000 (commercial circuit), issued on the 24th of June 2002. The claimant initiated proceedings against the owners of the ship, suing for the damages they claimed occurred to the goods. The first instance court appointed an expert to examine the damages and after he submitted his report—and after nearly two years of litigation, the first instance court submitted their decision. The appeal court on the other hand decided to reverse the decision of the first instance and to refer the dispute back to the first instance court for settlement. Dubai Court of Appeals, appeal no. 930/2002, issued on the 21st of December 2002. Lastly, the Cassation Court reversed the decision of the appeal court and decided to uphold the arbitral clause. Appeal no. 49 and 96/ 2003 *supra* note 14.

[19] The appellant's argument revolved around the fact that even though the bill of lading did not contain an arbitration clause, the ship's leasing agreement did, meaning the dispute should be resolved via arbitration. The cassation court concluded that the arbitral clause was enforceable, siding with the first instance court. The court

based on Article 151 of the Civil Procedures Law.[20] The court essentially stated that the arbitration (the subject of this appeal) involved a jurisdictional dispute that under normal circumstances would not be subject to appeal because such decisions do not end disputes, but that this article established an exception that allowed such appeals.[21] The court asserted its jurisdiction over the dispute in a way that raised more questions than it answered; the parties had essentially entered into an agreement to arbitrate and one of the parties initiated court proceedings instead of complying with this agreement. However, once the dispute was brought before the court, it ended up in a never-ending cycle of litigation attributable to a number of factors including the lack of procedures to safeguard the sanctity of arbitration agreements and arbitration processes in general.[22] The other and most crucial point is that the court failed to recognize arbitration as an equal partner to adjudication—a dispute resolution mechanism with the potential to ease the burden on the courts and, in the long run, reduce the costs and expenses of adjudication.[23] Thus, the court's acceptance of the appeal appears to have had a harmful effect on arbitration, increasing adjudication-related time and expenses for the parties in question and—worse still—potentially causing individuals to lose faith in the arbitral process.[24]

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came to this conclusion by first citing Article 151 of Federal Law no. 11/1992 Concerning Civil Procedures (hereinafter, Civil Procedures Law), which states:

> It is not possible to appeal against the decisions delivered during the progression of the action since the litigation has not been terminated therewith except with the delivery of the decision terminating all the litigation, and that with the exception of the temporary and summary decisions, the decisions issued for staying the action, the decisions liable to the obligatory execution, and the sentences issued deciding the lack of jurisdiction, unless the court had the authority to judge in the action.

(This is the official translation of the law found on the ministry of justice website, online at: http://www.elaws.gov.ae/ArLegislations.aspx).

[20] *Ibid*.

[21] *Ibid*.

[22] The enactment of the new arbitration law might address this issue; it introduced several safeguards for the process of arbitration, including limiting the submission of disputes concerning arbitration to the appeal court, according to Article 1 of the Arbitration Law, which defines the court as: 'The federal or local Court of Appeals agreed upon by the parties or in whose jurisdiction the arbitration is conducted.'

[23] Reuben states:

> ADR processes yields greater return than expanding funding for trial processes through the creation of more judgeships, specialty courts and other administration devices that merely restructure case management rather than reduce the flow of cases by preventing unnecessary conflict escalation.

Richard C. Reuben, 'Constitutional gravity: A unitary theory of alternative dispute resolution and public justice*', UCLA Law Review 47*(4) (2000): 1104. See appeal no.92/2007 and appeal 261/2002 *supra* note 11.

[24] Reuben mentions a finding by Dr. Deborah Hensler that helps explain individuals' loss of faith in ADR:

> what she termed 'puzzling inconsistencies in the ADR data. That is, despite what appears to be high institutional support for ADR (especially for legal disputes), voluntary use appears to be low-and even then, ADR does not appear to achieve its goals of lower cost and greater time efficiency, or party satisfaction.' The empirical literature on usage and efficiency is revealing.

Reuben, *ibid.,* 981. This finding explains what might drive parties engaged in arbitration to lose faith in and

A decision by the Federal Supreme Court of the UAE regarding another dispute provides additional insight into the courts' thinking regarding arbitration.[25] The dispute revolved around a maritime arbitration dispute regarding the lease of a naval vessel in which one of the parties asked the court to appoint an arbitrator to facilitate a settlement.[26] The court then received notification that the arbitrator had passed away, and decided to uphold the first instance court's decision and recognize the arbitral award.[27] This decision was later appealed to the Supreme Court[28] on three grounds, the first of which concerned *force majeure* and the application of Articles 245[29]and 249[30] of the Commercial Maritime Law, as well as Articles 212/2[31] and 214[32]

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ultimately abandon the process. Cortazzo also mentions that: '…. the parties respect the proceeding, the judicial system encourages it…' Cortazzo, *supra* note 5 at 257.

[25] Federal Supreme Court of the UAE appeal no. 32/23, issued on 8/6/2003.

[26] The defendant initiated litigation against the appellants, asking the court to appoint arbitrators to settle the dispute between them, as dictated by Clause 18 of the Naval Vessel Leasing Agreement, and to award the defendant the amount of the lease in addition to the legal interest. The defendant maintained that the appellants leased the naval vessel 'Shahd' for one month beginning 5/7/1995 in exchange for 3,000 U.S. dollars per day; the agreement stipulated that the appellants could extend the lease for one additional month in exchange for the same amount per day. The agreement also obliged the appellants to deliver the vessel to a UAE port in good condition at the conclusion of the leasing period. The defendant claimed that the appellants did not deliver the vessel at the end of the term, thus extending the lease term. The appellants also subleased the vessel to two other parties, making those two additional parties liable to the defendant. The appellants returned the vessel to the defendant on 30/6/1996; the lease thus lasted for 270 days, which, according to the lease agreement, meant they owed the defendant 71,000 dollars minus 5,000 dollars, or a total of 66,000 dollars. The appellants refused to pay this amount or cover the cost of damages that occurred on the vessel; the defendant therefore initiated these proceedings. Federal appeal no. 32/23. The first instance court appointed a maritime expert as an arbitrator and issued on award that the court recognized on 28/3/2000. The arbitrator was appointed on 15/11/1997; the court also refused to include the sublease parties in the dispute. The arbitrator issued an award in favour of the defendant on 6/10/1999, requiring that the appellants pay the ship's rent for the period in question, the cost of the damages suffered on the ship, and an interest rate of 9%. The court recognized this award on 28/3/2000. Sharjah's Court of First Instance civil circuit court, case no. 94/1996.

[27] Sharjah's Federal Court of Appeals, appeal no. 65/2000. This decision was later appealed and the appeal court issued an interim measure on 19/8/2000, referring the appellants' questions and appeal to the arbitrator, before rendering a decision on the dispute, only to subsequently learn that the arbitrator passed away.

[28] Appeal no.32/23 *supra* note 25.

