PUBLIC POLICY AS A GROUND FOR CHALLENGING AND VACATING DOMESTIC ARBITRAL AWARDS IN THE UNITED ARAB EMIRATES

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Table of Contents

List of Tables

List of Figures

List of Cases

List of Cases (United Kingdom)

Arenson **v** *Arenson* [1975] 3 All E.R. 901 [1976] 1 Lloyd's Rep 179

AT&T Corp **v** *Saudi Cable Co* [2000] 2 All ER (Comm) 625

Clyde & Co LLP **v** *Bates van Winkelhof* [2011] EWHC 668

Czarnikow **v** *Roth Schmidt & Co* [1922] 2 KB 478, 488

Davidson **v** *Scottish Ministers GWD* 27-572, [2004] UKHL 34

Denny **v** *Denny* [1919] 1 K B. 583

Deutsche Schachtbau-und **v** *Ras al Khaimah National Oil* [1987] 2 Lloyd's Rep. 246

Dimes **v** *Proprietors of Grand Junction Canal and others* HL [1852] 3 HL Cas 759

Dolling-Baker **v** *Merrett* [1990] 1 W.L.R. 1205

Egerton **v** *Earl of Brownlow* [1853] 4 HLC 484

Essex County Council **v** *Premier Recycling Ltd* [2006] EWHC 3594

Evanturel **v** *Evanturel* (1874) The Law Reports (Privy Council Appeals) 6 PC 1

Fiona Trust & Holding Corporation **v** *Privalov* [2007] UKHL 40

Fletcher **v** *Sondes*, 3 Bing. 50I [1826]

Floyd **v** *Barker* [1607] 77 Eng. Rep. 1305

Franklin **v** *Minister of Town and Country Planning* [1948] AC 87 (HL)

Fulham Football Club (1987) Ltd **v** *Richards and another* [2012] Ch 333

Halsey **v** *Milton Keynes General NHS Trust* [2004] EWCA Civ 576

Holmes Oil Co Ltd **v** *Pumpherston Oil Co Ltd* [1891] 18 R 52 (HL), 28 SLR 940

Indian Oil Corporation (Ltd) **v** *Coastal (Bermuda) Ltd* [1992] 2 Lloyds 407

Italmare Shipping **v** *Ocean Tanker* [1982] 1 WLR 158

Janson **v** *Driefontein Mines Ltd* [1902] AC 484

Jivraj **v** *Hashwani* [2011] UKSC 40

Kill **v** *Hollister* [1746] KB

Laker Airways Inc **v** *FLS Aerospace Ltd* [1999] EWHC B3

Lesotho Highlands Development Authority **v** *Impregilo SpA and Others* [2005] UKHL

Magill **v** *Porter & Magill* **v** *Weeks* [2001] UKHL 67

Mardorf Peach & Co Ltd **v** *Attica Sea Carriers Corp of Liberia, The Laconia* [1977] A.C. 850 at 878

Modern Engineering **v** *Miskin* [1981] 1 Lloyd's Rep 135

Mubu and others Zimbabwe [2012] UKUT 398 (IAC)

Owens **v** *Owens* [2018] UKSC 41

Pacol **v** *Rossakhar* [2000] 1 Lloyd's Rep 135

Pauline Eunice Tangiora **v** *Wellington District Legal Services Committee* [1999] UKPC 42

Pioneer Shipping Ltd **v** *BTP Tioxide Ltd (The Nema)* [1982] AC 724

R **v** *Gough* [1993] AC 646

Ras Behari Lal **v** *King Emperor* [1933] 50 TLR 1, (1933) 60 IA 354

Re AI and MT [2013] EWHC 100 (Fam)

Renusagar Power Co Ltd **v** *General Electric Co* [1993]

Rodriguez **v** *Speyer Bros* [1919] AC

Sanghi **v** *The International Investor (KCFC)* [2000] 1 Lloyd's Rep 480

Shell Egypt **v** *Dana Gas* [2009] EWHC 2097

Sirros **v** *Moore* [1974] 3 All ER 776

The House of Lords in Arnold **v** *National Westminster Bank* [1991] 2 W.L.R. 1177

The London Steamship Owners' Mutual Insurance Association Ltd **v** *The Kingdom of Spain and The French State* [2015] EWCA Civ 333

Vynior's Case 8 Co. 8oa, 8ib [1609]

Wales and West Utilities Limited **v** *PPS Pipeline Systems GmbH* [2014] EWHC 54 (TCC)

Wellington **v** *Macintosh* 2 Atk. 569 [1743]

List of Cases (United States)

American Almond Products Co. **v** *Consolidated Pecan Sales Co* [1944]

Baar **v** *Tigerman*, 140 Cal.App.3d 979 [1983]

Baravati **v** *Josephthal, Lyon & Ross* [1994]

Craviolini **v** *Scholer & Fuller Associated Architects* [1960]

Di Santo **v** *Pennsylvania*, 273 U.S. 34 [1927]

Doo Wop Shoppe **v** *Ralph Edwards Prods* [1998]

G Greenblatt **v** *Drexel Burnham Lambert* [1985]

Gibson **v** *Adinolfi* [2012]

Hall Street Associates LLC **v** *Mattel Inc* [2008]

Harold D. Stump, et al. **v** *Linda Kay Sparkman and Leo Sparkman*, 435 U.S. 349

Harris **v** *Harvey* [1979]

Idris Kabia **v** *Edward Koch* 186 Misc.2d 363 (2000).

Jones **v** *Brown Jones v Brown* [1880]

Lundgren **v** *Freeman* [1962]

Mireles **v** *Waco* [1991]

National Union Fire Insurance Company **v** *Nationwide Insurance Company* [1999]

Quitoriano **v** *Raff & Becker* [2009]

Railroad Co **v** *Curtiss*, 8o N. Y. 2I9

Randall **v** *Brigham* [1869]

Richard S. Olney **v** *Sacramento County Bar Association* [1989]

Rubenstein **v** *Otterbourg, Steindler, Houston and Rosen* [1973]

Schoenamsgruber **v** *Hamburg American Line* [1935]

United Paperworkers Int'l Union, AFL-CIO **v** *Misco Inc* [1987]

United States **v** *Utah Construction & Mining* [1966]

United Steelworkers **v** *Enterprise Wheel & Car Corp* [1960]

University of Tennessee **v** *Elliott* [1986]

Volt Information Sciences, Inc. **v** *Board of Trustees, Leland Stanford Junior University* [1989]

List of Cases (United Arab Emirates)

Abu Dhabi Court of Cassation Judgment 433/17 of 1997

Abu Dhabi Court of Cassation Judgment 487/18 of 1997

Abu Dhabi Court of Cassation Judgment 663 of 2012

Abu Dhabi Court of Cassation Judgment 118 of 2014

Abu Dhabi Court of First Instance Judgment 2847 of 2013

Amarjeet Singh Dhir **v** *Waterfront Property Investment Limited and Linarus FZE* , Claim No. CFI 011/2009

Banyan Tree Corporate Pte Ltd **v** *Meydan Group LLC* (Case ARB 003/2013 judgment 2 April 2015)

Banyan Tree Corporate Pte Ltd **v** *Meydan Group LLC*, Case No. 1619 of 2016

Dubai Court of Cassation Judgment 91 of 1993

Dubai Court of Cassation Judgment 249 of 1996

Dubai Court of Cassation Judgment 67 of 1998

Dubai Court of Cassation Judgment 393 of 1998

Dubai Court of Cassation Judgement 201 of 2001

Dubai Court of Cassation Judgement 503 of 2003 (*International Bechtel Co. Ltd.* **v** *Department of Civil Aviation of the Government of Dubai*)

Dubai Court of Cassation Judgment 40 of 2004

Dubai Court of Cassation Judgment 88 of 2004

Dubai Court of Cassation Judgment 180 of 2006

Dubai Court of Cassation Judgment 43 of 2009

Dubai Court of Cassation Judgment 67 of 2009

Dubai Court of Cassation Judgment 180 of 2011

Dubai Court of Cassation Judgment 14 of 2012

Dubai Court of Cassation Judgment 282 of 2012

Dubai Court of Cassation Judgment 212 of 2014

Dubai Court of Cassation Commercial Appeal 199 of 2014

Dubai Court of First Instance Judgment 288 of 2002 (*International Bechtel Co. Ltd.* **v** *Department of Civil Aviation of the Government of Dubai*)

Dubai Court of First Instance Judgment 489 of 2012

Dr. Lothar Ludwig Hardt and Hardt Trading F.Z.E **v** *DAMAC (DIFC) Company Limited et al* [Dubai International Financial Centre Court of First Instance, 036/2009]

(1) Egan (2) Eggert v (1) Eava (2) Efa [2013] Dubai International Financial Centre, Court of First Instance, ARB 002

(1) Fiske (2) Firmin v Firuzeh [2014] Dubai International Financial Centre, Court of First Instance, 006/2017, ARB 001

International Bechtel Co. Ltd **v** *Department of Civil Aviation of the Government of Dubai* [*Emirate of* Dubai Court of Cassation, 2004]

International Electromechanical Services Co LLC **v** *Al Fattan Engineering LLC & Al Fattan Properties LLC* [Dubai International Financial Centre Court of First Instance, 5/2012]

Isai **v** *Isabelle* [Dubai International Financial Centre, Court of First Instance, 006/2017]

ITF **v** *DWS* [Dubai International Financial Centre Court of First Instance, 2/2012]

National Bonds Corporation PJSC **v** *Taaleem PJSC & Deyaar Development PJSC* [Dubai International Financial Centre Court of Appeal, 2011/CA 001

Petroleum Development (Trucial Coast) Ltd. **v** *Sheikh of Abu Dhabi*, International and Comparative Law Quarterly. 247 (1952)

List of Cases (Europe)

Findlay **v** *United Kingdom* [1997]

McGonnell **v** *The United Kingdom* ECHR 28488/95 [2000]

List of Cases (Other international)

Anya **v** *Anya* [1988] C.A.S.W.P./cc/9/88, unreported (Cameroon)

Arbitrators' Institute of New Zealand Inc **v** *Legal Services Board* [1995] 2 NZLR 202 (New Zealand)

Benjamin **v** *Sobac South African Building & Construction (Pty) Ltd* 1989 (4) SA 940 (C) (South Africa)

Bester **v** *Easigas (Pty) Ltd & another* 1993 (1) SA 30 (C) (South Africa)

Booz- Allen and Hamilton Inc **v** *SBI Home Finance Ltd* (2011) 5 SCC 532 (India)

Bramalea **v** *T. Eaton Co* [1994] (Canada)

Clark **v** *African Guarantee and Indemnity Co Ltd* 1915 CPD 68 (South Africa)

Dexgroup (Pty) Ltd **v** *Trustco Group International (Pty) Ltd* (687/12)[2013] ZASCA 120 (South Africa)

Gold & Resource Developments Limited **v** *Doug Hood Limited* [2000] NZCA 131 (New Zealand)

Gordian Runoff Limited **v** *Westport Insurance Corporation* [2010] NSWCA 57, 201(Australia)

Hyperchemicals International (Pty) Ltd & another **v** *Maybaker Agrichem (Pty) Ltd & another* 1992 (1) SA 89 (W) (South Africa)

Labourers International Union of North America, Local 183 **v** *Carpenters and Allied Workers, Local 27* [1994] (Canada)

Naidoo **v** *EP Property Projects (Pty) Ltd* (444/2012) [2014] ZASCA 97 (South Africa)

National Ballet of Canada **v** *Glasco* 186 DLR (4th) 347 (Canada)

Oil & Natural Gas Corporation Ltd **v** *Saw Pipes Ltd* [2003] (India)

Oil and Natural Gas Corporation Ltd **v** *Western Geco International Ltd* [2014] (India).

Ruler of Qatar **v** *Int'l Marine Oil Co*, 20 ILR 534,545 [1957]

Saudi Arabia **v** *Arabian American Oil Co (ARAMCO)*, 27 ILR 117,169 [1963]

Soulemezis **v** *Dudley (Holdings) Pty Ltd* [1987] 10 NSW (Australia)

Superior Propane Inc **v** *Valley Propane (Ottawa) Ltd* [1993] (Canada)

Triulzi Cesare SRL **v** *XinyiGroup (Glass) Co Ltd* [2014] SGHC 220 at 46 (Singapore)

Vimal Kishore Shah **v** *Jayesh Dinesh Shah*, Civil Appeal No. 8164 of 2016 (India)

White Constructions (NT) Pty Ltd **v** *Mutton* [1988] 91 FLR 419 (Australia) Guru Nanak Foundation v Rattan Singh, (1981) 4 SCC 634 (India)

List of Statutes and Legislation

Kingdom of Saudi Arabia, Decree No. 58 of 1963

United Arab Emirates, *emirate* of Dubai Law No.3 of 1992

United Arab Emirates, *emirate* of Dubai Law No.12 of 2004

United Arab Emirates, *emirate* of Dubai International Financial Centre Law No. 10 of 2004

United Arab Emirates, *emirate* of Dubai International Financial Centre Law No. 1 of 2008

United Arab Emirates, Federal Law No. 1 of 1972 on the competencies of the ministries and the powers of the ministers, as amended

United Arab Emirates, Federal Law No. 8 of 1980 Regulating labour relations

United Arab Emirates, Federal Law No. 18 of 1981 Concerning Organizing Trade Agencies

United Arab Emirates, Federal Law No. 24 of 1981 amending certain Provisions of Federal Law No. (8) of 1980 regarding the Organization of Labour Relations

United Arab Emirates, Federal Law No. 3 of 1983 regarding the Judicial Authority, as amended;

United Arab Emirates, Federal Law No. 5 of 1985 promulgating the Civil Transactions Law, as amended

United Arab Emirates, Federal Law No. 15 of 1985 amending certain Provisions of Federal Law No. (8) of 1980 regarding the Organization of Labour Relations

United Arab Emirates, Federal Law No. 12 of 1986 amending certain Provisions of Federal Law No. (8) of 1980 regarding the Organization of Labour Relations

United Arab Emirates, Federal Law No. 3 of 1987 promulgating the Penal Code, as amended

United Arab Emirates, Federal Law No. 23 of 1981 regulating the Legal Profession, as amended

United Arab Emirates, Federal Law No. 10 of 1992 promulgating the Law of Proof in Civil and Commercial Transactions, as amended

United Arab Emirates, Federal Law No. 11 of 1992 promulgating the Civil Procedure Law, as amended

United Arab Emirates, Federal Law No. 35 of 1992 promulgating the Criminal Procedures Code, as amended

United Arab Emirates, Federal Law No. 18 of 1993 on Commercial Transactions Law

United Arab Emirates, Federal Law No. 1 of 1996 on Constitutional Amendment Law

United Arab Emirates, Federal Law No. 53 of 1999 on ratification of the the Riyadh Arab Agreement for Judicial Cooperation

United Arab Emirates, Federal Law No. 33 of 2000 agreement on Juridical and Judicial Cooperation in Civil and Commercial matters and Extradition

United Arab Emirates, Federal Law No. 8 of 2004 Regarding The Financial Free Zones

United Arab Emirates, Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce

United Arab Emirates, Federal Law No. 6 of 2012 regulating the Translation Profession

United Arab Emirates, Federal Law No. 7 of 2012 regulating Expert evidence before the Judicial Authorities

United Arab Emirates, Federal Law No. 2 of 2015 on Commercial Companies, as amended

United Arab Emirates, Federal Law No. 6 of 2018 on Arbitration

United Kingdom, Arbitration Act 1996

United Kingdom, Civil Procedure Rules 1998

United Kingdom, The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

United Kingdom, The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015

United States Federal Arbitration Act of 1925

Republic of South Africa, Small Claims Court Act 61 of 1984

Republic of Zimbabwe, Small Claims Courts Act 7[12]

ABSTRACT

The study explores how *Public policy (and/or public order)* is utilised as a ground for challenging and vacating domestic arbitral awards in the United Arab Emirates (UAE). Among the points of particular interest being its impact on the *finality, conclusiveness* and *binding* nature of arbitration due to the existence of different parallel courts in the country.

Three research questions are presented focused on first, the purpose of the *Public policy (and/or public order)* exception in the UAE; the second, on the scope of this exception and the third (and final) on the impact of the exception on the judicial rulings of the different parallel courts that constitute the 'UAE Courts. Three findings are made. The *first* suggests that *Public policy (and/or public order)* is used to provide legitimacy to institutions enacting coercive power. The *second* finding is that *Public policy (and/or public order)* is generally construed in a very broad manner in the UAE. The third is that is that *there are* differences in terms of interpretation of public policy across the various parallel courts in the UAE.

This study has three possible limitations. First, the case laws analysed were based on cases decided within the context of the 'old' UAE Arbitration law. However, the UAE promulgated a new standalone arbitration law, Federal Law No. 6 of 2018 on Arbitration, which took effect on July 2018. For this reason, none of the case laws analysed is based on statutory interpretations of 'new' UAE Arbitration law. Second, because the UAE does not maintain any formal case reports, nor do the arbitral institutions that operate in the country retain comprehensive information on arbitral awards that have been challenged, for this reason, the cases analysed in the study were limited to those reported in English in a number of legal databases. Third, noting that the UAE does not adhere to the principles of *stare decicis*, it is very doubtful whether a comprehensive overview of the *Public policy (and/or public order)* imperative in UAE domestic arbitration can actually be drawn. Arguably, these three limitations may impede the applicability of the findings to a *future* understanding of the use of *Public policy (and/or public order)* as a justification for challenging and also vacating domestic arbitral awards in the country.

However, despite these limitations, the analysis of the cases still affords scholars the opportunity to engage in detailed and intimate exploration of the broad manifestation of the *Public Policy and 'Order Public' (public order)* exception. Thus, in terms of generalisability, the findings from the study are likely to apply to a developing arbitration practice across the Gulf region.

The thesis makes specific contributions to the theory and practice of arbitration law in general and its application to *Public policy (and/or public order)* in particular. In terms of desired improvements which will entail restricting arbitration *vacatur* on the basis of *Public policy (and/or public order)*, the study highlights the impact of such exceptions on the operations of parallel legal systems in the UAE by directing our attention to the relationship and tensions between two of such parallel courts; UAE federal courts ('Courts of the UAE') and the 'free zone' courts such as the Dubai International Financial Courts (DIFC) and the Dubai International Arbitration Centre (DIAC) who together with the UAE federal courts constitute the 'UAE Courts'.

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DECLARATION

I solemnly declare that no part of this work has either in part or full been submitted in support of an application for another degree or qualification of this or any other University or other institution of learning.

DEDICATION

For Kasienna Ze’va Ojiako

CHAPTER 1: INTRODUCTION

1.1 Background - Bechtel

On the 15th May 2005, the Dubai Court of Cassation in Judgement 503 of 2003[1] nullified an arbitration award made to International Bechtel Company Limited (*hencewith*, 'Bechtel') in its dispute with the Department of Civil Aviation of the Government of Dubai (*hencewith*, the 'DCA'). The dispute had arisen in connection to a written contract (with an extensive arbitration clause) for project management services entered into between Bechtel and the DCA, an organ of state. The project entailed the planning, design and delivery of a major infrastructure development consisting of a theme park and adjourning residential and commercial units in Dubai. In 1999, a dispute arose between the two parties following which Bechtel submitted claims to the DCA for non-payment (the DCA made subsequent counterclaims for non-performance and payment restitution).

Arbitration proceedings commenced on July 26, 2000 before a single arbitrator. On February 20, 2002, following written findings to the two parties, the arbitrator made an award of approximately US$25.4 million to Bechtel. The award encompassed not only damages, but also costs and legal fees. In the process, he dismissed in its entirety, the counterclaim (valued at approximately US$42 million) made by the DCA. As the UAE is a 'double *exequatur*[2] jurisdiction[3], on April 7, 2002, Bechtel made submissions to the Dubai Court of First Instance seeking an enforcement order against the DCA who responded with a counter suit (on April 22, 2002) seeking to nullify the arbitrators award. On November 16, 2002, the Dubai Court of First Instance[4] rejected Bechtel's prayers for an enforcement order against the DCA and instead, nullified the arbitrators' award on the ground of public policy stating that the arbitrator had failed to *properly* swear in witnesses during the arbitral proceedings in a manner prescribed

[1] International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 503/2003 [Court of Cassation]
[2] The notion of double *exequatur* is simply being used to emphasise that enforcement of arbitration awards in the UAE still need an affirming court judgement. This in effect implies that arbitration still remains a two-way process within the UAE.
[3] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[4] International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 288/2002 [Court of First Instance]

under Article 41(2) of the Civil Procedure Code as applicable to UAE court procedures. Doing so the court opined, voided the arbitration proceedings and therefore, nullified the award. The court opined that stipulated court procedures were clear as relates to the proper manner and form of swearing in witnesses during civil proceedings. In its ruling, the court further rejected arguments put forward by Bechtel that the DCA had not objected to witnesses giving evidence during the arbitration proceedings without being under oath and had in fact waived any objections to this during the arbitration proceedings. On December 14, 2002, Bechtel filed an appeal with the Dubai Court of Appeal seeking to (i) overturn the decision of the Dubai Court of First Instance nullifying the award and (ii) affirm/ratify the original arbitration award. The Dubai Court of Appeal rejected Bechtel's appeal on June 8, 2003, following which Bechtel made a final appeal to the Dubai Court of Cassation. On 15 May 2005, in a decision that attracted considerable scholarly attention[5], the Dubai Court of Cassation ratified the earlier decision of both the Dubai Court of First Instance and the Dubai Court of Appeal, nullifying the arbitrators award in its entirety. The court found that under the laws of Dubai, rendering of oaths were as a matter of public policy, not waivable. Furthermore, the courts stated that the arbitrator had only issued warnings to the witnesses on their need to be truthful when rendering testimony and that this did not amount to oaths[6].

Following the decision of the Dubai Court of Cassation, Bechtel then took the unusual step of seeking to enforce the arbitrators' award before the Courts of France and the United States Courts[7]. While the specific jurisdictional rationale is beyond the interest of this paper, Bechtel's enforcement proceedings were based on the argument that the public policy exception relied upon by the Dubai Court of Cassation was "hypertechnical"[8].

[5] Polkinghorne, M. 2008. Enforcement of annulled awards in France: the sting in the tail. *International Construction Law Review*, 25(1), 48-56; Blanke, G and Corm-Bakhos, S. 2017. The Enforcement of International Commercial and Investment Arbitration Awards in the MENA Region, *Arbitration*, 1 (2017), 71-81..
[6] Robertson, J (District Judge). 2005. *Arbitration Between International Bechtel Co. and Department of Civil Aviation of Government of Dubai*, 360 F.Supp.2d 136 (2005), United States District Court, District of Columbia.
[7] The rational being to be able to seek financial restitution in countries where the DCA were known to have financial assets.
[8] Robertson, J (District Judge). 2004. *Arbitration Between International Bechtel Co. and Department of Civil Aviation of Government of Dubai*, 300 F. Supp. 2d 112 (2004), United States District Court, District of Columbia.

What made the 2005 Bechtel judgement controversial from a public policy perspective? The controversy is that it will appear that two parallel courts in the same country were able to draw upon public policy to frame two contradictory legal perspectives on what appears to be similar disputes. Thus, while the Dubai Court of Cassation had relied on public policy to nullify an arbitration award on the basis that that there were procedural flaws in the manner within which witnesses were sworn in during the arbitral proceedings, an earlier decision by the Abu Dhabi Court of Cassation found differently. More specifically, in Judgment 433/17 of 1997, the Abu Dhabi Court of Cassation ruled that it was *not* against public policy in the UAE for an arbitrator to depart from strict procedural rules regarding witnesses, production of evidence, and documentation. The court ruled that arbitrators were empowered to establish their own processes and procedures pertaining to, for example, the production of evidence. Process and procedures could also extend to an arbitration proceeding deciding on a point of law which is either not relevant to the dispute or which has not been cited by parties to the dispute.