[29] Federal Law no.26/1981 on Commercial Maritime Law, (hereinafter Maritime Law), Article 245 states:

> The freighter must place the specified vessel, in seaworthy condition and properly equipped to carry out the operations specified in the charter party, at the disposal of the charterer at the agreed time and place. Furthermore, he must keep the vessel in such condition throughout the period of the contract.

[30] Article 249 of the Maritime Law states:

> 1-The rent shall begin to run from the day on which the vessel is placed at the disposal of the charterer but nevertheless the rent is not due if the vessel is lost or if it is stopped by force majeure or act of the freighter. It is not allowed to agree that the same shall be paid under all circumstances. 2 - If news about the vessel cease and it is then established that it is lost, the rent shall be payable in full up to the date of the last news about the vessel.

[31] Article 212/2 of the Civil Procedures Law states: 'The arbitrator's decision shall be according to the rules of the law unless if it were authorized with the reconciliation, then it shall not be obliged with such rules except with those related to the public order.'

[32] Article 214 of the Civil Procedures Law states:

of the Civil Procedures Law and the court's right to refer the dispute back to the arbitrators for clarification.[33] Again, the court appeared to support arbitration, or, at the very least, to attempt to do so. Nevertheless, if we analyse how it reached this decision, we can see that it did so after re-examining the facts and the subject matter of the dispute. The court in this instance thus moved beyond its role as a court of law and assumed the role of another court of appeal.[34] Its decision may have ultimately supported arbitration, but the time and effort that went into reaching this decision showed an utter disregard for the parties' decision to engage in arbitration.

Another court decision[35] supports this interpretation. After a regressive litigation process through which the courts continually upheld an arbitration clause by dismissing the parties request and refraining from asserting their jurisdiction over the dispute,[36] the parties still

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> The court may, during the examination of the authentication request of the arbitrators' decision, return it to them in order to examine what they have failed to arbitrate in the arbitration matters therein or to clarify the decision if it were not definite in a way that makes it impossible to execute, and the arbitrators should, in both cases, deliver their decision within three months from the date of their notification with the decision unless the law shall decide otherwise. It is not possible to appeal against its decision except with the final sentence delivered with the authentication of the sentence or its invalidation.

[33] The appellants argued that: '…This article would require arbitrators to apply the rules of force majeure that exclude the appellants from their obligation to pay the lease amount.' The appellants continued their argument by stating that the appeal court at first agreed with this argument and referred the award back to the arbitrator to answer the appellants' concerns in this regard. The court retracted its decision, however, after learning the arbitrator had passed away; it justified this retraction by pointing out that the matter related to the Law of Evidence and Article 5/1 gives courts the right to retract their decisions. The appellants argued that this article did not cover interim measures; the court issued this interim measure according to Article 214 of the Civil Procedures Law, which the appellants contended the court had no right to retract and the passing of the arbitrator should have no effect on this matter. They maintained that the court should have appointed a new arbitrator or addressed the dispute itself. The appellants also argued that the interim measure rendered the arbitral award null, as did the fact that the arbitrator's issuance of the award contradicted the provisions of the Maritime Law. Article 245 of the Maritime Law, *supra* note 29. Article 249 of the Maritime Law, *supra* note 30. They contended that the arbitrator failed to take into account the ship captain's statement that confirmed that the ship's engines failed due to force majeure. Appeal no. 32/23, *supra* note 25.

[34] In explaining the role of the appeal and the high courts in the UAE, Dr. Turki stated:

> The role of the appeal court is to examine the case that has been decided by the first instance court on questions regarding the substance and the law. However, the cassation court role is limited to examining questions of law without reexamining the substance of the dispute. The court is limited to asking whether or not the appealed decision applied the law correctly or not.

See Ali Abdul Hamid Turki, *Al Wasit Fe Sharh Al-ijrat Al-Madaniah Al-Imaratiah* [*The Intermediate to Explain the Emirati Civil Procedures*] (Sharjah, UAE: University of Sharjah, 2009), 381. In this respect, Turki emphasizes the role that the cassation court should play.

[35] Dubai Court of Cassation appeal no. 578/2017 and 444/2017, issued on 30/7/2017. This dispute revolved around the arrest and seizure of a maritime vessel. The seizure request was based on a ship construction contract between the parties in addition to a mortgage agreement regarding that ship. The defendant attorney asked the court to dismiss the case based on the existence of an arbitration clause. See general Dubai Court of First Instance case no. 1010/2016. That decision was later appealed in two separate appeals, both of which were dismissed. See general Dubai Court of Appeals, appeal no. 178/2016 and 209/2017.

[36] *Ibid*.

presented their claims before the high court, which is supposed to be a court of law and refrain from answering claims on subjects of disputes. One of the appellants argued, for instance, that their arrest and seizure request was based on the mortgage agreement,[37] meaning the dispute was beyond the scope of the arbitration clause contained in the sales contract.[38] The high court came to the same conclusion as the appeal court, upholding of the arbitration agreement, and even found a connection between the sales agreement and the dispute, extending the power of the arbitration clause over the dispute. In essence, the courts appear to support arbitration by funnelling disputes back into the court system so that decisions confirming the jurisdiction of arbitration can be issued. This process runs contrary to the parties' decisions to arbitrate in these cases.[39]

A 2017 decision[40] regarding a similar set of events in which the court again upheld the arbitration agreement highlights the ease in which the high court accepts such appeals. The decision concerned the construction and sale of maritime vessels. This case highlights the number of procedures the parties should keep in mind when they have entered into contracts with arbitration clauses and want to issue a seizure order over a ship. The same pattern emerged in the form of a cycle of litigation that had a harmful effect on maritime arbitration.

This trend is further exemplified by three decisions issued in 2019.[41] The decisions in all three cases eventually upheld the arbitration agreements, but the courts' tendency to accept all

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[37] Article 164 of the Commercial Transaction Law states:

> 1- A commercial pledge is a bailment on a chattel in security of a commercial debt. 2- With the exception of the restrictions stipulated herein or in any other law, a commercial pledge may be established by all means of proof, as between the contracting parties or as concerns third parties.

This is a translation of the law by the Ministry of Justice; 'mortgage' was translated as 'pledge.' See general, Turki, *supra* note 34 at 384.

[38] Appeal no. 578/2017 and 444/2017, *supra* note 35.

[39] Moreover, it tramples on the 'freedom of contract' principle. See general, Thomas E. Carbonneau, *Cases and Material Arbitration Law and Practice*, (Eagan Minnesota: West Academic Publishing, 2007), 24-25.