Concerns about the scope of *Public policy (and/or public order)* considerations and its impact on the *finality*, *conclusiveness* and *binding* nature of arbitration expressed by a number of commentators[9] arguably provides us with an appropriate springboard justifying the need to seriously examine the role of *Public policy (and/or public order)* as a ground for challenging and vacating domestic arbitration awards in the UAE[10]. Organisations and individuals who seek to challenge arbitral awards do so due to a number of reasons. The *Public policy (and/or public order)* exception represents one of the special

[9] See for example Nambiar, S. (2009), *Common law needed as UAE sees spurt in arbitration*, Emirates Business 24/7, https://www.emirates247.com/eb247/companies-markets/construction/common-law-needed-as-uae-sees-spurt-in-arbitration-2009-09-09-1.24400, accessed 09/11/18; See for example Blanke, G. (2012), *United Arab Emirates: Public Policy In The UAE And The Future Of Arbitration: Has The Unruly Horse Turned Into A Camel*?, http://www.mondaq.com/x/201392/Arbitration+Dispute+Resolution/Public+Policy+In+The+UAE+And+The+Future+Of+Arbitration+Has+The+Unruly+Horse+Turned+Into+A+Camel, accessed 09/11/18; See for example Blanke, G. and Corm-Bakhos, S. (2012), *United Arab Emirates: Enforcement Of New York Convention Awards: Are The UAE Courts Coming Of Age*?

[10] For example, in a reported interview, Philip Punwar (of Baker Botts LLP) had suggested that there was a fear following the Dubai Court of Cassation in Judgement 503 of 2003 (International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai) that "…*when an arbitration award is issued, it will be struck down by the courts – for one reason or the other*."

conditions upon which an arbitral award may be challenged and vacated (nullified and set aside) by the courts.

More specifically, three research questions will be presented and addressed using a combination of different analytical approaches (mixed methods); in effect, triangulation. Doing so ensures that limitations associated with specific analytical approaches are limited. It is intended that the first two questions will be addressed through the literature (and case analysis). In terms of the third research question, a content analysis of written judicial opinions of both the UAE federal courts ('Courts of the UAE') and the 'free zone' courts (which together with the UAE federal courts constitute the 'UAE Courts') will be undertaken. As will be later shown, content analysis is deemed particularly useful in research focused not only on topics of essential interest and value[11], but also research focused on gaining an appreciation of the important legal reasoning of judges in matters with significant social interest[12]. *Public policy (and/or public order)* it will be argued, is a matter of significant social/public interest[13].

At this point, it is worth alerting the reader to what may appear as two interchangeable concepts; '*Public policy'* and '*Public order'*. As will be shown later in the literature review, UAE law[14] does not make reference to '*Public policy'*. Instead, it cites '*Public order'*, a concept which from the literature will be shown to be similar to the notion of '*Public policy'*, but is more widely applied in civil law jurisdictions[15]. Noting that although fundamentally different concepts, for expediency, a number of

[11] Green J, and Thorogood, N. (2004), *Analysing qualitative data*. In: Silverman D (ed.). Qualitative Methods for Health Research (1st edn). London: Sage Publications, 173–200; Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.
[12] Heise, M. 2002. Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism. *University of Illinois Law Review*,2002 (4), 819-850.
[13] Howlett, M., Ramesh, M. and Perl, A. 2009. *Studying public policy: Policy cycles and policy subsystems*, Vol. 3, Oxford: Oxford University Press.
[14] Article 3 of UAE Federal Law 11 of 1992
[15] Bewes, W. 1921. Public Order (Ordre Public). *Law Quarterly Review*, 37 (3), 315-322; Bernier, J. 1929. Droit Public and Ordre Public. *Transactions of the Grotius Society*, 15, 83-92; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Forde, M. 1980. The Ordre Public Exception and Adjudicative Jurisdiction Conventions. *International and Comparative Law Quarterly*, 29 (2 & 3), 259-273; Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.

scholars equate *'Public policy'* to *'Public order'*[16]. For brevity, we adopt the same; thus reference to '*Public policy (and/or public order)*' in the study.

The study is driven by a number of reasons including the ubiquitous nature of *Public policy (and/or public order)*. Yelpaala[17] suggests that academic and judicial interest in public policy exceptions in recent times has meant that the topic has generated more interest than other legal concepts have. The ubiquity of the concept has also meant that numerous scholars have examined policy grounds for challenging and vacating arbitration awards[18].

[16] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. Arab Law Quarterly, 3 (1), 19-32; Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403; Kantaria, S. 2012. The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law. *International Arbitration Law Review*, 15 (2), 61 – 66; Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244; Kanakri, C., and Massey, A. 2016. *Comparison of UAE and DIFC-seated arbitrations*. Global Arbitration News. Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18..

[17] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494.

[18] Antoine, T. 1977. Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny. *Michigan Law Review*, 75 (5 & 6), 1137-1161; Sterk, S. 1980. Enforceability of agreements to arbitrate: an examination of the public policy defense. *Cardozo Law Review*, 2 (3), 481-544; Edwards, H. 1988. Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain. *Chicago-Kent Law Review*, 64 (1), 3-36.; Meltzer, B. 1988. After the Labor Arbitration Award: The Public Policy Defense. *Industrial Relations Law Journal*,10,241-257; Parker, J. 1988. Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception. *The Labor Lawyer*, 4(4), 683-714; Stempel, J. 1990. Pitfalls of Public Policy: The Case of Arbitration Agreements. *St. Mary's Law Journal*, 22 (2), 259-356; Randall, B. 1992. The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards. *Brigham Young University Law Review*,1992 (3), 759-784; Galbraith, B. 1993. Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the Manifest Disregard of the Law Standard. *Indiana Law Review*, 27 (1), 241-266; Hayford, S. 1995. Law in Disarray: Judicial Standards for Vacatur of Commerical Arbitration Awards, *Georgia Law Review*, 30 (3), 731-842; Hayford, S. 1997. New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur, *George Washington Law Review*, 66 (3), 443-507; Glanstein, D. 2000. A Hail Mary Pass: Public Policy Review of Arbitration Awards, *Ohio State Journal on Dispute Resolution*, 16 (2), 297-334; Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law, *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164; Arfazadeh, H. 2002. In the shadow of the unruly horse: international arbitration and the public policy exception. *American Review of International Arbitration*, 13, 43-197; Ogden, J. 2002. Do Public Policy Grounds Still Exist for Vacating Arbitration Awards, *Hofstra Labor & Employment Law Journal*, 20 (1), 87-116.; Sullivan, K. 2002. The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act, *Saint Louis University Law Journal*, 46 (2), 509-560; Helm, K. 2006. The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?. *Dispute Resolution Journal*, 61(4), 16 – 26; Gibson, C. 2008. Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law. *Penn State Law Review*, 113 (4), 1227-1268.; Rendeiro, A. 2010. Indian Arbitration and Public Policy. *Texas Law Review*,89 (3), 699-728.; Brand, F. 2014. Judicial Review of Arbitration Awards, *Stellenbosch Law Review*, 25 (2), 247-264.

According to Postema[19], Beck[20] and Feteris[21], the majority if not all legal judgements are drawn from interpretations of legislative provisions, legal principles and/or supporting case law (precedent). Thus, judicial decisions are arrived at after due consideration (and balancing) of a number of factors. These include the ability of the courts to deliver justice (between specific disputants), but also after consideration of how the specific judicial decision may impact on the public at large[22]. In such circumstances, *Public Policy and 'Order Public' (public order)* considerations arise following recognition that a number of public concerns and priorities may need to be protected by law[23]. This means that the need to take into consideration the interests of the public becomes, according to the American jurist Oliver Wendell Holmes[24],

> "*...the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy...*" (pp. 35-36).

The study focuses on domestic arbitration awards in the UAE. Although the recently[25] promulgated UAE Federal Law No. 6 of 2018 on Arbitration is directed towards both international and local arbitral proceedings, the focus herein is on the challenge and vacation of *domestic* arbitration awards under the

[19] Postema, G. 2011. *A Treatise of Legal Philosophy and General Jurisprudence*. Volume 11: Legal Philosophy in the Twentieth Century: The Common Law World (Vol. 11). Springer Science & Business Media.
[20] Beck, G. 2013. *The Legal Reasoning of the Court of Justice of the EU*. Bloomsbury Publishing.
[21] Feteris, E. 2017. *Fundamentals of legal argumentation: A survey of theories on the justification of judicial decisions*, Vol. 1, Springer.
[22] Richards, M. and Kritzer, H. 2002. Jurisprudential regimes in Supreme Court decision making. *American Political Science Review*, 96(2), 305-320; Slepcevic, R. 2009. The judicial enforcement of EU law through national courts: possibilities and limits. *Journal of European Public Policy,* 16(3), 378-394; Wasserfallen, F. 2010. The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union. *Journal of European Public Policy*, 17(8),1128-1146; Reeves, A. 2016. Reasons of Law: Dworkin on the Legal Decision. *Jurisprudence*, 7(2), 210-230.
[23] Box, R. 2007. Redescribing the public interest. *Social Science Journal*, 44(4), 585-598; Bozeman, B. 2007. *Public values and public interest: Counterbalancing economic individualism.* Georgetown University Press.
[24] Holmes, O. 1881. *The Common Law*. Pub. Little Brown.
[25] This law was promulgated in May 2018.

'old' UAE Arbitration law as articulated under Federal Law, Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of Federal Law (11) of 1992, the Civil Procedure Code (CPC). This governs the procedure for civil cases that come before UAE federal courts ('Courts of the UAE'). The UAE promulgated a new standalone arbitration law – Federal Law No. 6 of 2018 on Arbitration – as recently as 3 May 2018, which then appeared in the official gazette in June 2018 before taking effect in July 2018. At the time of writing, there was no concluded case law on arbitration vacation in the UAE based on the new UAE Federal Law No. 6 of 2018 on Arbitration. The interest in domestic arbitral awards is driven by the fact that arbitration awards which are made *outside* the UAE can be enforced or challenged *in* the UAE under any one of three avenues:

(i) the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958

(ii) the GCC[26] (The Cooperation Council for the Arab States of the Gulf), or

(iii) other bilateral recognition and enforcement of judgements (basically, treaties) in civil matters that the UAE holds with other countries. These treaties includes the Riyadh Arab Convention on Judicial Cooperation[27] and the Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Judicial Commissions, and the execution of Judgments and Arbitral Awards[28], which the country holds with India.

The study is further driven by not only calls for empirical research on arbitration awards and arbitral decision-making[29], but also a recognition that although considerable interest (supporting literature and

[26] The Cooperation Council for the Arab States of the Gulf, also know as the Gulf Cooperation Council (GCC) is an economic and political of Arab states in Persian Gulf consisting of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.
[27] ratified under UAE Federal Decree No. 53 of 1999.
[28] ratified under UAE Federal Decree No. 33 of 2000.
[29] See Coyle, J. and Drahozal, C. 2018. An Empirical Study of Dispute Resolution Clauses in International Supply Contracts, *Vanderbilt Journal of Transnational Law*, https://ssrn.com/abstract=3206695, In Press; Drahozal, C. 2003. Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration. *Journal of International Arbitration*, 20 (1), 23-34; Drahozal, C. 2006a. Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration. *Arbitration International*, 22(2), 291-308; Drahozal, C. 2016a. The Issue Preclusive Effect of Arbitration Awards. *Proceedings of the NYU 69th Annual Conference on Labor: Mediation and Arbitration of*

case law) exists in understanding why arbitration awards may be challenged and vacated on the basis of *Public Policy and 'Order Public' (public order)*, empirical and/or case-based-content analytical studies explicitly contextualised within the UAE remain sparse (see, for example, Almutawa and Maniruzzaman[30]). This calls for exploration of:

(i) the purpose of this *Public policy (and/or public order)* exception,

(ii) the scope of the exception as applied by the UAE federal courts ('Courts of the UAE') and the 'free zone' courts (which together with the UAE federal courts constitute the 'UAE Courts'), and

(iii) possible differences in terms of judicial ruling on the *finality, conclusive and binding nature* of arbitration as a dispute resolution mechanism emanating from the 'UAE Courts', due to the broad manner to which *Public policy (and/or public order)* is construed within the country's jurisprudence.

So what is this context?

1.2 Articulation

As a recognised form of Alternative Dispute Resolution (ADR), *arbitration* is regarded as an attractive dispute resolution mechanism. One major attraction of arbitration is that its proceedings are construed as likely to ensure that private civil controversies and disputes are resolved to the point that they become

Employment and Consumer Disputes, https://ssrn.com/abstract=2888570, accessed 29/09/18; Drahozal, C. 2016b. *The State of Empirical Research on International Commercial Arbitration: 10 Years Later. The Evolution and Future of International Arbitration: The Next 30 Years*, Kluwer Law International, https://ssrn.com/abstract=2716377, accessed 29/09/18; Drahozal, C. 2016c. *Empirical Findings on International Arbitration: An Overview*. Oxford Handbook on International Arbitration. https://ssrn.com/abstract=2888552, accessed 29/09/18.

[30] Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.

final, conclusive and *binding*. This is a position reiterated in both the literature[31] and international case law. Two legal principles underpin/ underlie this idea – *Res Judicata* and *estoppel.*

Numerous international cases clearly demonstrate the international judicial fraternity's willingness to reiterate the *finality, conclusive and binding nature* of arbitration as a dispute resolution mechanism. Such cases have included seminal cases heard at the highest courts of countries such as the United Kingdom (in *Holmes v Pumpherston*[32], *Mardorf Peach v Attica Sea, The Laconia*[33] and *Italmare Shipping v Ocean Tanker*[34]), the United States (*American Almond Products Co. v Consolidated Pecan Sales Co*[35], *United Steelworkers v Enterprise Wheel & Car Corp*[36] and *National Union Fire v Nationwide Insurance*[37]), *Clark v African Guarantee*[38], *Hyperchemicals v Maybaker Agrichem*[39], *Bester v Easigas*[40] and *Naidoo v EP Property Projects*[41] in South Africa, and *Guru Nanak Foundation v Rattan Singh*[42] decided by the Supreme Court of India. Other similar cases have been decided in countries such as Canada (*National Ballet of Canada v Glasco 186 DLR (4th) 347*[43], *Bramalea v T. Eaton* [44] and *Superior*

[31] Ashe, B. 1983. Arbitration finality-myth or reality. *Arbitration Journal*, 38(4), 42-51; Thieffry, J. 1985. Finality of Awards in International Arbitration, *Journal of International Arbitration*, 2 (3), 27-48; Delaume, G. 1989. The finality of arbitration involving states: recent developments. *Arbitration International*, 5(1), 21-34; Jaffe, P. 1989. The Judicial Trend toward Finality of Commercial Arbitral Awards in England. *Texas International Law Journal*, 24 (1), 67-86; Cowling, M. 1994. Finality in Arbitration, *South African Law Journal*, 111 (2), 306-315; Schmitz, A. 2002. Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis. *Georgia Law Review*, 37 (1), 123-204; Zaiwalla, S. 2003. Challenging Arbitral Awards: Finality is Good but Justice is Better. *Journal of International Arbitration*, 20(2), 199-204; Mourre, A., di Brozolo, L. and Radicati, G. 2006. Towards Finality of Arbitration Awards: Two Steps Forward and One Step Back. *Journal of International Arbitration*, 23 (2), 171-188; Milone, N. 2011. Arbitration: the Italian perspective and the finality of the award. *Oñati Socio-Legal Series*, 1 (6), 1-12; Kirby, J. 2012. Finality and Arbitral Rules: Saying an Award is Final Does Not Necessarily Make it so. *Journal of International Arbitration*, 29 (1), 119-128; Roodt, C. 2012. Reflections on Finality in Arbitration. *De Jure*, 45 (3), 485-510; Platt, R. 2013. Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality, *Journal of International Arbitration*, 30 (5), 531-560; Conley, A. 2015. Promoting Finality: Using Offensive, Nonmutual Collateral Estoppel in Employment Arbitration. *UC Irvine Law Review*, 5 (3), 651-682

[32] Holmes Oil Co Ltd v Pumpherston Oil Co Ltd (1891) 18 R 52 (HL), 28 SLR 940.

[33] Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia [1977] A.C. 850 at 878.

[34] Italmare Shipping v Ocean Tanker [1982] 1 WLR 158 at 162(f).

[35] American Almond Products Co. v Consolidated Pecan Sales Co., 144 F.2d 448, 451 [2d Cir. 1944].

[36] United Steelworkers v Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

[37] National Union Fire Insurance Company v Nationwide Insurance Company., 82 Cal. Rptr. [1999].

[38] Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68.

[39] Hyperchemicals International (Pty) Ltd & another v Maybaker Agrichem (Pty) Ltd & another 1992 (1) SA 89 (W).

[40] Bester v Easigas (Pty) Ltd & another 1993 (1) SA 30 (C).

[41] Naidoo v EP Property Projects (Pty) Ltd (444/2012) [2014] ZASCA 97 (31 July 2014).

[42] Guru Nanak Foundation v Rattan Singh, [1981] 4 SCC 634.

[43] National Ballet of Canada v Glasco 186 DLR (4th) 347 at 362.

[44] Bramalea v T. Eaton Co [1994].

Propane v Valley Propane[45]), New Zealand (*Gold & Resource v Doug Hood* [46]), and Australia (*White Constructions v Mutton*[47]).

Reviewing the aforementioned cases, it becomes apparent that the various appellate courts have focused on both economic and policy perspectives of *finality, conclusive and binding nature* of arbitration as a critical rule-of-law principle. For example, from an economic perspective, by ensuring certainty in commercial and business transactions, it is assumed that businesses will be more secure in their legal rights and obligations. This is a point discussed extensively by Oxley and Yeung[48] and Veasey and Brown [49]. If disputes are not settled and companies engage in never-ending litigation, it is also possible that contractual obligations will not be adhered to. This has the potential of reducing trust and increasing transaction costs as, in an effort to protect their investments, companies will be obliged to expend considerable resources monitoring business partners. The policy perspective of *finality, conclusive and binding nature* of arbitration is, however, more contentious, for while policy considerations play a major role in how private law disputes are adjudicated, scholars are equally divided on whether policy considerations should play any role in private law dispute adjudication. According to Plunkett[50] this divide is between those who emphasise a rights-based perspective of justice and therefore posit that policy considerations should play no role in private law dispute adjudication[51] and those who do not share such a rights-based perspective of justice who posit that policy considerations should play a role in private law dispute adjudication, particularly when existing legal rules and standards are unable

[45] Superior Propane Inc v Valley Propane (Ottawa) Ltd [1993].
[46] Gold & Resource Developments Limited v Doug Hood Limited [2000] NZCA 131.
[47] White Constructions (NT) Pty Ltd v Mutton (1988) 91 FLR 419 (Australia).
[48] Oxley, J. and Yeung, B. 2001. E-commerce readiness: Institutional environment and international competitiveness. *Journal of International Business Studies*, 32(4), 705-723.
[49] Veasey, E. and Brown, G. 2014. Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions. *Business Law Journal*, 70 (2), 407-436.
[50] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[51] Weinrib, E. 2005. *The Disintegration of Duty*. In M.S. Madden (ed.), Exploring Tort Law, Cambridge; Weinrib, E. 2012. *The Idea of Private Law*. Pub. Oxford; Beever, A. 2007. *Rediscovering the Law of Negligence Torts and Rights*, Pub. Oxford...

to provide clear guidance on how to resolve novel disputes[52]. A rights-based perspective of justice in this context refers to obligations and liabilities individuals owe to each other which the state can enforce through its coercive power[53].

1.3 Study interest

While the courts have sought to reiterate the *finality, conclusive and binding nature* of arbitration as a dispute resolution mechanism, it is noted, as restated in the seminal case of *Ras Behari Lal v King Emperor*[54] heard by the Privy Council, that

> "…*finality is a good thing, but justice is better*".

This author postulates that this idea of justice from the literature[55] implies the establishment of benefits and burdens within social interactions, which are equitable, evenly balanced and fair. Thus, as was reiterated in *Czarnikow v Roth Schmidt*[56], it will be inappropriate for the judiciary not to – at the very least – enquire into the procedure of arbitral proceedings and the nature of the approach that such proceedings take in their determination of awards.

Essentially, therefore, this study is particularly interested in conditions that may lead to the 'UAE Courts' not only enquiring into arbitration proceedings and awards, but also actually vacating an award conferred through arbitration proceedings on the ground of *Public policy (and/or public order).* In doing so, the author's objectives are to understand:

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[52] Stapleton, J. 1998. *Duty of Care Factors: A Selection from the Judicial Menus*. In P. Cane and J. Stapleton (eds.), The Law of Obligations: Essays in Celebration of John Fleming, Oxford; Stapleton, J. 2003. The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable, *Australian Bar Review*,24 (2), 135-148..

[53] Nolan, D and Robertson, A. 2011. *Rights and Private Law*. Donal Nolan and Andrew Robertson (eds), Rights and Private Law (Hart 2011) 1-33.

[54] Ras Behari Lal v King Emperor (1933) 50 TLR 1, (1933) 60 IA 354.

[55] Rawls, J. 1957. Justice as Fairness. *Journal of Philosophy*, 54 (22), 653-662; Bentley, D. 1973. John Rawls: A Theory of Justice. *University of Pennsylvania Law Review*, 121(5), 1070-1078; Gans, E. 2005. John Rawls's Originary Theory of Justice. Contagion: *Journal of Violence, Mimesis, and Culture*, 12(1),149-157; Follesdal, A. 2015. John Rawls' Theory of Justice as Fairness. *Contemporary Philosophy*, 12, 311-328.

[56] Czarnikow v Roth Schmidt & Co [1922] 2 KB 478.

(i) the purpose of this *Public policy (and/or public order)* exception,

(ii) the scope of the exception as applied by the 'UAE Courts', and

(iii) the possible differences in terms of judicial rulings on the *finality, conclusive and binding nature* of arbitration as a dispute resolution mechanism emanating from the different 'UAE Courts' taking into account the broad manner to which *Public policy (and/or public order)* is construed in the country's jurisprudence.

In terms of these possible differences identified in the third objective of this study, two factors are considered. The first is to what extent differences exists between the various 'UAE Courts'. As will be demonstrated later in the thesis, although arbitration is not in itself a young quasi-legal dispute resolution mechanism – at least not according to recorded arbitration cases such as *Vynior's Case*[57], *Wellington v Macintosh*[58] and *Kill v Hollister*[59], there is ambiguity in terms of not only what is meant by '*policy*'[60], but also what is meant by '*public policy*'[61]. This ambiguity also extends – as noted by Husserl[62], Scott[63] and Gualtieri[64] – to the notion of '*public order'*. Of particular interest in terms of the UAE is that as

[57] Vynior's Case 8 Co. 8oa, 8ib (1609).
[58] Wellington v Macintosh 2 Atk. 569 (Ch. 1743).
[59] Kill v Hollister.3 I Wilson 129 (K. B. 1746).
[60] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. Australian Journal of Education Studies, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy, *Annals of the American Academy of Political and Social Science*, 600(1), 30-51; Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21; Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[61] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Paulsen, M. and Sovern, M. 1956. Public Policy" in the Conflict of Laws. *Columbia Law Review*, 56(7), 969-1016; Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494; Gibson, C. 2008. Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law. *Penn State Law Review*, 113 (4), 1227-1268; Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50
[62] Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67.
[63] Scott, W. 1940. Private Agreements and Public Order. *Canadian Bar Review*, 18 (3), 159-171.
[64] Gualtieri, R. 1952. The Legal Concept of Public Order. *Revue Juridique Themis*, 2 (3), 155-162.

Almutawa and Maniruzzaman[65] opine, the UAE federal courts ('Courts of the UAE') have construed *Public policy (and/or public order)* to encompass almost any matter. What this arguably means is that there is a strong need for some form of consensus to be reached about the essence of *Public policy (and/or public order)* in arbitration. In fact, we can go further to claim that there is certainly an interest in reflecting upon the very nature of *Public policy (and/or public order)*. Arguably, such an understanding will facilitate more insight into its scope and meaning. Second, the impact of such differences in terms of judicial rulings is considered, particularly within the scope of:

(i) the provisions of UAE Federal Law No. 18 of 1993 on Commercial Transactions Law which states that: "*Traders and commercial activities shall be governed by the agreement entered into by the two contracting parties unless such agreement contradicts an imperative commercial text"* (Article 2 (1))…and furthermore states that: "*Specific agreements or commercial customs rules may not be applied if they contradict the Public Order or Morals*" [Article 2 (3)] and

(ii) the provisions of the recently promulgated UAE Federal Law No. 6 of 2018 on Arbitration which states that: "*Any Arbitration conducted in the State, unless the Parties have agreed that another law should govern the Arbitration, provided there is no conflict with the public order and morality of the State*"[66](Article 2 (1)).

According to Turrini *et al*.[67], the recently promulgated law on arbitration is not applicable in certain parallel jurisdictions within the UAE, such as the DIFC (Dubai International Financial Courts)[68] and the

[65] Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.
[66] As the law is written in Arabic, an English version of the law is based on an unofficial translation obained under license by the author from two UAE law firms; *Baker & McKenzie Habib Al Mulla* and *Al Tamimi & Co*.
[67] Turrini, M., Robottom, L., Bailey, J., Cuffe, C., Roshan, A. and Raza, H. 2018. *The New UAE Arbitration Law: an incremental shift towards international norms*. https://www.whitecase.com/publications/alert/new-uae-arbitration-law-incremental-shift-towards-international-norms, accessed 26/05/18
[68] Carballo, A., 2007. The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?. *Arab Law Quarterly*, 21(1), 91-104; Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial*

DIAC (Dubai International Arbitration Centre)[69] pursuant of UAE Federal Law No. 8 of 2004 regarding the Financial Free Zones. This law allows these 'free zones'[70] which in addition to the DIFC and the DIAC, includes the Abu Dhabi Commercial, Conciliation and Arbitration Centre (ADCCAC) and the Islamic Centre for Reconciliation and Arbitration (IICRA) to operate civil laws independent of UAE Federal laws. Companies based in Free Zones are deemed (under UAE law – specifically UAE Federal Law No. 8 of 2004 Regarding The Financial Free Zones), as if they are operating offshore and are therefore not permitted to undertake any form of business within the 'mainland' of the UAE. If they wish to do so, then they must comply with all regulations governing the establishment of foreign businesses in the country. That being the case, the author directs his attention to the relationship between the UAE federal courts ('Courts of the UAE') on one side and the 'Free Zone' courts such as the DIFC and the DIAC. More specifically, in *Isai v Isabelle*[71], the Judicial Authority of the Dubai International Financial Centre: Court of First Instance opined [at 20] that:

> "*Not only are the jurisdiction of the DIFC Courts and the jurisdiction of the Dubai Courts in relation to the recognition and enforcement of an arbitral award mutually exclusive, they are also complementary. In enacting Article 7 of the Dubai Judicial Authority Law, the legislators contemplated that both the DIFC Courts and the Dubai Courts would have power (in appropriate cases) to ratify (or recognise) arbitral awards. There is no conflict between the jurisdiction of*

Law and Technology, 3 (3), 170-177; Luttrell, S. 2008c. Commentary on the 2008 Arbitration Law of the Dubai International Finance Centre. *International Journal of Private Law*, 2(1), 31-45; Kanakri, C., and Massey, A. 2016. Comparison of UAE and DIFC-seated arbitrations, *Global Arbitration News*. Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18.

[69] Bunni, N. 2008. The Dubai International Arbitration Centre, *Journal of World Investment & Trade*, 9, 83-86.

[70] These free zones are in effect 'free trade zones' and they exist in the different *emirates* within the UAE. These includes the Khalifa Industrial Zone Abu Dhabi and Masdar City Free Zone and Science and Technology Park (situated within the *emirate* of Abu Dhabi), Ajman Free Zone (situated within the *emirate* of Ajman), Dubai International Academic City, Dubai Internet City and Dubai Media City (all situated within the *emirate* of Dubai), Fujairah Free Trade Zone (situated within the *emirate* of Fujairah), Ras al Khaimah Free Zone (situated within the *emirate* of Ras al Khaimah), Sharjah Airport Free Zone and Sharjah Hamriya Free Zone (all situated within the *emirate* of Sharjah), and the Umm al Quwain Free Zone (situated within the *emirate* of Umm al Quwain).

[71] Isai v Isabelle [Dubai International Financial Centre, Court of First Instance, 006/2017]

the two courts, as is reflected in the complementary relationship highlighted by Article 7 of the Judicial Authority Law".

Thus, arguably, within limits of reason, both represent parallel courts on matters relating to arbitration in the UAE. However, as noted by the Judicial Authority of the Dubai International Financial Centre: Court of First Instance in *(1) Fiske (2) Firmin v Firuzeh* [72], notions of complementarity does not extend to the functions of the Union Supreme Court as the DIFC courts are extremely mindful of its exclusive jurisdiction on constitutional[73] matters as stipulated in Article 99 of the UAE Federal Constitution.

1.4 Tensions in the literature

As demonstrated in the literature[74] the grounds (reason or justification) for challenging and vacating arbitration awards continues to be a matter of interest to scholars. In the context of the UAE, this interest

[72] (1) Fiske (2) *Firmin v Firuzeh* [2014] [Dubai International Financial Centre, Court of First Instance, 006/2017] ARB 001

[73] It must be noted that in this case, that is (1) Fiske (2) *Firmin v Firuzeh*, the DIFC Courts found that a claim for constitutionality being made by any disputant in a DIFC hearing must first advance such pleadings of constitutionality before the DIFC Court for its assessment before being able to advance such pleadings before the Union Supreme Court.

[74] Edwards, H. 1988. Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain. *Chicago-Kent Law Review*, 64 (1), 3-36; Randall, B. 1992. The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards. *Brigham Young University Law Review*,1992 (3), 759-784; Galbraith, B. 1993. Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the Manifest Disregard of the Law Standard. *Indiana Law Review*, 27 (1), 241-266; Hayford, S. 1995. Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, *Georgia Law Review*, 30 (3), 731-842; Bingham, L. 1997. On repeat players, adhesive contracts, and the use of statistics in judicial review of employment arbitration awards. *McGeorge Law Review*, 29 (2), 223-260; Poser, N. 1998. Judicial Review of Arbitration Awards: Manifest Disregard of the Law. *Brooklyn Law Review*, 64 (2), 471-518; Younger, S. 1999. Agreements to Expand the Scope of Judicial Review of Arbitration Awards. *Albany Law Review*, 63 (1), 241-262; Ogden, J. 2002. Do Public Policy Grounds Still Exist for Vacating Arbitration Awards. *Hofstra Labor & Employment Law Journal*, 20 (1), 87-116; Mills, L., Bader, J., Brewer., and Williams, P. 2005. Vacating Arbitration Awards. *Dispute Resolution Magazine (Archives) - American Bar Association*, 11 (4), 23-27; Mills, L., Bader, J., Brewer., and Williams, P. 2006. Vacating Arbitration Awards. *General Practice, Solo and Small Firm Division of the American Bar Association Magazine*, 23, 28-29; Dammann, A. 2007. Vacating Arbitration Awards for Mistakes of Fact. *The Review of Litigation*, 27 (3), 441-512; Huber, S. 2008. State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts. *Cardozo Journal of Conflict Resolution*, 10 (2), 509-578; Gronlund, A. 2010. The Future of Manifest Disregard as a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in Hall Street Associates, LLC v Mattel, Inc. *Iowa Law Review*, 96 (4), 1351-1376; Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736; Cole, S. 2016. Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count. *Alabama Law Review*, 68 (1), 179-224; Marrow, P. 2016. *A Practical Approach for Expanding the Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*. AAA Handbook on Commercial Arbitration, 3rd Ed. https://ssrn.com/abstract=2754455, accessed 21/09/17; Stalker, T., Rosenberg, D. and Nolan, R. 2016. Vacating Arbitration Awards due to Evident Partiality under the Federal Arbitration Act. *Defense Counsel Journal*, 83(2), 207-211.

is being driven by the unsettled nature of the academic literature[75] practitioner commentary[76] and recent developments and changes in terms of UAE arbitration legislation following the promulgation in May 2018 of UAE Law No. 6 of 2018 on Arbitration and the repealing of prior statutory provisions previously articulated under Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of Federal Law (11) of 1992, the Civil Procedure Code (CPC).

[75] Angell, N. 1986. Regulation of business under the developing legal system of the United Arab Emirates. *Arab Law Quarterly*, 1 (2), 119-140; Ballantyne, W. 1986. Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study. *Arab Law Quarterly*, 1 (2), 205-215; Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32; Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial Law and Technology*, 3 (3), 170-177; Luttrell, S. 2008c. Commentary on the 2008 Arbitration Law of the Dubai International Finance Centre. *International Journal of Private Law*, 2(1), 31-45; Mohtashami, R. and Tannous, S. 2009. Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East. *Arbitration International*, 25(2),173-186; Lagarde, M. 2015. Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration. *ASA Bulletin*, 33(4),780-807; Dayton, B. and Takahashi, S. 2018. Arbitration Developments in the United Arab Emirates. *Asian Dispute Review*, 2018(1), 30-37.

[76] AlMulla, H., and Mackenzie, A. 2018. *The UAE introduces Long-awaited Stand-alone Arbitration Law*, https://www.bakermckenzie.com/en/people/m/mackenzie-andrew, accessed 26/06/18; Al Tamimi, E., Arab, H., and Snider, T. 2018. *UAE issues Federal Arbitration Law no. 6/2018*, http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfeb-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D, accessed 26/05/18; BouMalhab, N., Reeves, J. and Sahab, D. 2018. *The UAE's New Arbitration Law*, https://www.clydeco.com/insight/article/the-uaes-new-arbitration-law, accessed 26/05/18; Smith, B. and Mazzawi, M. 2018. *UAE approves arbitration law after 11 years*, https://www.out-law.com/en/articles/2018/march/uae-law-on-arbitration-in-commercial-disputes-is-approved-after-11-years-of-anticipation-/, accessed 26/05/18; Turrini, M., Robottom, L., Bailey, J., Cuffe, C., Roshan, A. and Raza, H. 2018. *The New UAE Arbitration Law: an incremental shift towards international norms*. https://www.whitecase.com/publications/alert/new-uae-arbitration-law-incremental-shift-towards-international-norms, accessed 26/05/18

A reading of various works of scholarship – for example those of Randall[77], Hayford [78], Gelander[79], Younger[80], Mills *et al*.[81], Huber[82], Arfazadeh [83], Feldman[84] and Marrow[85] – appears to suggest that there are four factors that, when taken into consideration, raise tensions within the literature that has sought to explore the grounds upon which arbitration awards may be challenged and vacated. These grounds are (i) contravention of core elements or the essence of a contract, (ii) serious manifest disregard of the law, (iii) illegality or serious irregularity in the arbitral proceedings, and (iv) when the arbitral proceedings or award are in conflict with Public policy (and/or public order).

To elaborate further, as relates to *purpose*, here, in the context of this study, the interest is in the purpose of the *Public policy (and/or public order)* exception as against the fundamental goals of arbitration, which emphasises *finality, conclusive and* its *binding nature*. Conversely, as relates to *scope*, this thesis is interested in understanding the scope of the *Public Policy and 'Order Public' (public order)* exception as applied by the parallel courts which operate in the UAE as against the rule-of-law implications for the different perspectives maintained by parallel courts and arbitrators – specifically as relates to the need to preclude endless litigation which threatens certainty in the law. As relates to *improvements*, this thesis is particularly interested in exploring how the number of arbitration cases that are challenged and vacated on the ground of *Public Policy and 'Order Public' (public order)* can be

[77] Randall, B. 1992. The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards. *Brigham Young University Law Review*,1992 (3), 759-784.
[78] Hayford, S. 1995. Law in Disarray: Judicial Standards for Vacatur of Commerical Arbitration Awards. *Georgia Law Review*, 30 (3), 731-842.
[79] Gelander, J. 1996. Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations. *Marquette Law Review*, 80 (2), 625-644.
[80] Younger, S. 1999. Agreements to Expand the Scope of Judicial Review of Arbitration Awards. *Albany Law Review*, 63 (1), 241-262.
[81] Mills, L., Bader, J., Brewer., and Williams, P. 2005. Vacating Arbitration Awards. *Dispute Resolution Magazine (Archives) - American Bar Association*, 11 (4), 23-27; Mills, L., Bader, J., Brewer., and Williams, P. 2006. Vacating Arbitration Awards. *General Practice, Solo and Small Firm Division of the American Bar Association Magazine*, 23, 28-29.
[82] Huber, S. 2008. State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts. *Cardozo Journal of Conflict Resolution*, 10 (2), 509-578.
[83] Arfazadeh, H. 2002. In the shadow of the unruly horse: international arbitration and the public policy exception. *American Review of International Arbitration*, 13, 43-197.
[84] Feldman, S. 2015a. Vacatur of Awards Under the Tennessee Uniform Arbitration Act: Substance, Procedure, and Strategies for Practitioners. *University of Memphis Law Review*, 46 (2), 271-382.
[85] Marrow, P. 2016. *A Practical Approach for Expanding the Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*. AAA Handbook on Commercial Arbitration, 3rd Ed. https://ssrn.com/abstract=2754455, accessed 21/09/17

reduced. One notes a particular challenge of the UAE's perspective on the rule of law which emphasises that litigants have the right to resort to federally constituted public courts regarding their disputes. Despite that being the case, the new UAE Law No. 6 of 2018 on Arbitration now makes a number of distinct provisions than were the case under the now repealed Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of Federal Law (11) of 1992, the Civil Procedure Code (CPC).

Taken together, these three factors lead to major tensions, which has been recognised by scholars. For example, in terms of the fundamental goals of arbitration which emphasises *finality, conclusiveness* and its *binding* nature, Hoellering (1995[86], p. 25) points out that

> "*…the effectiveness of [international commercial] arbitration depends on the predictable enforcement of arbitral agreements and awards*".

However, as observed by Ojiako[87], this position appears slightly more contentious in the UAE. First, in the UAE, prior to 3 May 2018, there were no explicit stand-alone statutory provisions for arbitration except as stated in Articles 203 to 218 of Federal Law (11) of 1992, the Civil Procedure Code (CPC). Under its provisions, the enforcement of any domestic arbitral award in the UAE had to be confirmed and ratified by a UAE court as part of a new set of legal proceedings. The recently promulgated arbitration law – the Federal Law No. 6 of 2018 on Arbitration which was signed into law on 3 May 2018[88] – appears to retain similar provisions. Thus, in Article 19 (2), parties to an arbitration hearing are allowed to challenge an arbitrator's decision on jurisdiction before the UAE federal courts; in effect, the 'Courts of the UAE'[89]. Similarly, Article 52 does stipulate that arbitration awards must be confirmed

[86] Hoellering, M. 1995. International Arbitration Under US Law and AAA Rules. *Dispute Resolution Journal*, 50, 25-25.
[87] Ojiako, U. 2017. *Using Online Dispute Resolution Platforms to Resolve Small and Low-Valued Construction Project Claims Disputes: An Examination of the Rule of Law and Justice Implications*. Unpublished LLB Thesis, University of London.
[88] However as the UAE promulgated a new standalone arbitration law; Federal Law No. 6 of 2018 on Arbitration as recently as 3 May 2018 which appeared in the official gazette in June 2018 taking effect in July 2018.
[89] In this case, the Federal Courts of Appeal or other local court dependent on contractual agreement between disputants.

and ratified by the courts. This in effect means that every domestic arbitral award in the country is *still* subject to validation by the courts according to the provisions of UAE law. This position had been emphasised (under the old provisions contained in the now repealed Articles 203 to 218 of Federal Law (11) of 1992, the Civil Procedure Code) by the *Abu Dhabi Court of Cassation Judgment 118 of 2014* where it had stated unequivocally that

> "*…litigants have the right to resort to the regular courts regarding the disputes relating to the performance of the temporal and precautionary procedures or the summary matters*".

1.5 The problem statement

This study focus is on the notion of *Public Policy and 'Order Public' (public order)* exception in the UAE. The reason for this focus is particularly driven by the potential for tensions emanating from a view within the UAE jurisprudence that suggests (i) an inalienable right of the judiciary to interfere with the mechanism of arbitration and (ii) the operation of parallel courts which concurrently operate under different legal traditions in the country[90]. The author further posits that the standards of review which empower disputants to challenge arbitration proceedings and courts to vacate arbitration awards are a source of tension in arbitration jurisprudence in three ways. The first is that the principle of *vacatur* represents a major threat to the notion of arbitration finality. The second source of tension is that while arbitration emphasises *finality*, the requirement to preclude endless litigation which threatens the rule of law needs to be counterbalanced by uniformity in judicial decisions touching upon *Public Policy and 'Order Public' (public order)* across the various parallel courts operating in the UAE. The third source

[90] Carballo, A., 2007. The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?. *Arab Law Quarterly*, 21(1), 91-104; Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial Law and Technology*, 3 (3), 170-177; Luttrell, S. 2008c. Commentary on the 2008 Arbitration Law of the Dubai International Finance Centre. *International Journal of Private Law*, 2(1), 31-45; Mohtashami, R. and Tannous, S. 2009. Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East. *Arbitration International*, 25(2), 173-186.

of tension relates to a need to clarify the scope of *vacatur* as an exception; in effect for instance, as relates to the exception of *Public Policy and 'Order Public' (public order), to what extent do UAE Courts differ in their judgements on matters that touch upon public policy and will the possible existence of differences* impede the on the *finality*, *conclusive* and *binding* nature of arbitration.

1.6 The research questions

Research questions are important in that they support the effort of researchers to not only develop an understanding of the gap that exists in literature, but also facilitate an understanding of what knowledge gap actually needs to be filled[91]. More specifically, Locke and Golden-Biddle[92] claim that, to understand the gap in literature, scholars are required to

> "*…cite and draw connections between works and investigative streams not typically cited together…[this will]… suggests the existence of underdeveloped research areas"* (p. 1030).

Research questions are particularly important in that, according to Bryman[93], they serve as guides in terms of how research should be designed and developed. Research questions also serve to provide guidance on what research methods should be adopted to support specific types of studies. In effect, the research question is the primary determinant in research and will guide the research methods adopted. In the process, research questions serve as a basis of developing a link between the reviewed literature and the data that will be eventually collected[94]. More specifically, White[95] claims that

[91] Alvesson, M. and Sandberg, J. 2011. Generating research questions through problematization. *Academy of Management Review*, 36(2), 247-271.
[92] Locke, K., and Golden-Biddle, K. 1997. Constructing opportunities for contribution: Structuring intertextual coherence and "problematizing" in organizational studies. *Academy of Management Journal*, 40, 1023–1062.
[93] Bryman, A. 2007. The Research Question in Social Research: What is its Role?. *International Journal of Social Research Methodology*, 10 (1), 5-20.
[94] Bryman, A. 2007. The Research Question in Social Research: What is its Role?. *International Journal of Social Research Methodology*, 10 (1), 5-20.
[95] White, P. 2013. Who's afraid of research questions? The neglect of research questions in the methods literature and a call for question-led methods teaching. *International Journal of Research & Method in Education*, 36(3), 213-227.

"…researchers make connections with existing theories and previous empirical findings and helps avoid unnecessary repetition of, or overlap with, previous work" (p. 213).

Noting the current articulation of the research problem in circumstances where according to Stuart *et al*.[96] the "*…the subject matter is complex*" (p. 423), the researcher sought to 'explore' in the words of Handfield and Melnyk[97], in the context of the UAE, "*What are the key issues?*" (p. 324), by presenting the study's three research questions as:

(i) *RQ1*: What is the purpose of the *Public policy (and/or public order)* exception?

(ii) *RQ2*: What is the scope of this exception as applied by the 'UAE Courts'? and

(iii) *RQ3*: How does the existence of different parallel courts within the 'UAE Courts system impact on how the *Public policy (and/or public order)* exception is construed and how is its impact on the *finality*, *conclusive* and *binding* nature of arbitration?

1.7 The need for the study

The position of the author is that a study of this nature is undertaken for a number of reasons, and is particularly timely noting the recent changes in UAE arbitration law. Firstly, though, the following are attested:

(i) the concurrent operation of different judicial jurisdictions and traditions within the UAE,

(ii) the existence of historical literature on the *Public policy (and/or public order)* exception[98],

[96] Stuart, I., McCutcheon, D., Handfield, R., McLachlin, R. and Samson, D. 2002. Effective case research in operations management: a process perspective. *Journal of Operations Management*, 20(5), 419-433.
[97] Handfield, R. and Melnyk, S. 1998. The scientific theory-building process: a primer using the case of TQM. *Journal of Operations Management*, 16 (4), 321-339.
[98] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219; Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102; Husserl, G. 1938. Public policy and public order.

(iii) the existence of considerable literature on the *Public policy (and/or public order)* exception in domestic arbitration in a number of different countries such as India[99], the United Kingdom[100], Saudi Arabia[101] and in fact a number of African countries[102],

(iv) literature focused on the *Public policy (and/or public order)* exception in the UAE appears quite sparse and nascent, yet the *Public Policy and 'Order Public' (public order)* exception has been a matter of considerable judicial interest in a number of arbitration cases heard in the UAE.

As reported by scholars such as Ballantyne[103], Angell and Feulner[104] and Mohtashami[105], for a number of different historical reasons, much earlier cases involving appeals to the UAE courts on matters relating to arbitration had taken a very restrictive view of arbitration, finding that the courts had exclusive jurisdiction over the implementation of any contract within the UAE. In such circumstances, contractually, disputes were not subject to arbitration. However, more recent judicial rulings in the UAE suggest that a clearer view of the *Public policy (and/or public order)* exception is materialising. Examples of such cases includes *(1) Fiske (2) Firmin v Firuzeh*[106] heard by the Judicial Authority of the

Virginia Law Review, 25 (1), 37-67; Tirona, S. 1941. What is Public Policy. *Philippine Law Journal*, 21, 158 – 170; Paulsen, M. and Sovern, M. 1956. Public Policy" in the Conflict of Laws. *Columbia Law Review*, 56(7), 969-1016; Stigler, G. 1972. The law and economics of public policy: A plea to the scholars. *Journal of Legal Studies*, 1(1), 1-120.

[99] Sharma, S. 2009. Public Policy under the Indian Arbitration Act-In Defence of the Indian Supreme Court's Judgment in ONGC v Saw Pipes. *Journal of International Arbitration*, 26 (1), 133-148; Rendeiro, A. 2010. Indian Arbitration and Public Policy. *Texas Law Review*, 89 (3), 699-728..

[100] Tweeddale, A. 2000. Enforcing Arbitration Awards Contrary to Public Policy in England. *International Construction Law Review*, 17 (1), 159-174.

[101] Al-Samaan, Y. 1994. The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia. *Arab Law Quarterly*, 9 (3), 217-237; Roy, K. 1994. New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards, *Fordham International Law Journal*, 18 (3), 920-958; Al-Ammari, S. and Timothy Martin, A. 2014. Arbitration in the Kingdom of Saudi Arabia. *Arbitration International*, 30(2), 387-408.