[40] Dubai Court of Cassation, appeal no. 238/2017 and 331/2017, issued on 17/12/2017. This dispute revolved around the construction and sale of a maritime vessel between the parties. A dispute arose when one party failed to pay the amount of the construction, resulting in a arrest and seizure request for the vessel in question. The defendant counter claimed in front of the first instance court, citing the existence of an arbitration clause. The appellant then asked the court to stay the proceeding until a decision could be issued in the arbitration proceedings. The court decided to dismiss the case based on the existence of an arbitration clause. See Dubai Court of First Instance, case no. 1072/2016. The appeal court decided to uphold the first instance court's decision regarding the arbitration clause and vacated the seizure order. See Dubai Court of Appeals, appeal no. 1637/2016 and 1791/2016. The appellant in appeal 238/2017 argued that even if the court decided to dismiss the case based on the existence of the arbitration clause this should not affect their arrest and seizure request for the maritime vessel. The court responded to this argument by stating that based on Articles 102 and 203 of the Civil Procedures Law the decision to dismiss the case effectively lifted the seizure order. The other grounds of the appeal also revolved around the procedure for the seizure and arrest of the ships, which the court ultimately dismissed

[41] Dubai Court of Cassation, appeal no. 685/2019. See, Dubai Court of Cassation, appeal no. 225/2019. See, Dubai Court of Cassation, appeal no. 128/2019.

grounds of appeal remained consistent. For instance, in appeal 128/2019,[42] a simple request to appoint an arbitrator was all that it took to initiate prolonged litigation. This is significant because although the court ruled in favour of arbitration, the parties could still contest the ruling.[43]

Appeal no. 225/2019 represents a slight break from the norm.[44] The appellants in this dispute tried to set the award aside, arguing that since the first instance court failed to answer their questions the dispute should return to the first instance court for a decision.[45] The court, however, decided to extend the jurisdiction of the new law and apply it to this dispute, giving the appeal court jurisdiction over the dispute.[46] This decision highlights how courts can play a positive role when it comes to arbitration.[47]

Lastly, in appeal 685/2019,[48] the court upheld the arbitration clause, dismissing all the appellant's grounds for appeal. These grounds revolved around the agent's right to sign an arbitration agreement and whether or not a party that failed to attend the arbitration hearing had the right to uphold the arbitration agreement. The court dismissed the appeal, citing Article 8 of the new Arbitration Law.[49]

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[42] *Ibid*. This dispute started in 2014 and was reintroduced to the courts in 2018, see Dubai Court of First Instance, case no. 109/2018. The court ordered the appointment of an arbitrator; that decision was appealed and the appeal court upheld the first instance decision. See Dubai Court of Appeals, appeal no. 725/2018.

[43] Moreover, the parties could still contest the arbitral award once it was issued, establishing a closed cycle of litigation in order to arbitrate. The parties seeking to arbitrate thus needed to provide evidence that supported their claims regarding arbitration and then had to engage in litigation a second time to enforce the award.

[44] *Supra* note 41. This case revolved around a request to set-aside an arbitral award issued by DIAC in case no. 103/2016. See Dubai Court of First Instance, case no. 1289/2018. See, Dubai Court of Appeals appeal no. 2364/2018. See Dubai Court of Cassation appeal no. 225/2019.

[45] On four grounds. See appeal no. 225/2019, issued in 19th of May 2019. In essence, the appellant tried to enforce the two-step litigation principal. See general Turki, *supra* note 34 at 381.

[46] See Article 1 of the Arbitration Law, *supra* note 22, which defines the competent court. The court also cited Articles 19, 53, and 60 of the Arbitration Law to support its argument.

[47] At the same time, the court supported the simple principles of arbitration. Furthermore, the new Arbitration Law codified some of those concepts. For example Article 6 of the Arbitration Law that discusses the separability of arbitration agreements, stating:

> 1- An Arbitration Agreement shall be separate from other clauses of the contract. The nullity, rescission or termination of the contract shall not affect the Arbitration Agreement contained if said Agreement is valid by itself, unless the matter relates to the incapacity of any party. 2- An argument on the nullity, rescission or termination of the contract which includes the Arbitration Agreement shall not result in the stay of the arbitration proceedings, and the Arbitral Tribunal may decide on the validity of said contract.

[48] The dispute in this case revolved around three unpaid bills; the first instance decided to dismiss based on the existence of an arbitration clause. See, Dubai Court of First Instance, case no. 1209/2018. The appeal court upheld the decision. See, Dubai Court of Appeals, appeal no. 2898/2018. See appeal no. 685/2019, *supra* note 41.

[49] Article 8 of the Arbitration Law states:

> 1- The Court before which the dispute is brought in a matter covered by an Arbitration Agreement, shall declare the inadmissibility of the action, if the defendant has raised such plea before any claim or defence on the substance of the case, and unless the Court finds that the Arbitration Agreement is null and void or incapable of being performed. 2- Where an action referred to in the preceding Clause has been brought, the arbitration proceedings may nevertheless be commenced or continued, and an arbitral award may be made.

This discussion indicates that although court support for arbitration has increased through the years and the courts have started to tolerate the existence of arbitration,[50] the courts still do not view it as an equal means of dispute resolution. This is evident from the fact that the courts continue to accept appeals based on the substance of disputes rather than the merits of the law.[51] This might be attributed to the fact that the new Arbitration Law in some instances can be interpreted as confirming certain established practices of the Civil Procedures Law,[52] while it also confirms some of the general principles of arbitration adopted in the UNCITRAL Model Law.[53] It is therefore crucial to highlight the dangerous trend of funnelling disputes back into the courts, which undermines parties' decisions to opt into arbitration in the first place.

Slow Justice

The courts way of supporting arbitration is a form of slow justice,[54] which has created a situation of everlasting and unresolved disputes or, at the very least, a cycle of disputes. One decision

[50] In this respect, it should be noted that the new Arbitration Law implemented a number of safeguards designed to ensure the sanctity and the success of arbitral processes. For instance, Article 5 of the new law gives examples of the different forms of arbitral clauses, including those that appear in separate documents. Furthermore, Article 7 provides examples of the ways arbitration agreements can satisfy the writing requirements outlined in the law.

[51] See general, Turki, *supra* note 34 at 381.

[52] Such as Article 8 of the new Arbitration Law, which confirms the first hearing requirement. Article 8, *supra* note 49.

[53] This is due to the fact that the law is based in part on the UNCITRAL model law. See general, United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006* (Vienna: United Nations, 2008). An example of this influence can be seen in Article 49 of the Arbitration Law, which states:

> 1- Immediately upon the issuance of the arbitral award, the Arbitral Tribunal shall no more have the authority to decide on any of the matters covered by the arbitration award. Nevertheless, any of the Parties may submit a request to the Arbitral Tribunal, within thirty (30) days following the date of receipt of the arbitral award, for the interpretation of any ambiguity in the operative part of the award, unless the Parties agree on other procedures or periods. The applicant for interpretation shall notify the other party of such request before its submitted to the Arbitral Tribunal. 2- If the Arbitral Tribunal considers the request for interpretation to be justified, then it shall give a decision on the interpretation, in writing, within thirty (30) days following the filing date of the request with the Authority. This time limit may be extended for another fifteen (15) days as it may consider the request justified. 3- The decision on the interpretation shall be considered supplementary to the arbitral award interpreted and shall it be subject to the rules applicable to it.

This article is influenced by Article 33 of the Model Law. See general Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction* (London: Sweet and Maxwell, 2009), 367-375; the author gives a detailed account of how Article 33 came to be included in the UNCITRAL Model Law.

[54] In essence, the courts' strict application of the procedures is the main source of concern. This in turn affects the entire arbitral process. See general, Turki, *supra* note 34 at 19 and 388-391. The author explains in general the harmful effects of having delays in justice—effects that are also applicable to arbitration—and shows that specialized circuits exist so that the courts have justices who specialize in certain fields, which in turn expedites litigation processes. The author cites Federal Law no.3/1983 on the Judiciary to validate his hypothesis that 'the purpose behind this division is to increase the courts activity, in a way that they are able to hear a number of cases at the same time in different circuits.'

that highlights this practice occurred during the era of the Civil Procedures Law[55] in appeal 116/2012.[56] This dispute remained in the courts for nearly five years,[57] and has come to exemplify one of the negative effects of slow justice, especially in the context of arbitration and more generally in relation to maritime arbitration and maritime commerce.[58] Both the lower court and the high court affirmed their jurisdiction over the dispute and disregarded the appellants' attempt to refer the dispute to arbitration, even though they had started arbitration proceedings in Australia.[59] This decision thus sheds light on the important role that the courts in the UAE play in supporting arbitration, and the direct effect that such decisions have on maritime arbitration and commerce.[60] This case answered the question, what happens if an arbitration proceeding is conducted in country X, while litigation proceedings are initiated in the UAE in the same dispute? Naturally, you would appoint an attorney to appear in the court and, in most cases, the attorney would ask the court to postpone the hearing until he or she could read the case file and respond properly. The court decided in this case that the parties failed to meet the requirements of the first hearing rule and therefore waived their right to arbitrate.[61]

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[55] This era ended with the enactment of the Federal Law on Arbitration. See general, Article 60 of the Arbitration Law that states:

> 1- The Articles from 203 to 218 of the aforementioned Federal Law No. 11 of 1992 shall be abrogated, provided that the proceedings performed according to them remain valid. 2- Any provision contrary to the provisions of the present Law shall be abrogated.

However, it warrants mention that some disputes remain subject to the application of the Civil Procedures Law.

[56] Dubai Court of Cassation, appeal no. 116/2012, issued 6/11/2012.

[57] It started in 2007 and ended in 2012. See Dubai Court of First instance, case no. 186/2007.

[58] The dispute in question started when the claimant requested that the first instance court force the defendant to pay the sum for the excavation equipment that the claimant delivered to the appellant. However, after a couple hearings, the defendant asked the court to dismiss the case based on the existence of an arbitration clause. Moreover, the defendant claimed that the Dubai courts had no jurisdiction over the dispute, basing this claim on the fact that the defendant had no local address in the UAE and that the contract was neither concluded nor had any effect in the UAE. The court dismissed the request to dismiss the case based on the existence of the arbitration clause, and referred the dispute to an expert. See Dubai Court of First Instance, case no.186/2007. That decision was appealed and the appeal court upheld the appealed decision. Dubai Court of Appeals, appeal no. 131/2009. This decision was appealed on two grounds to the cassation court. The appellant argued that the court lacked the proper jurisdiction to hear the dispute, since the contract was concluded outside the UAE and the effects of that contract did not extend to the UAE, citing Articles 142-143 of the Civil Transaction Law. The court dismissed this claim, citing Articles 19-20-21-24-93 of the Civil Transaction Law, and Articles 33-31 of the Civil Procedures Law to establish its jurisdiction over the dispute.

[59] The appellants claimed that the court had dismissed this request, since they failed to ask the court to do so in the first hearing. They asserted that there is a difference between a request to dismiss a case based on the existence of an arbitration clause and one that asks the court to dismiss the case based on an actual arbitral proceeding. The cassation court dismissed this claim, citing Article 203 of the Civil Procedures Law, and upheld the lower court's interpretation and argument regarding this matter. See appeal no. 116/2012, *supra* note 56.

[60] Article 8 of the Arbitration Law confirms the first hearing requirement. Article 8, *supra* note 49.

[61] Which is the requirement of Article 203 of the Civil Procedures Law. Another procedure that should be kept in mind in here relates to the 'Case Management Office'. Article 17 of the Civil Procedures Law states:

The Relationship between the Agent and the Principle

Any transaction conducted through third parties involves an element risk. This risk increases in the context of maritime commerce and especially when arbitration is added to the mix. Appeal no. 830/2017,[62] a case that involved a dispute regarding the sale of a fertilizing compound,[63] effectively demonstrates the potential risks involved in such relationships. This dispute is significant because the resulting argument made in front of the cassation court revolved around whether or not an agent requires a special power to enter into an arbitration agreement.[64] The appellant tried to nullify the arbitral clause by claiming that the agent was not authorized to enter into an arbitration agreement. The court cited Article 216[65] of the Civil Procedures Law as grounds for dismissing the appellant's argument. The court went on to explain that the appellant failed to meet the requirements for nullifying an arbitral clause by failing to prove their claim.[66] The court did not dispute the fact that such agreements could be nullified; it disputed the process through which such agreements can be nullified. The fact that this dispute occurred before the enactment of the new Arbitration Law warrants emphasis,[67] since both some of the

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> 1- An office called the "Case Management Office" shall be established by a decision of the Minister of Justice or the president of the local judicial authority, each in accordance with his competencies, at the seat of the competent Court. The decision shall determine the work system thereof.

This raises the question, would a hearing in front of that office fall under this first hearing requirement?

[62] Dubai Court of Cassation, appeal no.825/2017 and 830/2017. Issued on 17/12/2017.

[63] See, Dubai Court of First Instance, case no.103/2016. The plaintiff in this case was a company based in Malaysia that traded in fertilizers. They explained that they entered into a contract with the seller to buy a chemical compound (Urea) in 2011. Based on this agreement, they opened a documentary credit in the name of the seller and the seller gave them the bill of lading and the insurance policy for the goods that were supposed to be shipped from Ukraine. The seller claimed the documentary credit after they claimed that the goods have been loaded abroad the maritime vessel. The seller later informed the plaintiff that delivery of the goods would be delayed due to mechanical difficulties. The plaintiff subsequently learned that the no vessel or shipping company under the names provided actually existed, which forced them to initiate the proceedings. The court dismissed the case based on the existence of an arbitration clause and the appeal court upheld the first instance court's decision. See, Dubai Court of Appeals, appeal no.1800/2016.

[64] See, appeal no. 830/2017 and 825/2017, *supra* note 62.