[102] Mante, J. 2016. Arbitrability and public policy: an African perspective. *Arbitration International*, 33(2), 275-294; Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.

[103] Ballantyne, W. 1986. Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study. *Arab Law Quarterly*, 1 (2), 205-215.

[104] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.

[105] Mohtashami, R. 2014. Banishing the Ghost of Lord Asquith's Award: A Resurgence of Arbitration in the Middle East. *BCDR International Arbitration Review*, 1(1), 121-124.

[106] (1) Fiske (2) Firmin v Firuzeh [2014] [Dubai International Financial Centre, Court of First Instance, 006/2017] ARB 001

Dubai International Financial Centre: Court of First Instance which found that matters of conflict between Emirate of Dubai laws and DIFC laws on one hand and UAE Federal law on the other hand were matters of *Public policy (and/or public order)*. Other cases include *Dubai Court of Cassation Judgment 43 of 2009* which found that matters concerning registering of property, because they could subside proprietary rights, were matters of *Public policy (and/or public order)* and, thus, not subject to arbitration. *Dubai Court of Cassation Judgment 43 of 2009* was affirmed in *Dubai Court of Cassation Judgment 180 of 2011*, where the courts re-stated that sale and purchasing of off-plan property units that did not comply with mandatory registration rules could not be subjected to arbitration, again on the grounds of *Public policy (and/or public order)*. In the UAE, land registration lies outside the competency of arbitration as it is regarded as a matter of *Public Policy and 'Order Public' (public order)*. Other cases that have involved *Public Policy and 'Order Public' (public order)* considerations relating to arbitration in the UAE include the following cases: *Dubai Court of Cassation Judgment 14 of 2012*[107], *Abu Dhabi Court of Cassation Judgment 663 of 2012*, *Dubai Court of Cassation Judgment 282 of 2012* and *Abu Dhabi Court of First Instance Judgment 2847 of 2013*.

This study is also timely because there has been a proliferation of arbitral institutions in the UAE, and the UAE is no doubt becoming a popular arbitral centre [108] . In light of the reality that the UAE does not recognise the doctrine of judicial immunity[109] as reiterated in Article 257 of the UAE Penal Code[110], it is important that arbitral institutions, arbitrators and those interested in arbitration jurisprudence are

[107] The courts stated that disputes relating to private property were not subject to arbitration on the grounds of public policy.
[108] Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial Law and Technology*, 3 (3), 170-177; Luttrell, S. 2008c. Commentary on the 2008 Arbitration Law of the Dubai International Finance Centre. *International Journal of Private Law*, 2(1), 31-45; Mohtashami, R. and Tannous, S. 2009. Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East. *Arbitration International*, 25(2), 173-186; Mohtashami, R. 2014. Banishing the Ghost of Lord Asquith's Award: A Resurgence of Arbitration in the Middle East. *BCDR International Arbitration Review*, 1(1), 121-124; Comair-Obeid, N. 2014. Salient Issues in Arbitration from an Arab Middle Eastern Perspective. *Arbitration Brief*, 4, 52-[i]; Lagarde, M. 2015. Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration. *ASA Bulletin*, 33(4), 780-807.
[109] Lagarde, M. 2015. Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration. *ASA Bulletin*, 33(4), 780-807.
[110] Judicial Department United Arab Emirates (2011), (Legislation Series in English), *Penal Code*, ISBN, 978-9948-492-70-2 25/01/18; UAE's Federal Law No. 3 of 1987 (Penal Code).

able to develop a comprehensive understanding of how the UAE balances individual autonomy to contract against *Public Policy and 'Order Public' (public order)* in order not to be caught by the provisions of Article 257 of the UAE Penal Code[111]. This study is also timely because not understanding the *Public policy (and/or public order)* exception in UAE law may lead to arbitration in reality being utilised as a pre-litigation forum. This has the possibility of degrading the legal doctrines of *Res Judicata*[112] and *estoppel*[113]. This is likely even when judicial opinion in the UAE, as in the case of *Dubai Court of Cassation Commercial Appeal 199 of 2014*[114], has stated that arbitral awards were subject to *Res Judicata*.

1.8 Structure of the thesis

To undertake the study, our approach is structured to be consistent with the scientific method of research[115]. This method of research is not necessarily new to the legal studies and over the years, its application has been much discussed in the academic literature[116]. There are numerous advantages associated with the adoption of the scientific method of research in legal studies. Harper[117] for example claims that the use of the scientific method in legal studies will at the very least, help reduce the gulf that

[111] Judicial Department United Arab Emirates (2011), (Legislation Series in English), *Penal Code*, ISBN, 978-9948-492-70-2 25/01/18; UAE's Federal Law No. 3 of 1987 (Penal Code).
[112] Vestal, A. 1965. Preclusion / Res Judicata Variables: Nature of the Controversy. *Washington University Law Review*, 1965 (2), 158-192.
[113] Andrews, N. 1991. Issue Estoppel and Changes of Precedent. *Cambridge Law Journal*, 50 (3), 419-421; Chitimira, H. 2017. Aspects of the application of issue Estoppel on directors' fiduciary duties in South Africa: possible lessons from the United Kingdom and related jurisdictions Royal Sechaba case 1. *Juridical Tribune Journal*, 7, 136-152.
[114] This ruling was made on 21 August 2016.
[115] Beveridge, W. 1950. *The Art of Scientific Investigation*, Heinemann, Melbourne, Australia; Bauer, H. 1992. *Scientific Literacy and the Myth of the Scientific Method*, University of Illinois Press, Champaign, Illinois.
[116] Cook, W. 1927. Scientific Method and the Law. *American Bar Association Journal*, 13 (6), 303-309; Harper, F. 1927. Scientific Method in the Application of Law. *Dakota Law Review*, 1 (4), 110-125; Cohen, M. 1928. Law and Scientific Method. *American Law School Review*, 6 (5), 231-239; Radin, M. 1931. Scientific Method and the Law, *California Law Review*, 19 (2), 164-172; Diamond, B. 1967. The Scientific Method and the Law. *Hastings Law Journal*, 19 (1), 179-200; Levit, N. 1989. Listening to Tribal Legends: An Essay on Law and the Scientific Method. *Fordham Law Review*, 58 (3), 263-307; Wells, C. 1994. Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method. *Southern Illinois University Law Journal*, 18 (2), 329-346; Ulen, T. 2002. A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law. *University of Illinois Law Review*, 2002 (4), 875-920; Smith, H. 2013. Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures that Would Improve Uniformity, Efficiency, and Fairness in the Federal Appellate System. *Cleveland State Law Review*, 61 (1), 259-[iv].
[117] Harper, F. 1927. Scientific Method in the Application of Law. *Dakota Law Review*, 1 (4), 110-125.

exists between the law and social sciences. Doing so is important because of the interdependency that exists between the law and other various disciplines.

Essentially, the scientific method of research focuses on developing key critical knowledge of phenomena via 'structured' investigations. It does so with the ultimate aim of reliably predicting future events[118]. To achieve this aim, it involves approximately four steps which includes (i) making an observation of a phenomenon (ii) undertaking a basic description of the phenomenon under observation (iii) articulating basic inferences of possible general principles associated with the phenomenon under observation (iv) presentation of questions about the occurrence of the phenomena (v) the advancement of hypotheses, assertions or propositions of likely outcome of the phenomena and (iv) conduct of specific test (via empirical data) to explore, prove or in fact disprove the hypotheses or propositions. The thesis is structured in a manner that supports the chosen scientific method of research. Thus, the thesis proceeds as follows. In the next chapter (Chapter 2), the literature on '*policy'*, '*public policy'* and the '*policy exception'* is reviewed. The main objective of a literature review according to Fink [119] is to produce a "*…systematic, explicit and reproducible method for identifying, evaluating and synthesizing the existing body of completed and recorded work produced by researchers, scholars and practitioners*" (p. 3). The researcher utilised mainly peer-reviewed journal academic papers published by well respected legal publishers such as Heinonline and OUP. Book commentaries and conference papers were largely excluded from the literature research.

Chapter 3 focuses on providing background information on the specific context of domestic commercial arbitration. In Chapter 4, the legal and court systems of the UAE are described in detail. At the same time, the existence of parallel court systems in the UAE and their implications for the *finality, conclusive and binding nature* of arbitration as a dispute resolution mechanism and the notion of *vacatur* based on *Public policy (and/or public order)* are examined. For the theory which is presented in Chapter

[118] Lawlor, R. 1963. What Computers Can Do: Analysis and Prediction of Judicial Decisions. *American Bar Association Journal*, 49 (4), 337-344.
[119] Fink, A. 2010. *Conducting research literature reviews: From the internet to paper*. 3rd ed. Thousand Oaks, CA: SAGE.

5, the author draws on both *Freedom of contract* and *social contract theory*[120]. These theories have also been applied to arbitration[121]. Chapter 6 presents the research methodology and analysis, and the thesis concludes in Chapter 7. The research map is shown in Table 1.

[120] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge; Locke, J. 1690. Second Treatise of Government. Indianapolis: Hackett, 1980; Locke, J. 1992. Second Treatise of Government. *Classics of Moral and Political Theory*, 768-69, Michael L. Morgan ed; Roussseau, J. 1762. *The Social Contract*. London: Penguin Books; Rousseau, J. 1920. *The Social Contract: & Discourses*. Pub. JM Dent & Sons; Kahn, C. 1981. The Origins of social contract theory. *Hermes*, 44, 92-108; Riley, P., Goldie, M. and Wokler, R. 2006. *Social contract theory and its critics. The Cambridge history of eighteenth-century political thought*. Pub. Cambridge University Press, 347-376.

[121] Carlston, K. 1952. Theory of the arbitration process. *Law and Contemporary Problems*, 17(4), 631-651; Kochan, T. and Jick, T. 1978. The public sector mediation process: A theory and empirical examination. *Journal of Conflict Resolution*, 22(2), 209-240; Thomson, D. 1994. Arbitration theory and practice: A survey of AAA construction arbitrators. *Hofstra Law Review*, 23, 137-172; Speidel, R. 1996. Contract Theory and Securities Arbitration: Whither Consent. *Brooklyn Law Review*, 62 (4), 1335-1364; Macneil, I. 1999. Relational contract theory: challenges and queries. *Northwestern University Law Review*, 94 (3), 877-908; Lipsky, D. and Seeber, R. 2003. The social contract and dispute resolution: The transformation of the social contract in the United States workplace and the emergence of new strategies of dispute resolution. *International Employment Relations Review*, 9(2), 87-109; Lipsky, D. 2007. Conflict resolution and the transformation of the social contract, *Proceedings of the Fifty-Ninth Annual Meeting of the Labor and Employment Relations Association*. Presidential Address, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1025&context=conference, accessed 22/09/17.

Table 1: The research summary

Problem Statement	Research aim	Research objectives	Research questions	Underlying theories
The four grounds of arbitration *vacatur* which empower disputants to challenge arbitration proceedings and courts to vacate arbitration awards represent source of tension in arbitration jurisprudence. As relates to *'public policy'* and *'public order'*), its broad construction by the UAE Courts has the potential to impede the on the *finality, conclusive and binding nature* of arbitration. This is especially more so in circumstances where parallel courts operate.	The study explores how *Public policy (and/or public order)* is utilised as a ground for challenging and vacating domestic arbitral awards in the UAE.	To establish the purpose of the public policy exception. To review the extant literature on the notion of *Public policy (and/or public order)* as a ground for challenging and vacating arbitration awards - What do we mean by *Public policy* (is there, for example, a difference in the literature between *'public policy'* and *'public order'*)?	RQ1: What is the purpose of the *Public policy (and/or public order)* exception in the UAE?	Freedom of contract theory and Social contract theory
		To articulate the scope of the exception as applied by the UAE federal courts ('Courts of the UAE') and the 'free zone' courts (who together with the UAE federal courts constitute the 'UAE Courts'). Here, the researcher is particularly interested in the extent of such exceptions (in effect, how broad such exceptions are construed) taking into consideration the existence of parallel courts in the UAE.	RQ2: What is the scope of this exception as applied by the 'UAE Courts'?	
		To draw from a content analysis of UAE case law of the different parallel courts that constitute the 'UAE Courts', an understanding of impact of the broad construction of *Public policy (and/or public order)* on the *finality, conclusive and binding nature* of arbitration as a dispute resolution mechanism. By doing so, the regular citation of the public policy exception as an avenue of challenging and vacating arbitration awards – ultimately transforming arbitration into a pre-litigation procedure may be minimised, thereby enhancing the *finality, conclusive* and *binding* nature of arbitration.	RQ3: How does the existence of different parallel courts within the 'UAE Courts system impact on how the *Public policy (and/or public order)* exception is construed and how is its impact on the *finality, conclusive and binding* nature of arbitration?	

CHAPTER 2: POLICY, PUBLIC POLICY AND '*ORDER PUBLIC*'

2.1 What is policy?

In the introduction chapter, the author advanced literature suggesting that there were four grounds available to justify judicial intervention in arbitration awards via *vacatur*. These grounds are (i) contravention of core elements or the essence of a contract, (ii) serious manifest disregard of the law, (iii) illegality or serious irregularity in the arbitral proceedings, and (iv) when the arbitral proceedings or award are in conflict with *Public policy (and/or public order)*. In the chapter that follows, the *Public policy (and/or public order)* concept is explored in more detail and, in the process, the first research question *What is the purpose of the Public policy (and/or public order) exception in the UAE?* will be addressed.

Over the years, '*Policy'* as a topic has attracted the attention of numerous scholars in the field of administrative sciences. The various studies have focused on, for example, the meaning of 'policy'[122], its applicable frameworks[123], its various classifications[124], its development and enactment[125] how it influences and shapes governance[126], and its analysis[127]. Policy has also attracted the attention of legal

[122] Thompson, D. 1985. Philosophy and policy. *Philosophy & Public Affairs*, 14 (2), 205-218; Edelman, M. 1988. *Constructing the Political Spectacle*. Pub. University of Chicago Press; Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; .Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. Discourse: *Studies in the Cultural Politics of Education*, 36(3), 306-313; Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57; Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. *Annals of the American Academy of Political and Social Science*, 600(1), 30-51; Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313..

[123] Lowi, T. 1985. *The State in Politics: The Relation between Policy and Administration*. In Regulatory Politics and the Social Sciences, ed. Roger Noll. Berkeley: University of California Press; Smith, K. 2002. Typologies, Taxonomies, and the Benefits of Policy Classification. *Policy Studies Journal*, 30 (3), 379–395; Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.

[124] Smith, K. 2002. Typologies, Taxonomies, and the Benefits of Policy Classification. *Policy Studies Journal*, 30 (3), 379–395.

[125] Page, B. and Shapiro, R. 1983. Effects of public opinion on policy. *American Political Science Review*, 77(1), 175-190; Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332; Siddiki, S., Carboni, J., Koski, C. and Sadiq, A. 2015. How policy rules shape the structure and performance of collaborative governance arrangements. *Public Administration Review*, 75(4), 536-547.

[126] Mosse, D. 2004. Is good policy unimplementable? Reflections on the ethnography of aid policy and practice. *Development and Change*, 35(4), 639-671.

[127] Gale, T. 1999. Policy trajectories: Treading the discursive path of policy analysis. *Discourse: Studies in the Cultural Politics of Education*, 20(3), 393-407.

scholars in areas of jurisprudence such as judicial consistency[128], agenda setting[129] and jurisdiction disputes[130].

The literature[131] suggests that a cohesive and generally acceptable definition of policy is extremely difficult and has been used to describe a wide variety of shifting administrative sciences and legal concepts and ideas. Thus, in some instances, policy has been construed as a field, a government idea, or a specific proposal for government action. It has also been used to describe a series of desirable outcomes of interest to governments and, on other occasions, it has been used to describe how the nature of the relationship between the government on behalf of the state and its local communities is articulated.

From an administrative sciences perspective, policy can be construed to represent a set of attitudes, propositions, moral standards and values in the form of statements of intent that serve to guide decisions made by government and organisations[132]. Wedel *et al*.[133] claims that the objective of policy is to articulate ideals on normative citizenship and societal behaviour. At its core is its ability to convey information on the standing and outlook of society concerning matters of interest. However, noting that

[128] Dias, R. 1962. Remoteness of Liability and Legal Policy. *Cambridge Law Journal*, 20(2), 178-199; Williams, D. 1971. Policy and Discretion in Administrative Law. *Cambridge Law Journal*, 29(1), 6-8; Bailey, S. and Bowman, M. 1986. The Policy/Operational Dichotomy—A Cuckoo In The Nest. *Cambridge Law Journal*, 45(3), 430-456; Clayton, R. 2003. Legitimate Expectations, Policy, and the Principle of Consistency. *Cambridge Law Journal*, 62(1), 93-105; Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[129] Mondak, J. 1994. Policy legitimacy and the Supreme Court: The sources and contexts of legitimation. *Political Research Quarterly*, 47(3), 675-692; Bailey, M. and Maltzman, F. 2008. Does legal doctrine matter? Unpacking law and policy preferences on the US Supreme Court. *American Political Science Review*, 102(3), 369-384; Black, R. and Owens, R. 2009. Agenda setting in the Supreme Court: The collision of policy and jurisprudence. *Journal of Politics*, 71(3), 1062-1075.
[130] Fawcett, J. 1989. Trial in England or abroad: The underlying policy considerations. *Oxford Journal of Legal Studies*, 9 (2), 205–229.
[131] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. *Annals of the American Academy of Political and Social Science*, 600(1), 30-51; Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21; Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[132] Thompson, D. 1985. Philosophy and policy. *Philosophy & Public Affairs*, 14 (2), 205-218; Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57; Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. *Annals of the American Academy of Political and Social Science*, 600(1), 30-51; Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313.
[133] Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. *Annals of the American Academy of Political and Social Science*, 600(1), 30-51.

the study of policy is usually undertaken from a perspective that it represents a political outcome (see Moynihan and Soss[134]), in reality policy is more than a simple object of administration. Moynihan and Soss[135] sees policy in its own right as an arm of political action capable of altering critical elements of administration. These critical elements includes routines[136] and organisational structures[137]. For policy to be effective, it must be capable of legitimising and mobilising political[138] and societal support. Arguably, Edelman [139] offers a more dynamic administrative sciences definition of policy as

> "*…a set of shifting, diverse, and contradictory responses to a spectrum of political interests*" (p. 16).

Again, from an administrative sciences perspective, policy can also represent

> "…*visions for society*" (Edmondson[140], p. 11).

Alternate to administrative sciences perspectives of policy are legal perspectives. Here, similar to the notion of 'legal principles' which Waddams[141] claims that there is considerable "…*uncertainty*" (p. 7) as relates to its true meaning, MacCormick[142] notes that the conceptualisation of policy is a particularly

[134] Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332.
[135] Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332.
[136] Nigam, A., Huising, R. and Golden, B. 2016. Explaining the selection of routines for change during organizational search. *Administrative Science Quarterly*, 61(4), 551-583.
[137] Edmondson, A., Bohmer, R. and Pisano, G. 2001. Disrupted routines: Team learning and new technology implementation in hospitals. *Administrative Science Quarterly*, 46(4), 685-716.
[138] Mosse, D. 2004. Is good policy unimplementable? Reflections on the ethnography of aid policy and practice. *Development and Change*, 35(4), 639-671.
[139] Edelman, M. 1988. *Constructing the Political Spectacle*. Pub. University of Chicago Press.
[140] Edmondson, J. 2005. Policymaking in education: Understanding influences on the Reading Excellence Act. *Education Policy Analysis Archives*, 13 (11), http://epaa.asu.edu/epaa/v13n11/, accessed 26/03/19.
[141] Waddams, S. 2008. Private Right and Public Interest. In M. Bryan (ed.), Private Law.
[142] MacCormick, N. 1978. *Legal Reasoning and Legal Theory*. Pub. Oxford.

"…*hideously inexact word in legal discourse*" (p. 263).

Thus, on one hand, policy can be construed to represent

"…*a reason that does not rely on the law and is either goal-based or ethical/deontological in nature*" (Plunkett[143], p. 370).

On the other hand, it can also be considered according to Bell[144](p. 230):

"…*as substantive justifications to which judges appeal when standards and rules of the legal system do not provide a clear resolution of a dispute*".

Plunkett[145] primarily posits that *'policy-based'* legal perspectives basically represents

"…*an alternative to an argument based on the strict law*" (p. 369).

In sum, policy goes beyond the law[146]. Rather than simply addressing matters of specific interest to disputants, it seeks to address not only the wider economic but also political and social welfare concerns of communities. For this reason, according to Jones[147] it is important that in policy discourse, a determination is made on precisely (i) whom and what the policy is for, and (ii) who decides what such policy. Policy can also imply the balancing of

[143] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[144] Bell, J. 1983. *Policy Arguments in Judicial Decisions*. Oxford: Clarendon Press.
[145] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[146] Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332.
[147] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.

"*competing public interests by criteria which a court is not equipped to evaluate in terms of reasonableness*" (Aronson and Whitmore[148], p. 69).

Policy therefore has the ability to cause major disruption to administration leading to the need for routines to be altered and resources to be redistributed[149]. This can lead to a need for "*negotiation, contestation or struggle between different groups who may lie outside the formal machinery of official policy-making*" (Ozga[150], p. 113). Managing the negotiation required within the myriad of multi-layered and complex relationships that characterises *Public Policy and 'Order Public' (public order)* in particular requires the constant shaping of the capabilities of government in a manner that allows for assumptions and interests to be re-evaluated and repositioned as need be According to Siddiki *et al.*[151], it also requires stakeholder engagement between government and non-state actors.

2.2 Policy and public opinion

Policy is context-based and, according to Shore and Wright[152](p. 7), is set to

"…*encapsulate the entire history and culture of the society that generated them*".

Its primary function is social, although its standard use refers to specific courses of social or political action that are adopted and pursued by governments and organisations (Wedel *et al.*[153], p. 35). Policy

[148] Aronson, M. and Whitmore, H. 1982. *Public torts and contracts*. Pub. Sydney: Law Book Co.
[149] Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332.
[150] Ozga, J. 2000. *Policy Research in Educational Settings: Contested Terrain*. Buckingham: Open University Press.
[151] Siddiki, S., Carboni, J., Koski, C. and Sadiq, A. 2015. How policy rules shape the structure and performance of collaborative governance arrangements. *Public Administration Review*, 75(4), 536-547.
[152] Shore, C. and Wright, S. 1997. *Anthropology of public policy: Critical perspectives on governance and power*. London: Routledge.
[153] Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. Annals of the American *Academy of Political and Social Science*, 600(1), 30-51.

has a wide role in modern society in that it shapes and regulates practically every aspect of contemporary life including private rights and obligations. It is safe to suggest that, irrespective of whether policy is explored from an administrative sciences perspective or a legal perspective, the purpose of policy is to serve as a means of ensuring that people or individuals likely to be impacted by the subject matter of the policy in question are no worse off because of uncertainties associated with the relative merits of the factors under considerations[154].

Although this study's interest is on the large and developing body of literature which suggests that policy is impacted by public opinion[155], the researcher also acknowledges the existence of a number of studies which suggest that public opinion does not impact upon policy making. Such studies by Converse[156] suggest that societal policy-related interests do not generally contribute to policy formation because of their incoherent nature.

Public opinion refers to

> "…*the aggregated responses of individuals as reflected in opinion polls*" (Manza and Cook[157], p. 631).