[65] See general, Article 216 of the Civil Procedures Law. Article 4 of the Arbitration Law identifies the legal capacity requirement for entering into an arbitration agreement. It states:

> 1- An Arbitration Agreement may only be concluded by a physical person who has the legal capacity to act or by the representative of the juristic person authorised to conclude the Arbitration Agreement, or otherwise the Agreement shall be null and void. 2- Arbitration is not allowed where matters cannot be submitted to conciliation. 3- In the cases where the Parties are allowed under the present Law to agree on the procedure to be followed to determine a certain issue, where each of them may authorise a third party to select or determine this procedure; and in this regard, a third party means: any physical person or Arbitration Institution inside the State or abroad. 4- Unless otherwise agreed by the Parties, an Arbitration Agreement shall not be discharged by the death of any party or his withdrawal, and it may be enforced by or against the legal successor of said party.

[66] See appeal no. 830/2017, *supra* note 62.

[67] See, Article 4 of the Arbitration Law, *supra* note 65. See, Article 8, *supra* note 49, in addition to Articles 55-57, which address the enforcement of awards. Furthermore, the process would have changed entirely due to the fact that the case would have to be submitted directly to the appeal court under the rules of the new law, see Article 1

procedures involved and the outcome might have changed under the new law. The fact nevertheless remains that agents do not need any special authorization to enter into arbitration agreements on behalf of principles. This is both a significant step forward for arbitration and a source of concern for the parties to such agreements, since the nature of maritime commerce demands in some instances that agents enter into agreements without referring back to principles, meaning they can enter into arbitration agreements without principles' consent. This is one risk that principles need to keep in mind before appointing agents.

Translation

Translators must be present in some instances in arbitration hearings. This is because disputes resolved through arbitration[68] often involve international transactions, such as those that occur in maritime commerce. The position of the courts in this respect thus warrant emphasis. Appeal no.131/2015[69] is illuminating in this regard. This case started with a simple request for court recognition of an arbitral award[70] and evolved into a full defence of that award. The court eventually upheld the arbitral award. The appellant then attempted to set the award aside, claiming that the arbitrator failed to enlist the aid of a translator, citing Article 4 of the Civil Procedures Law.[71] This attempt failed due to the fact that the parties had agreed in the arbitration agreement to conduct the arbitration hearing in English. The lower courts examined this fact in depth and determined that the arbitrator met all the legal requirements and that no grounds for setting aside the award in accordance with Articles 212 or 216 of the Civil Procedures Law existed.[72]

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supra note 22. Lastly, the case management office would also play a role in this process under the rules listed in Article 17 of the Civil Procedures Law. Article 17, *supra* note 61.

[68] Article 29 of the Arbitration Law regulates the use of translators, stating:

> 1- Unless otherwise agreed by the Parties, the arbitration proceedings shall be carried out in Arabic. 2- The language agreed upon or determined shall apply to the arbitration proceedings, and to any written statement submitted by the Parties, any oral hearing and any arbitral award, decision or other communication by the Arbitral Tribunal, unless otherwise agreed. 3- Subject to the provisions of Federal Law No. 6 of 2012 on the Regulation of the Profession of Translation, the Arbitral Tribunal may order that all or some written documents submitted in the case shall be accompanied by translation into the language or languages used in the Arbitration. In case there are many languages, translation may be restricted to some of them.

[69] Dubai Court of Cassation, appeal no. 131/2015. Issued on 27/11/2016.

[70] See, Dubai Court of First Instance, case no. 926/2014. The court granted the recognition request and the appeal court upheld this ruling. See, Dubai Court of appeals, appeal no. 544/2014.

[71] Article 4 of the Civil Procedures Law states:

> The language of courts is Arabic, and the court shall hear the statements of the litigants, witnesses or others who have no knowledge of the Arabic language with the help of an interpreter after he/she has taken an oath, unless he/she did it prior to being appointed or prior to obtaining the interpretation licence.

[72] Appeal no. 131/2015, *supra* note 69.

This decision highlights the need to establish certain safeguards that limit such appeals and thereby mitigate the harmful effects of funnelling such disputes back into the courts. Leaving this process unchecked will eventually end up with some awards either being set-aside or tied up in the court for years.

The Recognition of Foreign Arbitral Awards

The recognition of foreign arbitral awards is certainly a general concern in the context of arbitration. The process for recognizing domestic awards is challenging on its own; adding foreign elements to the mix only increases the challenge. Luckily, the UAE is a signatory to the New York Convention.[73] This means courts in the UAE accept the fact they must abide by stricter requirements when setting aside foreign arbitral awards.[74] The fact nevertheless remains that such requests are still funnelled into the courts. Another concern is that Article 235-238 of the Civil Procedures Law[75] govern requests to recognize foreign awards while Article 55 of the new Arbitration Law governs the process for recognizing arbitral awards.[76] This raises the question, do Articles 235-238 of the Civil Procedures Law still govern the recognition of foreign awards or not? This concern arises because Article 60[77] of the new Arbitration Law clearly states that the new law replaces Articles 203-218 of the Civil Procedures Law without mentioning Articles 235-238. However, Article 2 of the new Arbitration Law establishes the scope of the new law's application as including international arbitration.[78] The courts and legislators thus have crucial roles to play in addressing this issue.

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[73] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S 3. The UAE acceded to this convention in 2006, based on Federal Decree no. 43/2006, on 6/13/2006.

[74] See, Dubai Court of Cassation, appeal no. 600/2013, issued on 4/6/2014. See, Dubai Court of Cassation, appeal no. 275/2015, issued on 21/1/2016. In both these cases, the court applied stricter measures of setting-aside the arbitral award.

[75] *Ibid*. See also, Civil Procedures Law Articles 235-238.

[76] Article 55 of the Arbitration Law states:

> 1- Any person willing to enforce an arbitral award shall submit a request for the recognition of the arbitral award and the issuance of an enforcement order to the president of the Court, provided that it is associated with the following: a- The original award or a duly certified copy thereof. b- A copy of the Arbitration Agreement. c- A translation into Arabic of the arbitral award duly certified by a duly recognized entity, if the award is made in another language. d- A copy of the minutes of deposit of the award in the Court. 2- The president of the Court or a delegated judge shall order the recognition of the arbitral award and its enforcement within sixty (60) days from the filing date of the request for recognition and enforcement, unless one or more reasons for the nullification of the arbitral award are furnished proving any of the cases mentioned in Clause (1) of Article 53 of the present Law.

Articles 56 and 57 of the Arbitration Law thus govern the process of setting aside awards.

[77] Article 60, *supra* note 55.