[154] Thompson, D. 1985. Philosophy and policy. *Philosophy & Public Affairs*, 14 (2), 205-218.
[155] Page, B. and Shapiro, R. 1983. Effects of public opinion on policy. *American Political Science Review*, 77(1), 175-190; Page, B, 1994. Democratic responsiveness? Untangling the links between public opinion and policy. *PS: Political Science & Politics*, 27(1), 25-29; Yee, A. 1996. The causal effects of ideas on policies. *International Organization*, 50(1), 69-108; Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667; Soroka, S. and Wlezien, C. 2005. Opinion–policy dynamics: public preferences and public expenditure in the United Kingdom. *British Journal of Political Science*, 35(4), 665-689; Wlezien, C. and Soroka, S. 2007. *The relationship between public opinion and policy*. In The Oxford Handbook of Political Behaviour; Warwick, P. 2015. Public opinion and government policy in Britain: a case of congruence, amplification or dampening?. *European Journal of Political Research*, 54(1), 61-80; Breznau, N. 2017. Positive returns and equilibrium: Simultaneous feedback between public opinion and social policy. *Policy Studies Journal*, 45(4), 583-612.
[156] Converse, P. 1964. *The nature of belief systems in mass publics*. In D. Apter (Ed.), Ideology and discontent (pp. 206-264). New York: Free Press; Converse, P. 1990. *Popular representation and the distribution of information flow*. In J. A. Ferejohn and J. H. Kuklinski (Eds.), Information and democratic processes (pp. 369-389). Urbana: University of Illinois Press.
[157] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.

According to Entman and Herbst[158], public opinion can occur in three forms: (i) views shared by those who participate actively within the political sphere, (ii) views perceived to represent fundamental values of the society, and (iii) views perceived and assumed to be shared by the majority of the population. Fundamental to this idea from a governance perspective which emphasises that societal preferences are embodied in policy (see Manza and Cook[159]), is that on one side, the three branches of government (that is the executive, the legislature and the judiciary) in their respective public policy-making capacity will be responsive to the preferences of the society. Manza and Cook[160], however, points out that the responsiveness of the three branches of government to public opinion is enacted through legislation (for the legislature), administrative action (for the executive) and judicial decisions and rulings (for the judiciary). What has been observed is that among the three branches of government, responsiveness varies significantly with the judiciary being the least responsive among the three arms of government. Perhaps this is unexpected. Both the legislature and the executive draw their legitimacy from public approval. However, while responsiveness to public approval is desirable, the judiciary is not expected to decide on matters based *solely* on public opinion[161]. For example, in the recently decided case of *Owens v Owens* [162], while acknowledging "…*the relevant social norm which has changed most obviously during the last 40 years*" [at 34], the UK Supreme Court refused to grant a divorce petition based on Section 1(2)(b) of the Matrimonial Causes Act 1973[163] on the basis that [at 46]:

[158] Entman, R. and Herbst, S. 2001. *Reframing public opinion as we have known it*. In W. L. Bennett and R. M. Entman (Eds.), Mediated politics (pp. 203-225). New York: Cambridge University Press.
[159] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.
[160] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.
[161] As will be discussed later on, there is an expectation that the judiciary decides cases in line with existing perceived societal values.
[162] Owens v Owens [2018] UKSC 41
[163] The Supreme Court found that the only avenue available to grant a 'no defence' divorce petition was under the provisions of Section 1(2)(e) of the Matrimonial Causes Act 1973 that required divorcing couples to have lived apart for a continuous period of five years.

"*It is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us".*

Such ruling should not come as a surprise. As reiterated by Breyer[164], this is because judges are by stature and constitutional provisions (if in existence) required to decide legal questions solely on their merits. This has been reiterated in the case law such as *McGonnell v United Kingdom*[165], *Dimes v Proprietors of Grand Junction Canal*[166] and *Davidson v Scottish Ministers*[167], where it has been stated that judges are *personally* and *institutionally* independent[168]. Personal and institutional independence means that judges should be free

"*…to develop whatever theories of statutory construction and constitutional interpretation, wise or foolish, deferential or mischievous, that captures their fancy*" (Epstein[169], p. 851).

The public will not only notice but will also respond to the actions of those who make policy[170]. The literature suggests that when the scale of policy is dissimilar from the desired scale preferred by the public (or society); policy is adjusted to ensure that both are aligned[171]. Without the existence of such responses, policy is unlikely to be incentivised to respond in a manner which public opinion desires (and

[164] Breyer, S., 1986. Judicial review of questions of law and policy. *Administrative Law Review*, 38 (4), 363-398.
[165] McGonnell v The United Kingdom: ECHR 28488/95, (2000) 30 EHRR 289, [2000] ECHR 62.
[166] Dimes v Proprietors of Grand Junction Canal and others HL (1852) 3 HL Cas 759.
[167] Davidson v Scottish Ministers GWD 27-572, [2004] UKHL 34.
[168] Ferejohn, J., 1998. Independent judges, dependent judiciary: explaining judicial independence. *Southern California Law Review*, 72 (2 & 3), 353-384; Stevens, R. 1999. A loss of innocence?: judicial independence and the separation of powers. *Oxford Journal of Legal Studies*, 19(3), 365-402; Melton, J. and Ginsburg, T. 2014. Does de jure judicial independence really matter? A reevaluation of explanations for judicial independence. *Journal of Law and Courts*, 2(2), 187-217.
[169] Epstein, R., 1990. The Independence of Judges: The Uses and Limitations of Public Choice Theory. *Brigham Young University Law Review*, 1990 (3), 827-856.
[170] Soroka, S. and Wlezien, C. 2005. Opinion–policy dynamics: public preferences and public expenditure in the United Kingdom. *British Journal of Political Science*, 35(4), 665-689; Wlezien, C. and Soroka, S. 2007. *The relationship between public opinion and policy*. In The Oxford Handbook of Political Behaviour.
[171] Soroka, S. and Wlezien, C. 2005. Opinion–policy dynamics: public preferences and public expenditure in the United Kingdom. *British Journal of Political Science*, 35(4), 665-689.

vice-versa). Thus, how policy is impacted by public opinion (and vice-versa) is likely to differ across different policy areas[172].

According to Page and Shapiro[173], there are a number of factors which may curtail the ability of public opinion to influence policy. For example, well-organised pressure and interest groups may curtail any potential influence of public opinion on policy. The reason for this, according to Manza and Cook[174], is that the political sphere is generally prejudiced towards the interests of professional groups and businesses. Both Page and Shapiro[175] and Manza and Cook[176] also suggest that, in some cases, the relationship between public opinion and policy is actually reversed, with the public sector being able to manipulate public opinion. What further emerges from reviewing policy-related literature is that the relationship between public opinion and policy is dependent on historical, institutional and political factors[177]. These institutional factors may include context[178] and information asymmetry[179]. In terms of context, for example, the expectation is that policy decisions in areas of little or no major public interest (for example, foreign policy) are unlikely to be substantially influenced and/or impacted by public opinion. Conversely, policy decisions in areas of considerable public interest such as the criminal justice system and healthcare are more likely to be substantially influenced and/or impacted by public opinion[180]. In effect, the relationship between public opinion and policy is more likely to be influenced

[172] Soroka, S. and Wlezien, C. 2005. Opinion–policy dynamics: public preferences and public expenditure in the United Kingdom. *British Journal of Political Science*, 35(4), 665-689.
[173] Page, B. and Shapiro, R. 1983. Effects of public opinion on policy. *American Political Science Review*, 77(1), 175-190.
[174] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.
[175] Page, B. and Shapiro, R. 1983. Effects of public opinion on policy. *American Political Science Review*, 77(1), 175-190.
[176] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.
[177] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.
[178] Warwick, P. 2015. Public opinion and government policy in Britain: a case of congruence, amplification or dampening?. *European Journal of Political Research*, 54(1), 61-80; Breznau, N. 2017. Positive returns and equilibrium: Simultaneous feedback between public opinion and social policy. *Policy Studies Journal*, 45(4), 583-612.
[179] Soroka, S. and Wlezien, C. 2005. Opinion–policy dynamics: public preferences and public expenditure in the United Kingdom. *British Journal of Political Science*, 35(4), 665-689.
[180] Soroka, S. and Lim, E. 2003. Issue definition and the opinion-policy link: public preferences and health care spending in the US and UK. *British Journal of Politics & International Relations*, 5(4), 576-593; Claassen, R. and Highton, B. 2006. Does policy debate reduce information effects in public opinion? Analyzing the evolution of public opinion on health care. *Journal of Politics*, 68(2), 410-420; Lax, J. and Phillips, J. 2009. Gay rights in the states: Public opinion and policy responsiveness. *American Political Science Review*, 103(3), 367-386; Conklin, A., Morris, Z. and Nolte, E. 2015. What is

by the level of public interest with the government and the judiciary more likely to accentuate policy responses in matters of considerable and sustained public opinion than when such public opinion is temporal or of a lesser degree. On the other hand, in terms of information, for example, the expectation is that how the public responds to policy will be dependent on the degree of information relating to policy, which the public is able to access. Poor or limited availability of information is likely to distort societal policy-related preferences in a significant manner[181]. When information is readily available and clear, the public is empowered not only to clearly respond to policy, but also to resist the influence of private interest groups[182]. Similarly, Manza and Cook[183] claim that policy makers are only likely to be responsive to public opinion when they are in possession of information with which they can confidently ascertain the precise nature of public opinion. Being in possession of such information clearly facilitates reasoned decisions to be made by policy makers.

2.3 Types and forms of policy

A traditional perspective of policy sees it as primarily

> "…*what governments do*" (Bacchi[184], p. 48).

This apparent focus on policy by governments suggests that the central tenet of policy is the coercive power of the state; that is, the ability of the government acting on behalf of the state to force individuals

the evidence base for public involvement in health-care policy?: results of a systematic scoping review. *Health Expectations*, 18(2), 153-165.

[181] Alvarez, R. and Brehm, J. 2002. *Hard choices, easy answers: Values, information, and American public opinion*. Princeton, NJ: Princeton University Press.

[182] Lewis, J. 2001. *Constructing public opinion*. New York: Cambridge University Press.

[183] Manza, J. and Cook, F. 2002. A democratic polity? Three views of policy responsiveness to public opinion in the United States. *American Politics Research*, 30(6), 630-667.

[184] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.

to conduct themselves in a specific manner. Both Lowi[185] and Smith[186] point out that this power represents the core characteristics of governments. Thus, policy is determinative of power relationships. Policy can be developed and enacted both privately and publicly: in other words, policy can be private *or* public. Drawing from Benn and Gaus[187], it will appear that the differences between public and private types of policy may be determined from three different dimensions. First, both differ in terms of their interest. For example, the interest of *Public Policy and 'Order Public' (public order)* lies in accruing communal or society benefits. Second, because of the focus of *Public Policy and 'Order Public' (public order)* on the wider community or society, information is generally open and readily available. The third difference between the two types of policy relates to agency. In *Public Policy and 'Order Public' (public order),* its various agents (in this case, the government) are construed as acting on behalf of the community's or society's interest (the idea of the public interest). On the other hand, in private forms of policy, its agents will be acting primary in the sole interest of the private entity in question. The author also contends that these two types of policy are distinguished in terms of the way and manner in which they are not only developed and enacted, but by the target of their influence, their constraints and also their incentives.

Thus, for example, Osborne and Gaebler[188] state that public forms of policy focus among others on

> "…*ensuring equity, preventing discrimination or exploitation, ensuring continuity and stability of services, and ensuring social cohesion"* (pp. 24-25).

[185] Lowi, T. 1985. *The State in Politics: The Relation between Policy and Administration*. In Regulatory Politics and the Social Sciences, ed. Roger Noll. Berkeley: University of California Press.
[186] Smith, K. 2002. Typologies, Taxonomies, and the Benefits of Policy Classification. *Policy Studies Journal*, 30 (3), 379–395.
[187] Benn, S., and Gaus, G. 1983. *Public and private in social life*. New York: St. Martin's Press.
[188] Osborne, D. and Gaebler, T. 1992. *Reinventing government: How the entrepreneurial spirit is transforming the public section*. New York: Addison-Wesley.

According to Rosenau[189], *Public Policy and 'Order Public' (public order)* focuses on matters of public interest and stewardship (p. 11). That being the case, *Public Policy and 'Order Public' (public order)* is developed and enacted in the public space meaning that it is open to public scrutiny. Private policy, however, focuses primarily on factors such as "*access to finance, technological knowledge, managerial efficiency and entrepreneurship*" (Rosenau[190], p. 218). Taking all the above into consideration, Fimyar[191] points out that the traditional perspective of policy as being about governments is conceptually limiting. It also has been one of the drivers for advancing an extended view of policy that encompasses both a textual and a discursive perspective of policy (as discussed by Ball[192] and Bacchi [193]).

It is worth highlighting that while it has been possible to distinguish between public and private forms of policy, some scholars suggest that such distinctions are in reality not easily construed. In fact, scholars such as Greenberg *et al.* [194], Steinberger[195] and Smith[196] have explored the benefits and challenges of policy classifications noting that the challenge with such classifications stems from the reality that not only will different scholars classify similar policies in different ways, but also that policies may overlap and, over time, their categories may change as they respond to broader social, political and economic changes. Smith[197] notes that the ambiguity associated with the true meaning of policy also served as a major challenge to any effective classification or categorisation of policy. Thus, it is of no

[189] Rosenau, P. 2000. *The strengths and weaknesses of public-private policy partnerships,* MIT Press, Cambridge, MA. The Politics of Self-Governance.
[190] Rosenau, P. 2000. *The strengths and weaknesses of public-private policy partnerships*, MIT Press, Cambridge, MA. The Politics of Self-Governance.
[191] Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21.
[192] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313.
[193] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.
[194] Greenberg, G., Miller, J., Mohr, L. and Vladeck, B. 1977. Developing public policy theory: Perspectives from empirical research. *American Political Science Review*, 71(4), 1532-1543.
[195] Steinberger, P. 1980. Typologies of public policy: Meaning construction and their policy process. *Social Science Quarterly*, 61(1), 185-197.
[196] Smith, K. 2002. Typologies, Taxonomies, and the Benefits of Policy Classification. *Policy Studies Journal*, 30 (3), 379–395.
[197] Smith, K. 2002. Typologies, Taxonomies, and the Benefits of Policy Classification. *Policy Studies Journal*, 30 (3), 379–395.

surprise that Seeleib-Kaiser[198] suggested that the distinction between the 'public' policy and the 'private' policy remains highly contested, fluid, and susceptible to negotiation. One such area is in the articulation of the notion of the 'public interest' which has proved quite challenging to precisely define and assess due to its multiple and often contradictory meanings[199]. Hamilton[200], however, defined the public interest as matters which are legally of common and general concern to the society.

In addition to policy being distinguished in type between public and private, policy can also be distinguished in applicability[201] and form[202]. In terms of applicability, Lowi[203] elaborated on four main categories of policy applicability:

(i) distributive policy

(ii) constituent policy – which deals with information and reapportionment

(iii) regulative policy – which deals with unfair competition, and

(iv) redistributive policy – which deals with matters relating to social welfare and wealth redistribution.

[198] Seeleib-Kaiser, M. 2008. *Welfare state transformations in comparative perspective: shifting boundaries of 'public'and 'private'social policy?*. In Welfare state transformations (1-13). Palgrave Macmillan, London.
[199] Hamilton, W. 1930. Affectation with Public Interest. *Yale Law Journal*, 34 (8), 1089-1112; Mitnick, B. 1980. *The political economy of regulation*. New York: Columbia University Press; Hirschman, A., 1982. *Shifting involvements: Private interest and public action*. Princeton University Press.
[200] Hamilton, W. 1930. Affectation with Public Interest. *Yale Law Journal*, 34 (8), 1089-1112.
[201] Lowi, T. 1985. *The State in Politics: The Relation between Policy and Administration*. In Regulatory Politics and the Social Sciences, ed. Roger Noll. Berkeley: University of California Press; Smith, K. 2002. Typologies, Taxonomies, and the Benefits of Policy Classification. *Policy Studies Journal*, 30 (3), 379–395.
[202] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57; Jones, T. 2013. Understanding education policy: The 'four education orientations' framework. Springer Science & Business Media.
[203] Lowi, T. 1985. *The State in Politics: The Relation between Policy and Administration*. In Regulatory Politics and the Social Sciences, ed. Roger Noll. Berkeley: University of California Press.

On the other hand, the four forms of policy discussed by Ball[204], Bacchi[205] and Jones[206] are:

(i) 'policy as text'

(ii) 'policy as discourse'

(iii) policy as values, and

(iv) policy as process.

These are discussed further. It is worth mentioning that Greenberg *et al*.[207] are of the view that an interesting aspect of Lowi's policy categories is that the relationship between individual policy variables may be quite pronounced in one policy type, but less pronounced or even absent in another policy type.

2.3.1 Policy as text

The first form of policy is referred to as '*policy as text*'[208]. In its basic form, *policy as text* refers to the means and process of its encoding, interpretation and translation. However, Gale[209] suggests that *policy as text* could be defined from an expansive perspective which moves policy beyond being conceptualised as mere documentation. This expansive perspective of *policy as text* is made up of four different, but interrelated perspectives:

[204] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 1994a. *Education reform: a critical and post-structural approach*. Pub. Buckingham, UK, Open University Press; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[205] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.
[206] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[207] Greenberg, G., Miller, J., Mohr, L. and Vladeck, B. 1977. Developing public policy theory: Perspectives from empirical research. *American Political Science Review*, 71(4), 1532-1543.
[208] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17.
[209] Gale, T. 1999. Policy trajectories: Treading the discursive path of policy analysis. *Discourse: Studies in the Cultural Politics of Education*, 20(3), 393-407.

(i) a form of policy that is understood or perhaps, distinguishable through meanings that can be ascribed to it

(ii) a form of policy that has a specific meaning ascribed to it

(iii) a form of policy that is separate and distinguishable from other policy forms, and

(iv) a form of policy that can only be understood when set within a specific context.

According to Jones[210] a text-based form of policy may also carry with it the assumption that policy represents a type of communication that exists in the form of text contained in documents, He contends that such policy exists irrespective of whether any meaning can be gleaned from the text or whether the texts conjure multiple meanings and/or are prone to multiple and differing interpretations that may end up supporting the development and enactment of policy that is contradictory to the society's benefit. Its focus is therefore on language used in documentation and how such language impacts on the effective communication and understanding of policy. More specifically, Ball[211] claims that

> "…*the translation of the crude, abstract simplicities of policy texts into interactive and sustainable practices of some sort involves productive thought, invention and adaptation*" (p. 19).

Drawing from Ball[212], Gale[213] suggests that policy texts are at the core of the interrelationship between the production and interpretation of policy.

[210] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[211] Ball, S. 1994a. *Education reform: a critical and post-structural approach*. Pub. Buckingham, UK, Open University Press.
[212] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17.
[213] Gale, T. 1999. Policy trajectories: Treading the discursive path of policy analysis. *Discourse: Studies in the Cultural Politics of Education*, 20(3), 393-407.

2.3.2 Policy as discourse

The second refers to policy as *'policy as discourse'*[214]. Noting that discourse implies the social use of language, here, the emphasis is on the meaning and use of specific words contained in policy text. Ball[215] postulates that *'policy as discourse'* involves

> "…*ways of talking about and conceptualizing policy*" (p. 109).

The literature[216] suggests that the true meaning of *discourse* depends on the statements that both precede and succeed such discourse. In effect, *policy as discourse* focuses on the language of policy and how such language can be employed to facilitate dialogue and refract, produce or distort the desires and intentions of policy makers as captured in policy text. From Jones[217], we come to understand that a discursive view of policy perceives the language utilised to construct meanings of text as determined by the nature of the society. In fact, according to Gilbert[218], language within this context articulates how individuals

> "…*enter into relations with each other as they engage in the process of producing and interpreting meaning*" (p. 58).

[214] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 1994b. *Researching inside the state: issues in the interpretation of elite interviews*. In: D. Halpin and B. Trona (Eds) Researching Education Policy: ethical and methodological issues, pp. 107-120, Pub. London, Falmer Press; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57; Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[215] Ball, S. 1994b. *Researching inside the state: issues in the interpretation of elite interviews*. In: D. Halpin and B. Trona (Eds) Researching Education Policy: ethical and methodological issues, pp. 107-120, Pub. London, Falmer Press.
[216] Fairclough, N. 1993. Critical Discourse Analysis and the marketization of public discourse: The universities. *Discourse and Society*, 4(2), 133 – 168; Rogers, R., Malancharuvil-Berkes, E., Mosley, M., Hui, D., and O'Garro Joseph, G. 2005. Critical discourse analysis in education: A review of the literature. *Review of Educational Research*, 75(3), 365–416.
[217] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[218] Gilbert, R. 1992. Text and context in qualitative educational research: Discourse analysis and the problem of conceptual explanation. *Linguistics and Education*, 4(1), 37–58.

According to Jones[219], the main contribution of Gilbert's[220]work is that he (Gilbert) was able to elaborate on the need to emphasise not only the interpretation but also the interaction between individuals in the society in the course of policy development, enactment and interpretation.

Discourse also focuses on the way in which policy is formed, refined and shaped for consideration. In this context, among its different meanings[221], discourse represents an embodiment of the interpretation and use of policy[222]. Bacchi[223] defines discourse as

> "…*the ways in which bodies of knowledge, interpretive schema, conceptual schema and signs define the terrain in ways that complicate attempts at change*" (p. 48).

By this definition, Bacchi [224] points out that it is the discourse perspective of policy that provides reasons on the difficulties associated with policy change and implementation although she does warn that unresolved ambivalence in terms of how best to combine the textual and discourse perspective of policy will continue to lead to unresolved tensions. This is a point also reiterated by Ball[225]. Of particular relevance is that it is through discourse that policy can be represented in a form which ends up subverting its true intentions. Thus, this perspective of policy suggests that, in terms of the public sector, problems are actually created by the nature of discourse contained in policy which is offered as representative of,

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[219] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[220] Gilbert, R. 1992. Text and context in qualitative educational research: Discourse analysis and the problem of conceptual explanation. *Linguistics and Education*, 4(1), 37–58.
[221] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.
[222] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313.
[223] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.
[224] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.
[225] Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313.

among other factors, the propositions that will guide decisions made by the various tiers of government. In other words, the premise of *policy as discourse* is that governments do not necessarily respond to societal problems via policy; instead, it is more likely that societal problems are actually created in the very policy that governments enact as responses to societal problems. The position adopted by Bacchi [226] is supported by an earlier assertion by Goodwin[227] who stated that the discourse perspective of policy

> "…*frames policy not as a response to existing conditions and problems, but more as a discourse in which both problems and solutions are created*" (p. 67).

To summate, based on the works of Fairclough [228](p. 25), three attributes of *'policy as discourse'* can be conceptualised. First, discourse can exist within the societal imperatives that drive the need for policy to be formulated. Second, discourse can encompass the actual production process. Finally, discourse is the text and language of the policy itself and how, specifically, such language is interpreted.

2.3.3 Policy as value

In addition to the conceptualisation of policy in the form of *text*[229] and *discourse*[230], policy can also be defined from a *value* perspective that conveys societal ideals[231]. Easton[232] defined policy as

[226] Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. *Discourse: Studies in the Cultural Politics of Education*, 21(1), 45-57.
[227] Goodwin, N. 1996. Governmentality in the Queensland Department of Education: policies and the management of schools, *Discourse: Studies in the Cultural Politics of Education,* 17(1), 65–74.
[228] Fairclough, N. 1989. *Language and power*. London: Longman.
[229] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[230] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313; Bacchi, C. 2000. Policy as discourse: What does it mean? Where does it get us?. Discourse: *Studies in the Cultural Politics of Education*, 21(1), 45-57; Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[231] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[232] Easton, D. 1953. *The Political System: An Inquiry into the State of Political Science*. Pub. New York: Alfred A. Knopf.