[78] Article 2 of the Arbitration Law states:

> The provisions of the present Law shall apply to: 1- Any Arbitration which is carried out in the State, unless the Parties agree on the application of the provisions of another Arbitration Law, provided that it is

Assessment

The general theme that unifies all the cases discussed in this section is that the cassation court acted as another court of appeal instead of acting as a court of law. This directly affects arbitration; instead of facilitating the process, it further complicates it by funnelling arbitration disputes back into the court system and entangling the parties in closed cycles of litigation. It thus creates situations in which the parties must develop strategies to defend their decisions to arbitrate in court to uphold their right to arbitrate. This raises the question, how does this issue manifest in the maritime context? A never-ending cycle of disputes is a concern in any situation, but the concern increases for arbitration and increases further for maritime arbitration. Any delay in resolving disputes has a ripple effect on the maritime industry, especially when it comes to time sensitive matters such as shipping that are affected by delays. Parties choose arbitration for its advantages and as a way of opting-out of the court system; having their disputes dragged back into the courts thus not only interferes with the parties' freedom of contract, but also raises questions about the effectiveness of the process.

Lastly, it warrants mention that the courts are not entirely hostile toward arbitration, but the process is designed in a way that prevents the courts from positively impacting arbitration.

The Challenges Facing Maritime Arbitration in the UAE

Maritime arbitration faces numerous challenges. Some relate to court interpretations, as this brief examination has shown; others relate to the effectiveness of arbitral awards. The impact of the out-dated view of maritime legislation on maritime trade is another source of concern.[79] Lastly, despite its historical and continued dependence on maritime trade,[80] the UAE has no independent and specialized maritime or admiralty courts.[81]

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not contrary to the public order and public morality of the State. 2- Any International Commercial Arbitration which is carried out outside the State, and which is subject to the provisions of the present Law upon the agreement of the Parties. 3- Any Arbitration arising from a dispute on a contractual or non-contractual legal relationship organised by the Laws in force in the State; unless whatever is excluded by a special provision.

[79] An example of this out-dated view can be found in the second chapter of the law (Articles 2-7). These articles emphasize the States supervisory role over the maritime industry, in which the State is trying to nurture and protect maritime vessels that carry the UAE flag and give it additional benefits over foreign vessels. This legal approach should give way to a more liberal/ open market approach to maritime trade. See general, Maritime Law Articles 2-7.

[80] Al-Flahi, *supra* note 12 at 54-63.

[81] Comparable to those in the UK, see general, Rule 61.2 of the Civil Procedures Rules of the UK, which establishes the submission of maritime disputes to the Admiralty Court. See CPR 61.2. See general, Turki, *supra* note 34 at 389-392. The author explains the benefits of having specialized justices and specialized circuits in the litigation process.

Court Practice

The first and most prominent challenge facing maritime arbitration is the fact that it remains subject to the interpretations of the courts; indeed, getting the courts to adopt a more favourable view of arbitration is crucial. In essence, the courts support arbitration in a questionable manner, as the preceding analysis shows. The high court basically acts as a second court of appeal, revising every detail of the disputes instead of answering questions of law. This highlights the importance of the success of the new Arbitration Law, especially when it comes to shifting the views of the courts to produce more favourable outcomes for arbitration. However, this brief examination and comparison suggests that the new law still has a long way to go; the courts are issuing decisions that support arbitration, but doing so after regressive re-examinations of the disputes. Furthermore, the new law appears to have confirmed certain established practices,[82] raising the question of whether the courts will adopt a different approach. The new Arbitration Law is thus clearly a step in the right direction, but the courts remain the key—their interpretations of the law will determine whether or not it succeeds. Indeed, the new law on its own is just a piece of paper; achieving the goals it sets forth will require the willing participation of the courts.

Enforcement

The second challenge facing maritime arbitration in the UAE is the enforcement of arbitral awards, especially those with orders requiring the arrest and seizure of maritime vessels.[83] How can such orders be enforced? How likely are they to succeed? What effect do they have on international vessels? Would arbitrators in international arbitration be able to issue such orders? How likely is it that such orders will be enforced? Finally, which law governs the process of arrest and seizure of maritime vessels?[84] Answering these questions requires an examination of four sources: 1- case law; 2- the Commercial Maritime Law; 3- the Civil Procedures Law; and 4- the new Federal Arbitration Law. Analysis of these four sources will generate an answer to the last question, which will serve as a basis for answering the remaining questions. The Commercial Maritime Law regulates the procedures concerning the arrest and seizure of

[82] Such as Article 8, which confirms the first hearing requirement. Article 8, *supra* note 49.

[83] This is a general challenge, one that is not unique to the UAE. Nevertheless, it has a negative effect on maritime trade and must be addressed.

[84] Addressing these questions requires attention to the design of UAE courts and legislation and an assessment of whether or not they have the necessary tools to support maritime arbitration in this respect. The issues that arise from the arrest of maritime vessels and the challenges that this procedure involves, on their own, are significant. Adding arbitration to the mix only intensifies and highlights the problem.

maritime vessels in the UAE.[85] Thus, arbitrators issuing these orders must comply with the requirements of this law; in addition to submitting or having the parties seeking the arrest submit the orders to the courts,[86] they must prove that the arrests concern maritime debts.[87] Subjecting the parties to the process outlined in the maritime law is a challenge on its own. However, the introduction of the new Arbitration Law, on top of the already-enacted Civil Procedures Law, adds a layer of difficulty for the parties and the judges in the short term at the very least—the need to determine which law governs this issue. An examination of the scope of application of the new law[88] reveals that this law applies to any arbitration conducted in the UAE[89] as well as any international commercial arbitration.[90] Furthermore, the law gives the authority to order interim measures[91] to the chief justices of the competent courts[92] and the arbitral tribunals.[93] In both instances, the parties seeking such measures must submit their requests to the court.[94] Determining whether the Commercial Maritime Law or the new Arbitration Law governs these

[85] Articles 115-134 govern the process of arrest and seizure of maritime vessels (sequestration of the vessels), as well as the enforcement of any orders regarding such vessels; this process in turn is derived from the 1952 international convention relating to the arrest of sea-going ships. Brussels 1952. Furthermore, Articles 247-323 of the Civil Procedures Law address the issue of sequestrations in general.

[86] Article 115/1 of the Maritime Law states: '1- A sequestration may be levied against a vessel by an order of the competent civil court. Such shall be made only for the satisfaction of a maritime debt.' Section 2 of the same article goes on to explain what it means by Maritime debt: '2- The expression "maritime debt" shall mean a claim in respect of a right arising from any of the following causes…'

[87] *Ibid*.

[88] Article 2, *supra* note 78.

[89] Unless the parties agreed to another law Article 2/1 and 2/3, *supra* note 78.

[90] Article 2/2, *supra* note 78.

[91] Article 18 of the Arbitration Law states:

> 1. The Competent Court shall have jurisdiction to consider arbitration issues referred hereunder in accordance with the procedural laws of the State. The Competent Court shall exercise exclusive jurisdiction until the conclusion of all arbitral proceedings. 2. The chief justice of the Court may, at the request of a party, or at the request of the Arbitral Tribunal, order such interim or conservatory measures as he may consider necessary to be taken in respect of existing or potential arbitral proceedings, whether before the commencement or the arbitral proceedings or during their course. 3. Taking the measures referred to in the preceding section of this article shall not stay the arbitral proceedings and shall not amount to a waiver of the Arbitration Agreement. 4. If the chief justice of the Court issues an order under section 2 of this article, the order shall only cease to have effect in whole or in part by a decision issued by the chief justice of the Court.