"*…a web of decisions and actions that allocates values*" (pp.129-130).

On the other hand, Kogan[233] defined policy as the

"…authoritative allocation of values" (p. 55).

The author contends that both definitions represent the value perspective of policy. This perspective of policy argues that policy is primarily a political objective[234]. Because values are most likely to be construed to mean a set of socially constructed attitudes and beliefs[235], the primary interest of such values is the need to resolve conflicts over morality. Studies by Studlar and Cagossi[236] found that in European countries and the United States, the main five areas of interest of this form of policy are (i) same-sex marriage, (ii) abortion, (iii) stem cell research, (iv) capital punishment, and (v) euthanasia and assisted suicide. For this reason, this form of policy is generally perceived as the most divisive and controversial; thus, the greater is the likelihood that it generally involves judicial intervention in its enactment[237]. It is not surprising therefore that Studlar and Cagossi[238] suggest that the perceived role of the judiciary in policy as values (or the morality policy) requires further study. Here they highlight that, over the years, the judiciary has taken on increasing roles in policy[239]. In fact, as this thesis demonstrates (a point also

[233] Kogan, M. 1975. *Educational Policy Making*. London: Allen & Unwin.
[234] Kogan, M. 1975. *Educational Policy Making*. London: Allen & Unwin.
[235] Easton, D. 1953. *The Political System: An Inquiry into the State of Political Science*. Pub. New York: Alfred A. Knopf; Taylor, S. 1997. Critical Policy Analysis: Exploring Contexts, Texts and Consequences. *Discourse: Studies in the Cultural Politics of Education*, 18(1), 23–35.
[236] Studlar, D. and Cagossi, A. 2018. Institutions and Morality Policy in Western Democracies. *Review of Policy Research*, 35 (1), 61–88.
[237] Tatalovich, R., Tatalovich, W., Daynes, B. and Lowi, T. 2014. *Moral controversies in American politics*. Routledge; Studlar, D. and Cagossi, A. 2018. Institutions and Morality Policy in Western Democracies. *Review of Policy Research*, 35 (1), 61–88.
[238] Studlar, D. and Cagossi, A. 2018. Institutions and Morality Policy in Western Democracies. *Review of Policy Research*, 35 (1), 61–88.
[239] Roesler, S. 2007. Permutations of judicial Power: the new constitutionalism and the expansion of judicial authority. *Law & Social Inquiry*, 32(2), 545-579.

noted by Studlar and Cagossi[240]), while the doctrine *finality, conclusive and binding nature* of judicial decisions as relates to policy may vary across different national jurisdictions, its importance cannot be underestimated.

Values can also mean qualities that contribute or constitute what may be determined to be '*right'* or '*good'*[241]. The challenge with the values perspective of policy is that it is characterised by the reality that the enactment of policy is not a linear, rational or consensual process. Rather, it is a process that involves various interest groups and stakeholders, all in competition with each other[242]. For this reason, although governments are not the only institutions with public value obligations, they play a crucial role in shaping and influencing public values[243]. More specifically, what are considered public values tend to be aligned to the views of those with political authority which is why what are considered public values will generally correspond to the law. Thus, in its various rulings and findings, the judiciary will set legal obligations for public (for government and other public institutions) and private entities (for private individuals) in line with perceived societal values. The values perspective of policy suggests that policy enactment is a disjointed and reactionary process that is dependent on the circumstances, dominated by the stakeholder groups in a position at that particular point in time to control how values are allocated. According to Ozga[244] these stakeholder groups are drawn from a variety of sources which include agencies, organisations and institutions that strive to generate and implement various policies through a number of different avenues including through agreements, policy networks and advocacy. Such advocacy may occur through a number of actions taken with a view to change legislation. However, while there has been a tendency for such legislative-changing advocacy, the reality is that values do not

[240] Studlar, D. and Cagossi, A. 2018. Institutions and Morality Policy in Western Democracies. *Review of Policy Research*, 35 (1), 61–88.
[241] De Graaf, G. and Van der Wal Z. 2008. On value differences experienced by sector switchers. *Administration & Society*, 40, 79-103.
[242] Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21.
[243] Jorgensen, T. and Bozeman, B. 2007. Public values: An inventory. *Administration & Society*, 39(3), 354-381.
[244] Ozga, J. 2005. *Models of Policy-making and Policy Learning*. Discussion Paper 1. Presented at the Seminar on Policy Learning in 14-19 Education, Joint Seminar of Education and Youth Transitions Project and Nuffield Review.

always have to be captured within legal forms in order for society to acknowledge their relevance, importance or correctness. Thus, sometimes advocacy focuses on legal action through the courts.

Values from a policy expectation will generally refer to the expectation of society[245], manifested in the form of actions and behaviour. While socially constructed and, by implication, juristically derived, values may be on occasion be specific to a particular legal jurisdiction although it is safe to suggest that some values transcend juristic boundaries. Values are manifested in all forms of law, including private[246] law of which arbitration is a part. In terms of private law, there are possibly three key values that transcends most juristic boundaries adhere to. Broadly speaking, they focus on what we construe as

(i) a legal dimensions of values – here it is expected that the society will not encourage the individual to be unfairly denied indelible rights to a fair and just hearing
(ii) social dimensions of values, and
(iii) economic dimensions of values.

Social and economic values are related in that they both emphasise opportunities. Overall, both imply an expectation that societal value systems support, for example,

(i) the right of individuals to develop themselves, and
(ii) the right to trade and make a living.

[245] Melchior, M., and Melchior, A. 2001. A case for particularism in public administration. *Administration & Society*, 33, 251-275; Jorgensen, T. and Bozeman, B. 2007. Public values: An inventory. *Administration & Society*, 39(3), 354-381.; De Graaf, G. and Van der Wal Z. 2008. On value differences experienced by sector switchers. *Administration & Society*, 40, 79-103.
[246] Harlow, C. 1980. "Public" and "Private" Law: Definition Without Distinction. *Modern Law Review*, 43(3), 241-265.

This implies that societal value systems will support commercial activities that are conducted fairly, honestly and peacefully. Societal values are likely to disapprove of commercial activity which is unconscionable, dishonest, oppressive and conducted under duress.

2.3.4 Policy as process

The final form of policy highlighted in this thesis is '*policy as process'*. Because policies have also been seen to represent not only processes, but also outcomes[247], the focus of this form of policy is on the multi-level routines within which the intended outcomes of policy are achieved. As stated in the *policy as values* discussion, the policy process is neither a linear, rational nor consensual process; rather, it is a process that involves various interest groups and stakeholders, all in competition with each other. Policy generally involves a repetition of decisions where policy is constantly made and then revised. The process of policy encompasses how policy is developed (see, for example, Keeney *et al*.[248]), funded, resourced, tested, enacted, implemented and enforced and then monitored. However, as Jones[249] notes, there is in reality no single and generally applicable policy process. In fact, policies do not need to be announced or distributed. Similarly, a policy can be completely abandoned without the need for any announcement.

In sum, the four forms of policy which have been discussed suggests that policy can be represented in text, contextualised, and bound within a narrative or discourse[250]. Most importantly, all this will occur in a process which reflects societal value systems.

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[247] Ball, S. 1993. What is policy? Texts, trajectories and toolboxes. *Australian Journal of Education Studies*, 13(2), 10-17; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313.
[248] Keeney, R., Von Winterfeldt, D. and Eppel, T. 1990. Eliciting public values for complex policy decisions. *Management Science*, 36(9), 1011-1030.
[249] Jones, T. 2013. *Understanding education policy: The 'four education orientations' framework*. Springer Science & Business Media.
[250] Gale, T. 1999. Policy trajectories: Treading the discursive path of policy analysis. *Discourse: Studies in the Cultural Politics of Education*, 20(3), 393-407.

2.4 Policy and the courts

2.4.1 Judges and policy making

The erstwhile American jurist Benjamin N. Cardozo[251] (p. 168) had suggested that:

> "*…[Judges] do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by*".

This dictum brought to the fore that the notion of the impartial judge whose exclusive premise is to debate obscure legal points is far from the reality. As the literature posits[252], for judges to be able to properly settle disputes, it is imperative that they interact with various actors outside the institutional context of the courts thus familiarising themselves with events that occur outside the confines of not only the courtroom, but the legal profession as well.

The contention that judges are makers of law is generally accepted in the academic literature[253]. For example, judges make law in that when occasions arise in disputes relating to the applicability of legislative provisions to a dispute within which such legislative provisions has not been previously applied, judges make law through their restatement of the law in a manner not previously done[254].

In the development of the law, it is also acknowledged that judges are required to call upon

[251] Cardozo, B. 1921. *The Nature of the Judicial Process*. New Haven: Yale University Press.
[252] McKay, R. 1972. Judges, the Code of Judicial Conduct, and Nonjudicial Activities. *Utah Law Review*, 1972 (3), 391-401; Shaman, J. 1995. The impartial judge: Detachment or passion. *DePaul Law Review*, 45 (3), 605-632; Mack, K. and Roach Anleu, S. 2010. Performing impartiality: Judicial demeanor and legitimacy. *Law & Social Inquiry*, 35(1), 137-173.
[253] Schaefer, W. 1966. Precedent and policy. *University of Chicago Law Review*, 34(1), 3-25; The Lord Reid., 1972. The judge as law maker. *Journal of Society of Public Teachers of Law*, 12 (1), 22-29; Doyle, J. 1998. Do judges make policy? Should they?. *Australian Journal of Public Administration*, 57(1), 89-98; Keane, R. 2003. Judges as lawmakers: the Irish experience. Radharc, 4, 81-98; Sherwin, E. 2006. Judges as Rulemakers. *University of Chicago Law Review*, 73 (3), 919-932; Wills, E. 2017. The Roles of Judges and of Judge-Made Law in English Common Law and the Civil Law Family of Legal Systems. *Anglo-German Law Journal*, 3, 114-128.
[254] Doyle, J. 1998. Do judges make policy? Should they?. *Australian Journal of Public Administration*, 57(1), 89-98.

"…*common sense, legal principle and public policy in that order*" (Lord Reid[255]: 25-9).

Thus, in addition to their law-making function, judges are also political actors engaged in policy making. Defined by Grossman and Tanenhaus[256] as "…*the factor that punctuates the role of courts in the political system*" (p. 406), the policy-making role of the judiciary has attracted considerable academic interest and been espoused in the works of numerous scholars over the years[257]. This policy-making role according to Roesler[258] is indicative of the fact that the notion of the impartial judge whose exclusive premise is to debate obscure legal points is far from the reality. Instead, judicial policy making occurs because, as Volcansek[259] notes, more often than not, judges are called upon to make rulings where either competing rules exist or where new ones have to be interpreted or where in fact, there are no clear rules. This of course does not mean that the legitimacy of such roles is widely shared. Indeed some scholars argue that the judiciary lacks any form of technical-related competency and political legitimacy to make

[255] The Lord Reid., 1972. The judge as law maker. *Journal of Society of Public Teachers of Law*, 12 (1), 22-29.
[256] Grossman, J and Tanenhaus, J. 1969. *Frontiers of Judicial Research,* Pub. Wiley, New York,
[257] See for example Dahl, R. 1957. Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law*, 6 (2), 279-295; Casper, J., 1976. The Supreme Court and national policy making. *American Political Science Review*, 70(1), 50-63; Songer, D. 1987. The impact of the Supreme Court on trends in economic policy making in the United States courts of appeals. *Journal of Politics*, 49(3), 830-841; Mondak, J. 1994. Policy legitimacy and the Supreme Court: The sources and contexts of legitimation. *Political Research Quarterly*, 47(3), 675-692; Flemming, R. and Wood, B., 1997. The public and the Supreme Court: Individual justice responsiveness to American policy moods. *American Journal of Political Science*, 41 (2), 468-498; McGuire, K. and Stimson, J. 2004. The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences. *Journal of Politics*, 66(4), 1018-1035; Roesler, S. 2007. Permutations of judicial Power: the new constitutionalism and the expansion of judicial authority. *Law & Social Inquiry*, 32(2), 545-579; Bailey, M. and Maltzman, F. 2008. Does legal doctrine matter? Unpacking law and policy preferences on the US Supreme Court. *American Political Science Review*, 102(3), 369-384; Alaire, B. and Green, A. 2009. Policy preference change and appointments to the Supreme Court of Canada. *Osgoode Hall Law Journal*, 47 (1), 1-46; Black, R. and Owens, R. 2009. Agenda setting in the Supreme Court: The collision of policy and jurisprudence. *Journal of Politics*, 71(3), 1062-1075; Megie, A. 2014. The origin of EU authority in criminal matters: a sociology of legal experts in European policy-making. *Journal of European Public Policy*, 21(2), 230-247; Martinsen, D. 2015. Judicial influence on policy outputs? The political constraints of legal integration in the European Union. *Comparative Political Studies*, 48(12), 1622-1660; Rosenthal, M., and Barzilai, G., and Meydani, A. 2016. *Constitutional Judicial Review, Chief Justices, and Judges' Preferences: Institutional Lessons and Israel's High Court of Justice*. http://dx.doi.org/10.2139/ssrn.2815665, accessed 08/02/18.
[258] Roesler, S. 2007. Permutations of judicial Power: the new constitutionalism and the expansion of judicial authority. *Law & Social Inquiry*, 32(2), 545-579.
[259] Volcansek, M. 1992. Judges, courts and policy-making in Western Europe. *West European Politics*, 15 (3), 1-8.

policy-related decisions[260]. In *Anns v Merton*[261] heard in the House of Lords, this position was espoused by Lord Wilberforce who stated [at 754]:

> "*Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion' meaning that the decision is one for the authority or body to make, and not for the courts".*

In terms of technical-related competency, Plunkett[262] for example points out that the judiciary are not conversant with policy via their training or educational background. On the other hand, as relates to political legitimacy, because the judiciary are generally not elected, they do not hold account to the public as, for example, government officials would.

According to John Doyle[263] the former Chief Justice of Australia, judges are engaged in policy making because when formulating a revised or new legal principle, in their quest to ensure that a practical judgement is rendered, judges are expected to take into consideration existing societal interests. It therefore follows that judges arrive at their rulings by drawing upon policy considerations in the sense that their decisions are influenced by their view of what the society considers as appropriate. This should be expected as the law does not serve its own interest. *The law must serve and be seen to serve the interest of the society*. It is important however to note that the policy-making role of the judiciary does not imply that it is their role to decide on what societal values are or what is in effect an appropriate value for the society. Judges make policy in that they must only take into consideration what those

[260] See for example, Heydon, D. 2003. Judicial Activism and the Death of the Rule of Law. *Australian Intellectual Property Journal*, 14(2), 78-93; Smillie, J. 2005. Who Wants Juristocracy. *Otago Law Review*, 11 (2), 183-196; Nackenoff, C. 2006. Is There a Political Tilt to Juristocracy. *Maryland Law Review*, 65 (1), 139-151; Rytter, J. and Wind, M. 2011. In need of juristocracy? The silence of Denmark in the development of European legal norms. *International Journal of Constitutional Law*, 9(2), 470-504.

[261] Anns v Merton London Borough Council [1977] UKHL 4, [1978] AC 728; This was later overruled by the House of Lords in Murphy v Brentwood District Council [1991] UKHL 2, [1991] 1 AC 398.

[262] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.

[263] Doyle, J. 1998. Do judges make policy? Should they?. *Australian Journal of Public Administration*, 57(1), 89-98.

societal values are and ensure that the law is appropriately aligned to such values. They also make policy when they make decisions not to affirm existing rules.

According to Glick[264], the most visible way in which this occurs is through the courts where judges seek to draw upon policy when creating legal solutions to disputes presented to them to adjudicate on. It therefore emerges that the judiciary will develop and draw upon policy when hearing and determining one case. Sometimes, however, such policy is developed and drawn upon in a number of cases which are all focused on the same or similar subject matter. Thus, according to Dahl [265], the judiciary play a policy role in that they adjudicate on controversies which involve policy questions.

2.4.2 Principled or Policy judicial making

Judicial decision making can either be driven by principles or policy[266]. It can also be driven from a confluence of both whereby, for example, legal principles are construed in the form of policy, or vice-versa[267]). When judicial decisions are based solely on principle, it implies a set of broad (Hart[268]) and abstract legal rules (Beever[269]), which tend to serve to

> "*…justif[y]ies an outcome on the basis that it conforms to a generalisation of a particular set of legal rules*" (Plunkett[270], p. 370).

[264] Glick, H. 1970. Policy-Making and State Supreme Courts-The Judiciary as an Interest Group. *Law & Society Review*, 5 (2), 271-292.
[265] Dahl, R. 1957. Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law,* 6 (2), 279-295.
[266] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[267] Dworkin, R. 1978. *Taking rights seriously*. Harvard University Press.
[268] Hart, H. 2012. *The Concept of Law*, 3rd ed. Pub. Oxford.
[269] Beever, A. 2007. *Rediscovering the Law of Negligence Torts and Rights,* Pub. Oxford.
[270] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.

Waddams[271] further posits that principles are legal decisions that will be made based solely on generalised legal rules or reasoning. This also implies that such judicial decisions will be based on the application of such generalised legal rules to the dispute without any consideration for the potential impact of such judicial decisions on the society. Judicial decision making which is principle-driven emphasises interpersonal justice, which focuses on the standard or state of interactions, relationship and exchanges that exists between disputants[272]. The focus of legal principles is therefore on the individual disputants before the court. One key characteristic of the principle-based approach to justice according to Plunkett[273] is that its advocates tend to opine the exclusiveness of its relevance. They do so on the premise that it is only by determining cases purely on legal principles that a key rule-of-law principle can be attained, as advocated by Lord Bingham[274]:

> "…*the law must be…clear and predictable*" (p. 69).

When a dispute comes before the courts, and judicial decision making is to be based on principles, judges traditionally draw upon legal history, analogy and custom (Winfield[275]) to make judicial decisions in six forms which have been identified by Daynard[276] to comprise the following. He refers to the first type as the *particularistic* judicial decision type. Here, judicial decisions are reached with limited or no exploration of any legal principles nor impact of precedent. The objective of decision making here will

[271] Waddams, S. 2008. *Private Right and Public Interest*. In M. Bryan (ed.), Private Law; Waddams, S. 2011. Principle and policy in contract law: competing or complementary concepts?. Cambridge University Press.
[272] Cohen-Charash, Y. and Spector, P. 2001. The role of justice in organizations: A meta-analysis. *Organizational Behaviour and Human Decision Processes*, 86(2), 278-321; Cook, L., Bowen, D., Chase, R., Dasu, S., Stewart, D. and Tansik, D. 2002. Human issues in service design. *Journal of Operations Management*, 20(2), 159-174; Liu, Y., Huang, Y., Luo, Y. and Zhao, Y. 2012. How does justice matter in achieving buyer–supplier relationship performance?. *Journal of Operations Management*, 30(5), 355-367; Katok, E. and Pavlov, V. 2013. Fairness in supply chain contracts: A laboratory study. *Journal of Operations Management*, 31(3), 129-137; Holtz, B. and Harold, C. 2013. Interpersonal justice and deviance: The moderating effects of interpersonal justice values and justice orientation. *Journal of Management*, 39(2), 339-365.
[273] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[274] The Lord Bingham. 2007. The rule of law. *Cambridge Law Journal*, 66 (1), 67-85.
[275] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[276] Daynard, R. 1970. Use of Social Policy in Judicial Decision-Making. *Cornell Law Review*, 56 (6), 919-950.

be simply to apply clearly articulated law to the facts of the case. The *statutory* judicial decision type is the second type of judicial decision making. Here, the primary objective of the court is to ensure that the a proper and correct interpretation of particular legislation and statute or rules is applied to the question of law before the court. The courts here will apply plain meaning of such laws to the case before them; but will also, in applying such law, be willing to draw upon accepted notions in the case of ambiguity with any of such statutory provisions. The *precedential* judicial decision t is the third type. Here, the courts will seek to defer to the doctrine of *stare decisis*. Precedent from similar prior cases is strictly drawn upon. Noted by Daynard[277] as slightly similar to the statutory and precedential judicial decision types, the fourth type, the *grand style* judicial decision, occurs when the courts are only willing to go as far as recognising statute and precedent as persuasive and indicative of the law. Daynard[278] claims that public policy considerations are only manifest in the fifth and sixth types of judicial decision making. In the fifth type, which he refers to as *social policy asserted*, social (public) policy is drawn upon as persuasive and indicative of the law. The final (sixth) judicial decision type which Daynard[279] identifies is referred to as *social policy derived*. Here, judicial decision making is based on social (public policy). In this type of judicial decision making, the courts will go beyond the use of social (public) policy as persuasive and indicative of the law. Instead, the courts rigorously examine such policy, its intentions (directions) and likely (expansive) meanings within the context of justice.

Policy as earlier discussed mainly refers to non-legal-based justifications. One key difference between the policy-based approach to justice and the principle-based approach is that, unlike the principle-based approach which opines exclusiveness in terms of relevance, the policy-based approach only claims that policy can be relevant to judicial decisions. This approach therefore recognises the relevance of legal principles, but only claims that such principles cannot be the sole considerations in judicial decision making. Plunkett[280] posits that policy represents

[277] Daynard, R. 1970. Use of Social Policy in Judicial Decision-Making. *Cornell Law Review*, 56 (6), 919-950.
[278] Daynard, R. 1970. Use of Social Policy in Judicial Decision-Making. *Cornell Law Review*, 56 (6), 919-950.
[279] Daynard, R. 1970. Use of Social Policy in Judicial Decision-Making. *Cornell Law Review*, 56 (6), 919-950.
[280] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.

"…*an alternative to an argument based on the strict law*" (p. 369).

Bell[281] claims that policy-based reasoning in law serves as

"…*substantive justifications to which judges appeal when standards and rules of the legal system do not provide a clear resolution of a dispute*" (p. 23).

As observed in the literature, the role of policy (or the potential of such a role) has attracted the attention of a number of scholars with some (Stapleton[282]) noting particular advantages of its considerations in judicial decision making and others suggesting otherwise[283]. Policy-based reasoning is however of particular interest to private law of which arbitration (our main interest) is a constituent element, exerting considerable influence on rights-based theories of private law[284].

Dworkin[285], Robertson[286] and Plunkett[287] suggest that from a private law context, policy tends to be construed predominantly from the perspective of goals. More specifically, Dworkin[288] stated that "*Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole*" (p. 82) while Robertson[289] stated that

[281] Bell, J. 1983. Policy Arguments in Judicial Decisions. Oxford: Clarendon Press.
[282] Stapleton, J. 1998. *Duty of Care Factors: A Selection from the Judicial Menus*. In P. Cane and J. Stapleton (eds.), The Law of Obligations: Essays in Celebration of John Fleming, Oxford; Stapleton, J. 2003. The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable, *Australian Bar Review*, 24 (2), 135-148..
[283] Weinrib, E. 2005. The Disintegration of Duty. In M.S. Madden (ed.), Exploring Tort Law, Cambridge; Weinrib, E. 2012. *The Idea of Private Law*. Pub. Oxford; Beever, A. 2007. Rediscovering the Law of Negligence Torts and Rights, Pub. Oxford...
[284] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[285] Dworkin, R. 1978. *Taking rights seriously*. Harvard University Press.
[286] Robertson, A. 2011. *Policy and the Duty of Care*. Society of Legal Scholars Conference, Cambridge, September.
[287] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[288] Dworkin, R. 1978. *Taking rights seriously*. Harvard University Press.
[289] Robertson, A. 2011. *Policy and the Duty of Care*. Society of Legal Scholars Conference, Cambridge, September.

"*considerations of community welfare, as distinct from considerations of interpersonal justice*" (p. 1).

What this means is that, for those who advocate a policy-based approach to judicial decision making, the central ethos of policy-based reasoning is that, in determining legal disputes, the courts should not necessarily rely on the law itself (Beever[290]); instead, they should take into consideration factors likely to accentuate societal values and expectations. Plunkett[291] points out that incorporating policy considerations in judicial decision making is important because of two factors – the reality that (i) the sole use of legal principles is seldom adequate to cater for the complexity and novelty of legal disputes, and (ii) the law should represent an instrument of attaining societal goals. By implication, it therefore appears that a policy-based approach to judicial decision making will emphasise the more general interest and concerns of the society (community) as against that of disputants standing before a court. This has led to some scholars such as Mason[292] positing that a policy-based approach to judicial decision making equates to public policy.

Thus, not surprisingly, Morgan[293] suggests that policy-based reasoning in [tort] law is "*a central, perhaps the central, characteristic of the judicial development of [tort] law*" (p. 215). Similarly, Waddams[294] claims that the policy-based approach to judicial decision making in contract law is of "*enormous practical as well as theoretical importance*" (p. 148). On the other hand, those who argue a principle-based approach to judicial decision making advocate that policy has no role in judicial

[290] Beever, A. 2007. *Rediscovering the Law of Negligence Torts and Rights*, Pub. Oxford.
[291] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[292] Mason, A. 2001. *Policy Considerations*. In A. Blackshield, A., Coper, M., and Williams, G. (eds.), The Oxford Companion to the High Court of Australia (Melbourne, Oxford), 536.
[293] Morgan, J. 2009. Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics. *Law Quarterly Review*, 125, 215-221.
[294] Waddams, S. 2011. *Principle and policy in contract law: competing or complementary concepts*?. Cambridge University Press.

rulings[295] and that, instead, the courts should focus exclusively on the individual rights and obligations of disputants[296].

The literature supports the contention that although forms and methods vary considerably, judicial policy making occurs both in civil law and common law traditions[297]. However, it is safe to posit that in civil law jurisdictions, there are more legal and institutional factors that will restrict judges from expressing their personal policy preferences. While it is noted that the civil law tradition expects judges to be rigorous in their application of the law to the facts of individual cases, judges are able to engage in policy making through ascribing different interpretations to legal provisions.

A review of literature on judicial policy making in civil traditions suggests that there are approaches to judicial policy making in civil law traditions[298]. These two approaches are judicial review and judicial interpretation. Under judicial review within a civil law tradition, the courts through vested constitutional powers will generally exercise their discretion to rule on the constitutional validity of legislation or administrative decisions taken by the government[299].

[295] Weinrib, E. 2005. *The Disintegration of Duty*. In M.S. Madden (ed.), Exploring Tort Law, Cambridge; Weinrib, E. 2012. The Idea of Private Law. Pub. Oxford; Beever, A. 2007. *Rediscovering the Law of Negligence Torts and Rights*, Pub. Oxford.
[296] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[297] Volcansek, M. 1992. Judges, courts and policy-making in Western Europe, *West European Politics*, 15 (3), 1-8; Roesler, S. 2007. Permutations of judicial Power: the new constitutionalism and the expansion of judicial authority. *Law & Social Inquiry*, 32(2), 545-579.
[298] De Franciscis, M. and Zannini, R. 1992. Judicial policy-making in Italy: The constitutional court. *West European Politics*, 15(3), 68-79; Landfried, C. 1992. Judicial policy-making in Germany: The federal constitutional court. *West European Politics*, 15(3), 50-67; Stone, A. 1992. Where judicial politics are legislative politics: The French constitutional council. *West European Politics*, 15(3), 29-49; Van Koppen, P. 1992. Judicial policy-making in the Netherlands: The case-by-case method. *West European Politics*, 15(3), 80-92; Volcansek, M. 1992. Judges, courts and policy-making in Western Europe, *West European Politics*, 15 (3), 1-8; Oster, J. 2008. The Scope of judicial review in the German and US Administrative legal system. *German Law Journal*, 9, 1267-1297; Dyevre, A. 2011. The German Federal Constitutional Court and European Judicial Politics. *West European Politics*, 34(2), 346-361.
[299] Jordao, E. and Rose-Ackerman, S. 2014. Judicial review of executive policymaking in advanced democracies: beyond rights review. *Administrative Law Review*, 66 (1), 1-72; Kopecek, L. and Petrov, J. 2016. From Parliament to Courtroom: Judicial Review of Legislation as a Political Tool in the Czech Republic. *East European Politics and Societies*, 30(1), 120-146.

2.4.3 Factors favouring policy based judicial making

According to Plunkett[300], there are three principal factors which will favour a policy-based approach to judicial decision making. These three factors relate to (i) transparency, (ii) a clear differentiation between legal principles and policy, and (iii) conceptualisation of policy itself.

The first factor which Plunkett[301] highlights is *transparency*. One key attribute of the transparency factor in policy-based judicial decision making is a more open form of judicial reasoning. This differs significantly from principle-based judicial decision making which generally has the potential to obscure the reasoning behind judicial decisions[302]. According to Plunkett[303], the advantages of the policy-based judicial decision making come from the fact that it does not place restrictions on the rationale for judicial decision making. This creates supporting conditions for the courts to articulate the rationale and reason for individual judgements, thus creating further opportunities for interested parties to understand how the courts reason. This scenario contributes to the development of the law in that such judicial reasoning can serve as precedent when applied to different scenarios.

The second factor which Plunkett[304] identified is *differentiation*. Here, the contention is that, in reality, there is no major distinction between principle and policy. Thus, irrespective of the view that legal principles focus predominantly on interpersonal forms of justice[305] and policy principles focus predominantly on social imperatives, there is, in an actual sense, very limited differentiation between principle and policy because rights and obligations are in reality always traceable to social imperatives.

The final factor which Plunkett[306] identified is *policy conceptualisation.* More specifically, Plunkett[307] claimed that one of the principal reasons why the policy-based approach to judicial decision

[300] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[301] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[302] Stapleton, J. 2003. The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable, *Australian Bar Review*, 24 (2), 135-148.
[303] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[304] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. Cambridge Law Journal, 75(2), 366-397.
[305] Raz, J. 1972. Legal principles and the limits of law. *Yale Law Journal*, 81(5), 823-854; Anderson, C. 1979. The place of principles in policy analysis. *American Political Science Review*, 73(3), pp.711-723.
[306] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.
[307] Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397.

making was favoured is because accounts of the law which are free of policy are actually not cogent. Luntz[308] supports this proposition by stating that the courts *"…must make use of policy, since principle alone is seldom sufficient, to enable it to decide the cases before it*" (p. 1). This position taken by Luntz[309] appears to be supported by Stapleton[310] and Witting[311] who both argue that, irrespective of attempts by the courts to give an impression that rulings are driven by principle; the reality is that judicial rulings flow from policy reasons.

2.4.4 How the courts influence policy

So how do the courts play a major and significant role in policy? The literature[312] suggests that, irrespective of the courts serving as one of the three main arms of government, the role of the courts in policy making is not necessarily that straightforward. In fact, Dahl[313] and Glick [314] claim that, in reality, the courts cannot make policy on their own. Dahl[315] actually claims that, as relates to national policy making, the judiciary rarely play any decisive role.

[308] Luntz, H. 2004. The Use of Policy in Negligence Cases in the High Court of Australia. *University of Melbourne Legal Studies Research Paper No. 264*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=583581, accessed 06/03/18.
[309] Luntz, H. 2004. The Use of Policy in Negligence Cases in the High Court of Australia. *University of Melbourne Legal Studies Research Paper No. 264*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=583581, accessed 06/03/18.
[310] Stapleton, J. 2003. The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable, *Australian Bar Review*, 24 (2), 135-148.
[311] Witting, C. 2008. The House That Dr Beever Built: Corrective Justice, Principle and the Law of Negligence. *Modern Law Review*, 71 (4), 621-640.
[312] Dahl, R. 1957. Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law*, 6 (2), 279-295; Casper, J., 1976. The Supreme Court and national policy making. *American Political Science Review*, 70(1), 50-63; Songer, D. 1987. The impact of the Supreme Court on trends in economic policy making in the United States courts of appeals. *Journal of Politics*, 49(3), 830-841; Mondak, J. 1994. Policy legitimacy and the Supreme Court: The sources and contexts of legitimation. *Political Research Quarterly*, 47(3), 675-692; Flemming, R. and Wood, B., 1997. The public and the Supreme Court: Individual justice responsiveness to American policy moods. *American Journal of Political Science*, 41 (2), 468-498; McGuire, K. and Stimson, J. 2004. The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences. *Journal of Politics*, 66(4), 1018-1035; Bailey, M. and Maltzman, F. 2008. Does legal doctrine matter? Unpacking law and policy preferences on the US Supreme Court. *American Political Science Review*, 102(3), 369-384; Alaire, B. and Green, A. 2009. Policy preference change and appointments to the Supreme Court of Canada. *Osgoode Hall Law Journal*, 47 (1), 1-46; Black, R. and Owens, R. 2009. Agenda setting in the Supreme Court: The collision of policy and jurisprudence. *Journal of Politics*, 71(3), 1062-1075.
[313] Dahl, R. 1957. Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law*, 6 (2), 279-295.
[314] Glick, H. 1970. Policy-Making and State Supreme Courts-The Judiciary as an Interest Group. *Law & Society Review*, 5 (2), 271-292.
[315] Dahl, R. 1957. Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law*. 6 (2), 279-295.

The judiciary are only able to make policy indirectly through either their cooperation with other stakeholders such as the legislative and executive branches of government and other political agencies (Glick[316]), and by drawing upon their role in setting policy boundaries for the public sector (Casper[317]) or through their ability to determine the timing and effectiveness of subordinate policy. Overall, to make policy, the judiciary generally adopt any or a combination of the following approaches which may include:

(i) through judicial review where the choices and considerations of the judiciary become part of the wider policy-making process[318];

(ii) through expressed views on policy as part of *obiter dicta* when making rulings;

(iii) through their interpretation of laws – which will inevitably lead to the legislature intervening to revise or change the laws in question;

(iv) through the judicial conferences where policy preferences and alternatives are discussed and recommendations made openly by the judiciary on matters both related and not related to the courts, and;

(v) sometimes (although this raises considerable separation of powers questions) through recommendations made directly to the legislative and/or the executive branches of government.

[316] Glick, H. 1970. Policy-Making and State Supreme Courts-The Judiciary as an Interest Group. *Law & Society Review*, 5 (2), 271-292.
[317] Casper, J., 1976. The Supreme Court and national policy making. *American Political Science Review*, 70(1), 50-63.
[318] Breyer, S., 1986. Judicial review of questions of law and policy. *Administrative Law Review*, 38 (4), 363-398; Emmert, C. 1992. An integrated case-related model of judicial decision making: Explaining state supreme court decisions in judicial review cases. *Journal of Politics*, 54(2), 543-552; Wasserfallen, F. 2010. The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union. *Journal of European Public Policy*, 17(8), 1128-1146; Jordao, E. and Rose-Ackerman, S. 2014. Judicial review of executive policymaking in advanced democracies: beyond rights review. *Administrative Law Review*, 66 (1), 1-72; Hamilton, J. and Slutsky, S. 2017. Judicial review and the power of the executive and legislative branches, *Research in Economics*, 71(1), 102-117.

Thus, in sum, the courts not only make or influence policy outside regular judicial decision-making channels[319], but also do so by their ability to confer legitimacy on the actions of public servants and the policies that emerge from their activities. To summate, judicial policy making flows from the complex nature of relationships between the different (and numerous) actors involved in the politics of policy. Through judicial policy making, judges have been able to frame societal values in a manner enforceable by the state through its coercive power.

2.5 Public policy

2.5.1 What is public policy?

The literature suggests that what is meant by public policy has not only historically been unclear[320] but continues to remain so[321]; Conversely, Sterk[322] states that public policy

> *"…is a catchphrase elusive of meaning without reference to the context in which it is used"* (p. 483).

Gibson[323] describes public policy as a

[319] Glick, H. 1970. Policy-Making and State Supreme Courts-The Judiciary as an Interest Group. *Law & Society Review*, 5 (2), 271-292.
[320] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Paulsen, M. and Sovern, M. 1956. Public Policy" in the Conflict of Laws. *Columbia Law Review*, 56(7), 969-1016.
[321] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494; Gibson, C. 2008. Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law. *Penn State Law Review*, 113 (4), 1227-1268; Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50
[322] Sterk, S. 1980. Enforceability of agreements to arbitrate: an examination of the public policy defense. *Cardozo Law Review*, 2 (3), 481-544.
[323] Gibson, C. 2008. Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law. *Penn State Law Review*, 113 (4), 1227-1268.

"*…dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions*" (p. 1230).

Similarly, Yelpaala[324] had posited that

"…public policy appears to have constantly defied all attempts at precise definition…and remains…vague, nebulous, intractable, and lacks meaningful and consistent contours that can guide its definition and application" (p.380).

A review of international case law also suggests an acknowledgement of the vagueness of the concept of public policy. In the *Duke of Norfolk's Case*[325], in considering the merits of public policy considerations in the common law rule against perpetuities, the court reflected:

"*Where will you stop, if you stop, if you do not stop here?... I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear*".

In the seminal case of *Richardson v Mellish*[326] which dealt with a dispute over a contract that involved a presumed breach of contract to purchase command of a voyage ship in the Courts of Common Pleas, the courts stated that public policy was

"*... a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law*".

[324] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494.
[325] Duke of Norfolk's Case, [1681] 22 Eng. Rep. 931, 960, 3 Ch. 1, 20.
[326] Richardson v Mellish, [1824-34] All ER Rep. 258 (1824)

Similarly, in *Safeway Stores v Retail Clerks International Association*[327], the California Supreme Court in the US suggested that

> "…*what is public policy in a given case, is as broad as the question of what is fraud*".

The vagueness of the concept is also recognised by the Supreme Court of India which stated in *Murlidhar Aggarwal v State of Uttar Pradesh* [328] that:

> "*...public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation*"[329].

Although the author acknowledges the conceptual vagueness associated with the concept of 'public policy', there are attempts both in literature and in the case law to bring clarity to the concept. Scholars have not deferred to the judiciary on what is 'public policy' because, according to Traynor[330], scholars should not

> "*...be misled by the half-truth that policy is a matter for only the legislators to decide…*" (p. 749).

Public policy has been defined by Lowi[331] as the

> "…*deliberate coercion-statements attempting to set forth the purpose, the means, the subjects, and the objects of coercion*" (p. 86).

[327] Safeway Stores v Retail Clerks International Association, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)
[328] (1975) 1 S.C.R. 575 (India)
[329] (1975) 1 S.C.R. 575 (India)
[330] Traynor, R. 1970. Reasoning in a Circle of Law, 56 *Virginia Law Review*, 56 (5), 739-754.
[331] Lowi, T. 1985. *The State in Politics: The Relation between Policy and Administration. In Regulatory Politics and the Social Sciences*, ed. Roger Noll. Berkeley: University of California Press.

At common law, public policy is defined more expansively by Walker[332] as:

> "*A very indefinite moral value, sometimes appealed to by Anglo-American courts as justifying a decision. It has been said to be a principle of judicial legislation or interpretation founded on the current needs of the community. It normally prohibits and rarely creates: the standard phrase is 'contrary to public policy'. It depends not on evidence but on judicial impression of what is or is not in the general public interest. For that reason judges have criticised it as providing an uncertain, even dangerous, standard, an 'unruly horse', and have been reluctant to invoke it in unprecedented circumstances*" (p. 1015).

Public policy is not an instant, determinate single phenomenon, but reflects a process with numerous decision points and participants[333]. Public policy is

> "…*formulated by some governmental authority, expressing an intention to influence the behaviour of citizens, individually or collectively, by use of positive or negative sanctions*" (Lowi[334], p. 70).

[332] Walker, D. 1980. *The Oxford Companion to Law*. Oxford: Clarendon Press.
[333] Greenberg, G., Miller, J., Mohr, L. and Vladeck, B. 1977. Developing public policy theory: Perspectives from empirical research. *American Political Science Review*, 71(4), 1532-1543.
[334] Lowi, T. 1985. *The State in Politics: The Relation between Policy and Administration*. In Regulatory Politics and the Social Sciences, ed. Roger Noll. Berkeley: University of California Press.

2.5.2 Attributes of public policy

Public policy exceptions flow from legal provisions which are rooted within national constitutions, treaties and legal precedent[335]. At the core of the '*public policy'* exception is the focus on matters that may generate a wider national impact on society's effects. However, Yelpaala[336] emphasises that public policy is not necessarily about social-driven value systems. Instead, the focus of public policy is on how individual rights and obligations can be articulated within such a system. Thus, public policy should be about "…*fundamental values of society are not subverted by sharp dealings, manipulative litigants, and by transactions contrary to the esprit de corps of the law*" (p. 383) or, more importantly, as the Buea Court of Appeal in the Cameroons stated in *Anya v Anya*[337], it should be about "…*natural justice, equity and good conscience*"

Kanakri and Massey[338] suggest that the overriding determination of public policy may be consideration of those matters which have the potential to damage the

> "*…foundations on which society is based*" (n.p).

In effect, public policy serve as a means of ensuring that legal reasoning and decisions do not ignore the perception of the public on what represents an acceptable level of moral values and equitable justice[339]. *So, what do we mean by public policy?*

Winfield[340] defines public policy as "*a principle of judicial legislation or interpretation founded on the current needs of the community*" (p. 92). According to Easton[341], *public policy* represents the

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[335] Randall, B. 1992. The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards. *Brigham Young University Law Review*, 1992 (3), 759-784.
[336] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494.
[337] (1988) C.A.S.W.P./cc/9/88, unreported
[338] Kanakri, C., and Massey, A. 2016. *Comparison of UAE and DIFC-seated arbitrations*. Global Arbitration News. Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18.
[339] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[340] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[341] Easton D. 1965. *A systems analysis of political life*. New York, NY: Wiley.

means by which values are allocated through politics. This is further espoused by Mason[342], who highlights that a policy-based approach to judicial decision making can be equated to public policy.

Yelpaala[343] claims that conceptualising public policy against it's "…*ordinary meaning*" (p. 388) allows for resolution of the challenge on whether its articulation requires that all available legislative provisions within a specific jurisdiction are taken into account. Historical case law appears to support this conceptualisation of public policy. Thus, in *Egerton v Earl of Brownlow*[344] where the House of Lords considered a legal challenge related to the terms and conditions of a trust on the argument that such terms were against public policy, the courts suggested [at 196] that:

> "*Public policy…is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the adminstration of the law.…*".

Similarly, in *Deutsche Schachtbau-und v. Ras al Khaimah National Oil*[345], the House of Lords in the context of arbitration stated that public policy [at 254] referred to matters deemed

> "*… clearly injurious to the public good or, possibly, that enforcement would be offensive to the ordinary reasonable and fully informed members of the public on whose behalf the powers of the State are exercised*".

[342] Mason, A. 2001. *Policy Considerations*. In A. Blackshield, A., Coper, M., and Williams, G. (eds.), The Oxford Companion to the High Court of Australia (Melbourne, Oxford), 536.
[343] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494.
[344] Egerton v Earl of Brownlow [1853] 4 HLC 484.
[345] Deutsche Schachtbau-und v Ras al Khaimah National Oil, [1987] 2 Lloyd's Rep. 246, 254.

The issue here is that such wide conceptualisation of 'public policy' suggests that every legal ruling could be construed as representing an element of public policy. However, in *Loucks v Standard Oil* [346], the Court of Appeals of New York suggested that

> "*...a statute or a decision would announce a state public policy only if it addresses some fundamental principle of justice, deeply rooted traditions, or good morals*".

Arguably, the precise nature of 'public policy' as defined by the Supreme Court of India reflects the view of both academic scholarship[347] and other judicial opinions, such as the United States Supreme Court in *United Paperworkers Int'l Union*[348] [at 2] where it was stated that public policy must be

> "*...well defined and dominant, and is to be ascertained by reference to the laws and legal precedents, and not from general considerations of supposed public interests*".

2.5.3 Fluidity in public policy

The inconclusiveness of these different decision points means that what is extolled as public policy can change as the process of its formation and enactment evolves over a period of time.

The literature[349] suggests that the aim of *Public policy (and/or public order)*is to attain desired goals deemed to be in the societies' best interests. It is therefore impacted by a wide range of economic, social and political factors[350]. Public policy is inherently a social process which aims to shape societal

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[346] Loucks v Standard Oil - 224 N.Y. 99, 111, 120 N.E. 198 (1918).
[347] Randall, B. 1992. The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards. *Brigham Young University Law Review*, 1992 (3), 759-784; Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164..
[348] United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 30 (1987).
[349] Smith, B. 2003. *Public Policy and Public Participation: Engaging Citizens and the Community in the Development of Public Policy*. Halifax: Health Canada, Atlantic Region, September; Torjman, S. 2005. What is policy. Caledon Institute of Social Policy, Ontario, Canada.
[350] Burstein, P. 2018. The Determinants of Public Policy: What Matters and How Much. *Policy Studies Journal*; DOI: https://onlinelibrary.wiley.com/doi/full/10.1111/psj.12243, In Press.

values and aspirations. Public policy can also be described as an organised but not necessarily integrated range of actions, proposals, precepts and positions that affects the public. It encompasses a system of, for example, regulatory and other measures and priorities concerning topics promulgated by governments on behalf of the society they govern. Public policy is therefore not static: It can change in response to a myriad of reasons, which may include changes in demographics. Public policy therefore is expected to address societal concerns and aspirations. It must, however, be noted that not all public policies are necessarily promulgated for the benefit of the entire society. As Torjman[351] claims, on some occasions, 'public policy' is promulgated to promote targeted interest of specific groups. However, on such occasions, such policies – while targeting specific interest groups – are expected to be of benefit to the wider society.

2.5.4 Types of public policy

Drawing from Torjman[352], the author posits that public policy can be classified into four major types. The *first* type, referred to as '*administrative public policy'*, focuses on legislative provisions that exist to provide the necessary governance to societal work. From an administrative perspective, public policy represents the programmes by which officers of the state attempt to govern and exercise control over the public[353]. Heckathorn and Maser[354] claims that this is only possible if public policy draws upon the contractual-based perspective which is focused on "… *unanticipated physical and social conditions*" (p. 1104). It also involves administrative processes related to, for example, the collation of statistical information that can be utilised to support policy-related decision making. Ghodoosi[355] identifies various

[351] Torjman, S. 2005. *What is policy*. Caledon Institute of Social Policy, Ontario, Canada.
[352] Torjman, S. 2005. *What is policy*. Caledon Institute of Social Policy, Ontario, Canada.
[353] Goodin, R., Rein, M. and Moran, M. 2011. *Overview of public policy: The public and its policies*. En R. Goodin (ed.), The Oxford handbook of political science (pp. 885-918). Oxford, Inglaterra: Oxford University Press.
[354] Heckathorn, D. and Maser, S. 1990. *The contractual architecture of public policy: A critical reconstruction of Lowi's typology*. Journal of Politics, 52(4), 1101-1123.
[355] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.

types of '*administrative public policy'*. These include (i) policies that limit the incorporation of foreign laws into national jurisprudence – this flows from society being unwilling to assent to foreign values, (ii) policies that forbid the enforcement of judgements from foreign jurisdictions and (iii) public policy as rules that ensure that personal rights to contract do not supersede societal values.

The *second* type can be referred to as '*structural public policy'*; it focuses more on the internal process of policy introduction, formation and implementation, and seeks to explore where policy originates from and the framework of organisational structures that underpins the development of policy. At the heart of this form of public policy is stakeholder collaboration.