[92] Article 1 of the Arbitration Law identifies the court of appeals as the competent court. Article 1, *supra* note 22

[93] Articles 21/1 of the Arbitration Law states:

> 1. Subject to the provisions of Article 18 of this Law, and unless otherwise agreed by the Parties, the Arbitral Tribunal may, at the request of a party or on its own motion, order any party to take such interim or conservatory measure as the Arbitral Tribunal may consider necessary given the nature of the dispute, including, in particular:..

[94] Article 21/4 of the Arbitration Law states:

> A party for whom an interim measure has been ordered may, after obtaining written permission from the Arbitral Tribunal, request the competent court to order the enforcement of the order of the Arbitral Tribunal or any part thereof within fifteen days of receipt of the request. Copies of any request for permission or enforcement hereunder shall be sent simultaneously to all the other Parties.

requests is critical since the Maritime Law identifies the first instance circuit[95] as the competent court, implying that such requests must be submitted to the first instance court. The new Arbitration Law, meanwhile, identifies the competent court as the court of appeals[96] and requires that parties submit requests directly to the chief justice of the court of appeals.[97] The process outlined in the new law should, in theory, save the parties time and money, making it the process most likely to be adopted by the parties.

Addressing this concern requires the support of the courts. The courts should both enforce the provisions of the new Arbitration Law and guide the parties seeking to enforce awards and arrest orders to employ the procedures outlined in said law. However, a review of the ways the courts in the UAE have addressed this matter suggests that they are still hesitant to take the necessary steps to apply the provisions of the new law to interim measures regarding maritime vessels and might feel more comfortable maintaining the status-quo. This hesitation might be attributed to how the Maritime Law addresses the interpretation of its own provisions.[98] Judges should therefore keep in mind that this law is designed to promote trade and establish a modern fleet.[99] A closer examination of the provisions of the Maritime Law suggests, however, that the law's shape contradicts the principles it aims promote.[100] The Maritime Law as a whole—notwithstanding the provisions concerning the arrest and seizure of maritime vessels—badly needs reworking. Therefore, the court will need to intervene to resolve this conflict and determine whether the Maritime Law or the new Arbitration Law should govern this issue.

The cases examined here imply that the courts have started taking the necessary steps to resolve the interpretation issues;[101]this should have a positive impact on maritime arbitration and commerce and hopefully this approach will become the norm in time.

Specialized Courts/Circuits

The lack of a specialized court or a circuit within the court that deals with maritime disputes[102] is also a significant issue. Having a specialized court ensures that justices specializing in maritime

[95] Article 115 of the Maritime Law, *supra* note 86.
[96] Article 1 of the Arbitration Law, *supra* note 22.
[97] Article 18/2 of the Arbitration Law, *supra* note 91.
[98] Article 2 of the Maritime Law states: '…is to promote the domestic and foreign trade of the State, and also to establish and develop an efficient and modern fleet flying the flag of the State, such in view of ensuring its economic security and growth and the interests of its people.'
[99] *Ibid*. Even if the some of the provisions and concepts of this law are out-dated, this article at the very least can provide guidelines for the courts in taking a more favourable position toward arbitration.
[100] Again, the maritime industry cannot be promoted without having an open market approach to maritime trade. See general Maritime Law, *supra* note 29.
[101] See appeal no. 685/2019, appeal no. 226/2019 and 128/2019, *supra* note 41.

disputes oversee such disputes; presumably such justices would have more tolerance and understanding when it comes to maritime dispute-related issues and maritime arbitration.[103] They would be more cognisant of the important role that arbitration plays in developing maritime commerce and presumably tolerate and encourage the parties' decisions to arbitrate, which would translate into more favourable outcomes for arbitration, leading the courts to shut down attempts by the parties to curtail award enforcement, and limiting judicial review of awards.[104]

POSSIBLE REMEDIES

The purpose of proposing remedies is to initiate a discussion that ultimately leads to solutions for the challenges identified in this paper.

New Maritime Law

Solid legislation that supports the process of reforming the practice of maritime arbitration must be enacted. Legislation is, at its core, designed to regulate the conduct of individuals in given societies;[105] because the conduct and practices of individuals evolve over time, legislation also needs to evolve.[106] A mobile phone company, for instance, would surely fail to compete and might risk bankruptcy if it started selling mobile phones with out-dated specifications better suited to the early 2000s; this failure would result from the company's failure to satisfy consumer demands. Legislation that fails to keep up with societal demands will likewise reach a point where it needs to be replaced or, at the very least, amended. The UAE's maritime legislation is in dire need of reworking and modernization, especially since it aims to regulate a field that

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[102] Having a specialized maritime court would boost the popularity of arbitration. See, e.g., Wilfered Feinberg, 'Maritime arbitration and the federal courts'*, Fordham International Law Journal 5*(2) (1981): 245. The author highlights that historically the courts in the US and especially the New York courts have 'played a leading role in the development of American maritime law.' See Turki, *supra* note 34 at 389-392.

[103] Even the US, which is more likely to support and enforce arbitral awards and agreements, still has some hostile elements within their court system. See, e.g., Feinberg, *ibid,* 247-248.

[104] This is one of the advantages of choosing New York as a venue for maritime arbitration according to Tassios, Peter Tassios, 'Choosing the appropriate venue: Maritime arbitration in London or New York?', *Journal of International Arbitration 21* (4) (2004): 360.

[105] In the introduction to Hart's book (*The Concept of Law*), Leslie Green writes:
'when I say law is a social construction, I mean that it is one in the way that some things are not. Law is made up of institutional facts like orders and rules, and those are made by people thinking and acting. But law exists in a physical universe that is not socially constructed, and it is created by and for people who are not socially constructed either.' L. Green, *Introduction to H.L. A. Hart, The Concept of Law*, (Oxford, UK: Oxford University Press, 2012), xvii.

[106] Which is what Hart seeks to highlight as well, according to Green. Green, *ibid.,* at xvii.

deals directly with maritime commerce.[107] Reinventing the wheel is unnecessary when revising the provisions of the Maritime Law; the selection of established jurisdictions to serve as models for the development of revisions to the UAE's maritime legislation would be one way to achieve this goal.[108]

The New Arbitration Law

This new Arbitration Law has the potential to promote the UAE as a hub for maritime commerce and maritime arbitration, and it has all the necessary tools to succeed. The law is not, however, a magical remedy for all the issues facing arbitration in the UAE; rather, it is a step in the right direction and its success will depend on various other factors. Laws are, ultimately, just pieces of paper; no matter how well written they are, they must garner the acceptance of practitioners and proper court enforcement to succeed.[109]

The Courts

Court involvement in this process is essential; it serves as the glue that binds these remedies together and ensures their effective implementation. The courts appear to be trying to support arbitration in their own way, but the process is designed in a way that prolongs disputes. Thus, the courts need to take a more proactive role in promoting and supporting arbitration. This involvement can be broken down into two equally important components: judges' adoption of pro-arbitration perspectives and the establishment of specialized circuits in which these judges can operate.

The first component might be the main key to resolving most of the previously identified issues. Justices' general views of arbitration directly affect maritime arbitration. The courts' adoption of more pro-arbitration stances would have a direct, positive impact on maritime arbitration; by being more active in their support and limiting the never-ending cycle of disputes, the courts would help boost arbitration in the UAE.

[107] The Maritime Law generally aims to promote and develop maritime trade and commerce. Article 2, *supra* note 98. However, the out-dated provisions of the law are not suited to the achievement of this goal.

[108] New York, London, and Singapore are among the main maritime hubs in the world. Understanding what enabled them achieve this status and learning from their experience would be to the UAE's advantage. See general, Tassios, *supra* note 104 at 355. The author attempts to determine what makes one jurisdiction or venue more appealing for arbitration from a maritime arbitration point of view.

[109] Green provides a quotation from Dworkin that helps explain Hart's position on this matter: 'The true grounds of law lie in the acceptance by the community as a whole of a fundamental master rule (he calls this a "rule of recognition")….'. Green, *supra* note 104 at xxviii.

The second component would require employing these justices to establish specialized circuits[110] in the UAE.[111] This would have the benefit of providing specialized venues for resolving maritime disputes, including those that relate to maritime arbitration, and in promoting the UAE as a hub of maritime commerce.

Specialized Arbitral Institutes

The fourth remedy is to promote the use of arbitral institutes that specialize in maritime arbitration such as the EMAC.[112] The UAE formed this institute for the sole purpose of promoting the UAE and attracting individuals to it as a venue for settling their maritime disputes—a great step in promoting maritime arbitration.[113] The question then is, how can the UAE achieve this goal? Any promotion campaign that attempts to present new ideas would face some degree of resistance; the resistance in this instance would come from justices and court procedures, which means that the success of this campaign would rely on the successful implementation of the previous remedies. Hostility and unwillingness to accept arbitration as an equal on the part of the courts is not uncommon.[114] However, no promotion campaign will succeed without court support; the fact that the courts play a vital role in the success of arbitration and that judges should therefore understand their roles in such a campaign warrants emphasis;[115] indeed, persuading parties to choose to the UAE and the

[110] See general, Georgeios I. Zekos, 'Courts' intervention in commercial and maritime arbitration under US law'*, Journal of International Arbitration 14*, (1997): 99. John G. O'Connor, 'Maritime arbitration without consent vouching, consolidation and self-execution—Will the New York practice migrate to Canada?', *Journal of International Arbitration.10* (1993): *161*, and Sam Luttrell and Isuru Devendra*,* 'Inherent jurisdiction and implied power to stay proceedings in aid of arbitration: "A Nice Question" ' *Journal of International Arbitration 32.*(2015): 493. See general, Turki, *supra* note 34 at 389-392. In general, these authors highlight the important role that the courts must play in promoting maritime arbitration.

[111] This component would not function without the existence of the first component in this equation (the justices), since the human element is the main force behind the courts; without qualified staff willing to support this campaign promoting maritime arbitration, the campaign surely will fail to succeed, as would any effort to establish an admiralty court. Therefore, the role the justices play warrants emphasis.

[112] Which is the Emirates Centre of Maritime Arbitration, established by decree no. 14 of 2016, by the Ruler of Dubai.

[113] The EMAC and other institutes, which were established to serve the needs of the maritime arbitration industry, always have the goal of establishing and selling themselves to the maritime community as hubs of maritime arbitration in mind. See general, Carbonneau, *supra* note 39 at 386-390; the author discusses the LMAA and SMA arbitral institutes. See general Zekos, *supra* note 110, Luttrell and Devendra, *supra* note 110. O'Connor ,*supra* note 110. General, Tassios, *supra* note 104.

[114] See Burton, *supra* note 7 at 473-475 and 478-485. See Paulsson, *supra* note 7 at 265. See, Carbonneau, *supra* note 15 at 115. See, Carbonneau, *supra* note 39 at 45. See Frances Kellor, *American Arbitration: Its History, Function, and Achievements* (New York City: Harpers and Brothers, 1948), 5-8.

[115] See general Zekos, *supra* note 110. Luttrell and Devendra, *supra* note 110. O'Connor, *supra* note 110. Tassios, *supra* note 104.

EMAC as an arbitration venue will be far easier if the courts played a more active role in ending these cycles of litigation.

Case Management Office[116]

Utilizing the power of this office in a way that benefits arbitration might become one of the key factors in curtailing the funnelling epidemic. In essence, the purpose of having such an office is to limit the numbers of disputes that reach the court. This means it is possible to utilize the number of disputes that challenge the jurisdiction of arbitration, especially given the fact that this office is headed by a judge[117] and has all the necessary tools to issue judgments.[118] However, to utilize the powers of this office for this purpose, legislators must specifically give the office the power to rule on the arbitral jurisdiction—to, for instance, review arbitral agreements and decide whether the disputes in question should be brought to the court.

Nevertheless, extending the power of this office would be a double edge sword. Such an action must therefore be taken with the utmost care and consideration, especially when it comes to the first hearing requirement,[119] which, if left unchecked, has the potential to negatively affect arbitration. Those who draft legislation to empower this office must take these risks into consideration to avoid severely harming the arbitral process.

CONCLUSION

This discussion highlights the challenges facing maritime arbitration—some that relate to arbitration in general and others that directly affect maritime arbitration. In addition, most of the challenges are intertwined and they all contribute to the funnelling of disputes back into the courts, which perpetuates cycles of litigation and defeats the purpose of choosing arbitration in the first place. Note that the remedies identified here are not magical solutions; nor would they require that the UAE reinvent the wheel. The identified remedies are based on a restatement of simple facts: in most cases, the simplest solutions are the most practical and the most likely to succeed. Therefore, acknowledging and understanding the existence of these challenges is one part of the solution; the remedies proposed in this article should serve as a blueprint and initiate a broader discussion that will contribute to the formulation of solutions that will bolster the UAE's status as a regional hub of maritime arbitration.

[116] Article 17 of the Civil Procedures Law, *supra* note 61.
[117] Article 17/2 of the Civil Procedures Law ,*supra* note 61.
[118] Article 17/4 of the Civil Procedures Law, *supra* note 61.
[119] Article 8 of the Arbitration Law, *supra* note 49. The first hearing requirement of this article might be employed in hearings conducted in this office, as such the parties' failure to uphold arbitration agreements in those hearings might constitute a waiver of their right to arbitrate.

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