Public policy can also be classified based on response (as the *third* type). Here, the interest is on whether policy is introduced, formed and enacted in response to, for example, a crisis or whether such policy is introduced, formed and enacted consciously and intentionally. Heckathorn and Maser[356] advance a contractual perspective of the '*response-based form of public policy*' that is based on transaction cost economics. This contractual perspective argues that, for example, the predominant role of the government (in this case, the judiciary) is to economise costs associated with business transactions. Thus, intervention in disputes will only tend to arise on the occasion that individuals become unable to resolve private disputes.

The fourth type of public policy classification deals with '*time frame'*, the major interest being to understand whether a particular policy is currently or not currently within the scope of public interest.

[356] Heckathorn, D. and Maser, S. 1990. The contractual architecture of public policy: A critical reconstruction of Lowi's typology. *Journal of Politics*, 52(4), 1101-1123.

In addition to the four types of public policy gleaned from Torjman[357], public policy can also be explored from a number of other perspectives including an economic and political perspective[358], the sociological perspective[359] and a legal perspective[360].

2.5.5 The administrative sciences and legal perspectives of public policy

The *administrative sciences* perspective emerges from the idea that policy is in its own right as an arm of socio-political action capable of altering critical elements of administration[361]. The administrative sciences perspective serves a number of functions, providing insights into the role of politics, and articulating how processes, routines[362] and organisational structures[363] serve to guide policy decisions made by government[364]. Drawing from Metcalfe[365], the focus of the administrative sciences perspective is on the managerial capacity required to ensure appropriate performance. Policy from an administrative

[357] Torjman, S. 2005. *What is policy*. Caledon Institute of Social Policy, Ontario, Canada.
[358] Sharkansky, I. and Hofferbert, R. 1969. Dimensions of state politics, economics, and public policy. *American Political Science Review*, 63(3), 867-879; Chetty, R. 2015. Behavioral economics and public policy: A pragmatic perspective. *American Economic Review*, 105(5), 1-33.
[359] Burstein, P. 2018. The Determinants of Public Policy: What Matters and How Much. *Policy Studies Journal*; DOI: https://onlinelibrary.wiley.com/doi/full/10.1111/psj.12243, In Press.
[360] Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21; Plunkett, J. 2016. Principle and Policy in Private Law Reasoning. *Cambridge Law Journal*, 75(2), 366-397; Howlett, M. 2018. Moving policy implementation theory forward: A multiple streams/critical juncture approach. *Public Policy and Administration*, p.0952076718775791.
[361] Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332.
[362] Nigam, A., Huising, R. and Golden, B. 2016. Explaining the selection of routines for change during organizational search. *Administrative Science Quarterly*, 61(4), 551-583.
[363] Edmondson, A., Bohmer, R. and Pisano, G. 2001. Disrupted routines: Team learning and new technology implementation in hospitals. *Administrative Science Quarterly*, 46(4), 685-716.
[364] Ostrom, V. and Ostrom, E. 1971. Public choice: A different approach to the study of public administration. *Public Administration Review*, 31(2), 203-216; Henderson, K. 1981. From comparative public administration to comparative public policy. *International Review of Administrative Sciences*, 47(4), 356-364; Jones, B. 2003. Bounded rationality and political science: Lessons from public administration and public policy. *Journal of Public Administration Research and Theory*, 13(4), 395-412; Sindane, A. 2004. Public administration versus public management: parallels, divergences, convergences and who benefits?. *International Review of Administrative Sciences*, 70(4), 665-672; Wright, B. 2011. Public administration as an interdisciplinary field: Assessing its relationship with the fields of law, management, and political science. *Public Administration Review*, 71(1), 96-101; Fimyar, O. 2014. What is policy? In search of frameworks and definitions for non-Western contexts. *Educate*, 14(3), 6-21; Ball, S. 2015. What is policy? 21 years later: Reflections on the possibilities of policy research. *Discourse: Studies in the Cultural Politics of Education*, 36(3), 306-313.
[365] Metcalfe, L. 2001. *Law, Conservatism and Innovation: A management perspective*, In George, A., Machado, P., and Ziller, J. (eds) European University Institute Working Paper LAW No. 2001/12 Law and Public Management: Starting to Talk Workshop held at the European University Institute (Part I), pp. 5-10.

sciences perspective has the ability to be disruptive leading to the need for routines to be altered and resources to be redistributed[366]. This can lead to a need for

> "…*negotiation, contestation or struggle between different groups who may lie outside the formal machinery of official policy-making*" (Ozga[367]; p. 113).

Managing the negotiation required within the myriad of multi-layered and complex relationships that characterises public policy requires constant shaping of management capabilities in a manner that allows for assumptions and interests to be re-evaluated and repositioned as need be. In particular, it also requires stakeholder engagement between government and non-state actors.

Of also interest to public policy is its *legal* perspective[368]. This perspective is particularly interested in understanding how socially framed policy, which are in reality discretionary, can be validated utilising instruments of the law[369]. The legal perspective of policy serves the primary function of providing the necessary foundations (legitimization) of public policy implementation[370]. In effect, it is the legal perspective that provides the authoritative context for policy implementation. The legal

[366] Moynihan, D. and Soss, J. 2014. Policy feedback and the politics of administration. *Public Administration Review*, 74(3), 320-332.
[367] Ozga, J. 2000. *Policy Research in Educational Settings: Contested Terrain*. Buckingham: Open University Press.
[368] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219; Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102; Stigler, G. 1972. The law and economics of public policy: A plea to the scholars. *Journal of Legal Studies*, 1(1), 1-12; Howlett, M. 2018. Moving policy implementation theory forward: A multiple streams/critical juncture approach. *Public Policy and Administration*, p.0952076718775791.
[369] Kreis, A. and Christensen, R. 2013. Law and public policy. *Policy Studies Journal*, 41, S38-S52.
[370] Kravchuk, R. 1991. Public administration and the rule of law. *International Journal of Public Administration*, 14(3), 265-301; Rosenbloom, D. 1991. Public administration and law: An introduction. *International Journal of Public Administration*, 14(3), 251-263; Ibanez, A. 2001. *European Administrative Law and Public Management: Mutual Exclusion or Mutual Learning?* In George, A., Machado, P., and Ziller, J. (eds) European University Institute Working Paper LAW No. 2001/12 Law and Public Management: Starting to Talk Workshop held at the European University Institute (Part I), pp. 15-34; Metcalfe, L. 2001. *Law, Conservatism and Innovation: A management perspective*, In George, A., Machado, P., and Ziller, J. (eds) European University Institute Working Paper LAW No. 2001/12 Law and Public Management: Starting to Talk Workshop held at the European University Institute (Part I), pp. 5-10; Strauss, P. 2001. *Public Management From a lawyers Perspective: A view from the United States*, In George, A., Machado, P., and Ziller, J. (eds) European University Institute Working Paper LAW No. 2001/12 Law and Public Management: Starting to Talk Workshop held at the European University Institute (Part I), pp. 11-14; Lynn, L. 2009. Restoring the rule of law to public administration: What Frank Goodnow got right and Leonard White didn't. *Public Administration Review*, 69(5), 803-813; Wright, B. 2011. Public administration as an interdisciplinary field: Assessing its relationship with the fields of law, management, and political science. *Public Administration Review*, 71(1), 96-101.

perspective of policy also provides the necessary governance framework and analytical tools required to effectively articulate individual the relationship, but also how these relationships can be regulated and enforced [371]. A further governance role of the legal perspective as relates to governance is that they serve to provide the necessary checks against unfettered public sector discretion and self-serving interests (or non-critical deference to the government by public sector managers[372]. They also not only provide the necessary framework for accountability (clarity in terms of responsibilities and roles) of the public service bureaucracy[373], but also ensure that such frameworks are legitimately established and can be enforced to ensure effective functioning of the society. In effect, drawing from Ibanez[374], the legal perspective ensures that the key regulatory and procedural principles of the rule of law guides policy development and implementation. In sum, Metcalfe[375] claims that the focus of the legal perspective is on the legitimization of power and the articulation of legal authority (in effect, the mandate to manage).

2.5.6 The law and public policy

A core aspect of public policy is the law. The law is important to public policy because for public policy to be enforceable, it must have legal force[376]. Thus, it is of no surprise that scholars such as Kain and

[371] Chan, H. and Rosenbloom, D. 1994. Legal control of public administration: a principal-agent perspective. *International Review of Administrative Sciences*, 60(4), 559-574

[372] Lynn, L. 2009. Restoring the rule of law to public administration: What Frank Goodnow got right and Leonard White didn't. *Public Administration Review*, 69(5), 803-813; McConnell, A. 2018. Hidden agendas: shining a light on the dark side of public policy. *Journal of European Public Policy*, 25(12), 1739-1758.

[373] Chan, H. and Rosenbloom, D. 1994. Legal control of public administration: a principal-agent perspective. *International Review of Administrative Sciences*, 60(4), 559-574; Hood, C. 1995. Emerging issues in public administration. *Public Administration*, 73(1), 165-183.

[374] Ibanez, A. 2001. *European Administrative Law and Public Management: Mutual Exclusion or Mutual Learning?* In George, A., Machado, P., and Ziller, J. (eds) European University Institute Working Paper LAW No. 2001/12 Law and Public Management: Starting to Talk Workshop held at the European University Institute (Part I), pp. 15-34.

[375] Metcalfe, L. 2001. *Law, Conservatism and Innovation: A management perspective*, In George, A., Machado, P., and Ziller, J. (eds) European University Institute Working Paper LAW No. 2001/12 Law and Public Management: Starting to Talk Workshop held at the European University Institute (Part I), pp. 5-10.

[376] Goodin, R., Rein, M. and Moran, M. 2011. *Overview of public policy: The public and its policies*. En R. Goodin (ed.), The Oxford handbook of political science (pp. 885-918). Oxford, Inglaterra: Oxford University Press.

Yoshida[377] claim that *public policy* remains one of the most arcane concepts in the laws. The literature[378] suggests that the concept of public policy is to be found in virtually all areas of law including public law, private law (more specifically, contract law) and real estate. Along the same lines, Ghodoosi[379] suggests that the term 'public policy' exists in practically all legal systems making it a well-recognised legal concept in numerous legal jurisdictions. For example, a search by Ghodoosi[380] in 2015 in *Westlaw*, an online legal research service for lawyers and legal professionals in the United States, found more than 7000 case references to public policy. We conducted a similar search on BAILII, the British and Irish Legal Information Institute website and found 8902 case references to '*Public policy'*. The pervasive nature of the public policy concept has led to scholars suggesting that the concept is not only an indication of judicial deference "…*towards a rational system of justice*" (Waddams[381], p. 404), but that it fundamentally is "…*the one principle rule at the foundation of the whole system of [English] law*" (Knight[382], p. 219). However, although public policy is pervasive in judicial decision making, the literature[383] does suggest it has its limit in terms of applicability; that limit is that it is the law that eventually leads to public policy. Any considerations of public policy in judicial decision making cannot be done in a manner that contradicts national legislative provisions. In this context, policy only serves to support the courts in their efforts to interpret such legislative provisions.

[377] Kain, B. and Yoshida, D. 2007. *The Doctrine of Public Policy in Canadian Contract Law*. Annual Review of Civil Litigation. In Todd L. Archibald and Randall Scott Echlin (eds), Annual Review of Civil Litigation, Pub. Toronto: Thomson Reuters, 1-47.

[378] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219; Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Tirona, S. 1941. What is Public Policy. *Philippine Law Journal*, 21, 158 – 170; Paulsen, M. and Sovern, M. 1956. Public Policy" in the Conflict of Laws. *Columbia Law Review*, 56(7), 969-1016; Stigler, G. 1972. The law and economics of public policy: A plea to the scholars. *Journal of Legal Studies*, 1(1), 1-120.

[379] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.

[380] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.

[381] Waddams, S. 2005. *The Law of Contracts*. 5th ed. Toronto: Canada Law Book Inc.

[382] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219.

[383] Daynard, R. 1970. Use of Social Policy in Judicial Decision-Making. *Cornell Law Review*, 56 (6), 919-950; Chayes, A., 1976. The role of the judge in public law litigation. *Harvard Law Review*, 89 (7), 1281-1316; Abella, R. 1988. Public Policy and the Judicial Role. *McGill Law Journal*, 34 (4), 1021-1035; Handler, A. 1999. Judging Public Policy. Rutgers Law Journal, 31 (2), 301-324; Aldisert, R. 2009. Judicial Declaration of Public Policy. *Journal of Appellate Practice and Process*, 10 (2), 229-246.

According to Winfield[384], public policy has influenced the law in three ways. Firstly, it is observed that legal rules which emerged from public policy considerations now require legislation before they can be altered. Secondly, it is observed that legal rules exist which are dependent on relatively debateable public policy, and cases in these area still require adjudication. Third, it is observed that there are legal rules flowing from public policy which are still subject to changes.

Public policy also plays a major role in arbitration. More specifically, according to Nuss[385] and Hollander[386] there are two aspects of public policy in law as relates to arbitration. The first relates to process and procedures while the second relates to the substantive essence of the law itself. In terms of process and procedures, the emphasis is on whether the arbitration proceedings is/was undertaken in a manner consistent with fundamental and well recognised rule of natural justice and fairness (such as the right to be heard).

2.5.7 Public policy based approach to judicial decision making

We had for example earlier stated (drawing from Mason[387]), that a policy-based approach to judicial decision making can be equated to public policy. However, Baron Pollock notes in *Egerton v Earl of Brownlow*[388] [at 149/150]

> "*…that all matter relating to the public welfare - all acts of the legislature or the executive - must be decided and determined upon their own merits only*".

[384] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[385] Nuss, J. 2013. Public Policy Invoked as a Ground For Contesting the Enforcement of an Arbitral Award, or for Seeking its Annulment. *Dispute Resolution International*, 7, 119-133.
[386] Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50
[387] Mason, A. 2001. *Policy Considerations.* In A. Blackshield, A., Coper, M., and Williams, G. (eds.), The Oxford Companion to the High Court of Australia (Melbourne, Oxford), 536.
[388] Egerton v Earl of Brownlow [1853] 4 HLC 484.

In effect, public policy considerations in judicial decision making had to be determined on their merits alone. While public policy is pervasive in judicial decision making (Wedel *et al*.[389], p. 31), it can often play a direct or an indirect role in shaping judicial decision making in that its incorporation in judicial decision making can be unconscious or conscious[390]. However, as demonstrated in the seminal case of *Egerton v Earl of Brownlow*[391], the incorporation of public policy considerations in judicial decision making has historically been regarded as controversial and associated with considerable debate due to the lack of clarity on the true meaning of public policy; thus, Furmston's[392] claim that public policy has been "*clouded by much confusion of thought*" (p. 405).

Winfield's[393] case analysis of *Egerton v Earl of Brownlow*[394] suggests, for example, that the 16 judges involved in this case developed various and remarkably differing connotations of public policy. These ranged from its representation as a basic guide for establishing the objective of particular laws to an abstraction of judicial legislation that was independent of both individual circumstances and also of time. More specifically, the courts [at 123] stated the following:

> "*Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for*

[389] Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. Annals of the *American Academy of Political and Social Science*, 600(1), 30-51.
[390] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[391] Egerton v Earl of Brownlow [1853] 4 HLC 484.
[392] Furmston, M. 2001. *Cheshire, Fifoot & Funnston's Law of Contract*, 14th ed. London: Butterworths.
[393] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[394] Egerton v Earl of Brownlow [1853] 4 HLC 484.

it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from the text writers of acknowledged authority, and upon principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become part of the established law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise".

This observation is based on the variability around the concept of public policy. The literature[395] posits that this variability stems from the reality that a particular set of actions in one country, society or location may be construed to be against public policy, while in another country, society or location; such an action will be construed as in line with public policy. Thus, the case law is repellent with the courts arriving at what appears to be different conclusions when public policy is drawn upon as a basis of judicial ruling.

Bockstiegel[396](p. 123) suggests that

"*Public policy is a relative concept dependent on the judgment of the legal community and that public policy can change through time*".

[395] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219; Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Tirona, S. 1941. What is Public Policy. *Philippine Law Journal*, 21, 158 – 170; Paulsen, M. and Sovern, M. 1956. Public Policy" in the Conflict of Laws. *Columbia Law Review*, 56(7), 969-1016; Stigler, G. 1972. The law and economics of public policy: A plea to the scholars. *Journal of Legal Studies*, 1(1), 1-120.
[396] Bockstiegel, K. 2008. Public Policy as a Limit to Arbitration and its Enforcement. *Dispute Resolution International*, 2 (1), 123-132.

At the same time, Wakim[397] states that

> "*…the construction of public policy by national courts turns on legal interpretation as much as it does on political, sociological, and even religious matters*".

Yelpaala[398] also suggests that the difficulty with public policy considerations is that, while on the facts a specific case may not appear to have implications for a specific public policy; it may actually indirectly impact upon a number of contradictory policies. In fact, according to Hodges[399], the basic principle of the public policy exception is an observation that

> "*...the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements*" (p. 101).

The choice of public policy to be considered in a particular dispute can in itself be a decision based on individual preferences[400]. It is for these reasons that some legal practitioners have expressed reservations over taking public policy into consideration in judicial decisions, except under well-defined and limited conditions. This view is also shared in judicial decisions; thus, in *Richardson v Mellish*[401], the English courts found that

[397] Wakim, M. 2008. Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East. *New York International Law Review,* 21(1), 1-51.
[398] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law,* 2 (2), 379-494.
[399] Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164.
[400] Coffin, F. 1988 Judicial balancing: the protean scales of justice. *New York University Law Review,* 63 (1), 16-42.
[401] Richardson v Mellish, [18241 130 Eng. Rep. 294.

"*…the courts of Westminster-hall…have gone much further than they were warranted in going in questions of policy*".

Judicial attempts to instil clarity on the concept of public policy can be best understood from a historical perspective of the case law in the first instance because the determination of what is public policy is as stipulated in *Building Serv. Employees International Union Local 262 v Gazzam*[402] where the United States Supreme Court stated that

"*…the public policy of any state is to be found in its constitution, acts of the legislature and decisions of its courts…primarily, it is for the lawmakers to determine the public policy of the state*".

This position was also reiterated in *W.R. Grace & Co. v Local Union 759, International Union of United Rubber Workers*[403] where it was stated that determination of what was public policy was

"*…ultimately one for resolution by the courts*".

Relying on judicial determination of the public policy concept is reasonable. According to Sharma[404], this is because

"*…principle of judicial legislation or interpretation [are] founded on the current needs of the community*" (p. 147).

[402] Building Serv Employees Int'l Union Local 262 v Gazzam, 339 U.S. 532, 537-38 (1950).
[403] W.R. Grace & Co. v Local Union 759, International Union of United Rubber Workers (1983) at 461 U.S. 757, 766 (1983).
[404] Sharma, S. 2009. Public Policy under the Indian Arbitration Act-In Defence of the Indian Supreme Court's Judgment in ONGC v Saw Pipes. *Journal of International Arbitration*, 26 (1), 133-148.

This position appears to be reiterated in by the United States Supreme Court in *Hurd v Hodge*[405] where it was opined that

> "*...the public policy of the United States [is] . . . manifested in the Constitution, treaties, federal statutes, and applicable legal precedents*".

Similarly, in *United States v Trans-Missouri Freight Association*[406], a case dealing with a dispute over an illegal agreement, commenting on policy reasons for determining that there is no remedy at law where contractual agreements are illegal, the United States Supreme Court suggested that

> "*…when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts*".

As a concept recognised in the laws, historical commentaries by Veeder[407]; Knight,[408] and Winfield[409] make earlier references by the English courts to concepts such as '*equity of public necessity'* and '*public policy'* in cases such as *Mitchel v Reynolds*[410] which was decided in 1711 and had focused on deciding on the true meaning of reasonable restraints of trade. Other historical cases that appear to have addressed public policy issues include the *Duke of Norfolk's Case, Jones v Randall*[411], *Gilbert v Sykes*[412], *Cole v*

[405] Hurd v Hodge, 334 U.S. 24, 34-35 (1948).
[406] United States v Trans-Missouri Freight Association, 166 U.S. 290 (1897) [1].
[407] Veeder, V. 1901. A Century of English Judicature II. Green Bag, 13 (2), 75-87.
[408] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219.
[409] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[410] 1 PWms 181, 24 ER 347, 45 Digest (Repl) 395, [1558-1774] All ER Rep 26.
[411] Jones v Randall, i Cowp. 37, 39 (1774).
[412] Gilbert v Sykes, 16 East 150 (1812).

Gower[413], *Kircudbright v Kircudbright*[414], *Kingston v Pierepont*[415], and *Lawton v Lawton*[416]. However, Tirona[417], Gualtieri[418] and Brachtenbach[419] suggested that the impact of public policy considerations on judicial decision making was perhaps first explored in considerable detail in the seminal case of *Egerton v Earl of Brownlow*[420] with the courts finding that public policy focused on the 'spirit of the law' and not necessarily on the actual law itself.

2.5.8 When is public policy engaged?

In effect, public policy considerations do take effect when the dispute between two or more parties draws upon legislative provisions, legal principles and/or supporting case law (precedent) which has the potential to go beyond dispensing justice between the disputing parties by invariably impacting, interfering with or compromising the interests of the wider public.

Thus, according to the literature[421], the question of public policy flows from society's increasing reliance on the courts and judiciary to resolve an increasing number of social challenges and questions. These may relate to questions of free speech, religious rights, civil liberties, and freedom of association. The danger of course is that, irrespective of the author's earlier justifications on why the judiciary was best placed to articulate precisely *what* public policy meant, one might still contend that the court's perception of public policy is restrictive since it was based on their own perception of what actually

[413] Cole v Gower, 6 East 109, no (1805).
[414] Kircudbright v Kircudbright, 8 Ves. 31 (1802).
[415] Kingston v Pierepont, i Vem. s (1681).
[416] Lawton v Lawton, 3 Atk. 12, 13, i j , 16 (1743).
[417] Tirona, S. 1941. What is Public Policy. *Philippine Law Journal*, 21, 158 - 170.
[418] Gualtieri, R. 1952. The Legal Concept of Public Order. *Revue Juridique Themis*, 2 (3), 155-162.
[419] Brachtenbach, R. 1985. Public Policy in Judicial Decisions. *Gonzaga Law Review*, 21 (1), 1-20.
[420] Egerton v Earl of Brownlow [1853] 4 HLC 484.
[421] Sterk, S. 1980. Enforceability of agreements to arbitrate: an examination of the public policy defense. *Cardozo Law Review*, 2 (3), 481-544; Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164; Ogden, J. 2002. Do Public Policy Grounds Still Exist for Vacating Arbitration Awards. *Hofstra Labor & Employment Law Journal*, 20 (1), 87-116; Hirschl, R. 2006. The new constitutionalism and the judicialization of pure politics worldwide. *Fordham Law Review*, 75 (2), 721-754; Drummonds, H. 2012. The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush. *Willamette Law Review*, 49 (1), 105-164.

constitutes '*Public policy*'. This assertion is made taking into consideration the literature which has questioned the role of the judiciary in public policy making. Ghodoosi[422](p. 7), for example, claims that similar questions were raised in *Egerton v Earl of Brownlow*[423]. In addition, there are some scholars – notably Sterk[424] and Stempel[425] and more recently Wasserfallen[426] – who suggest that deferring to the judiciary on the articulation of public policy allows a much wider scope of judicial policy making and discretion, and by implication, wider powers to make law. Also, because '*Public policy*' considerations go beyond a "…*rule by the law alone*" (Harvey[427], p. 493), the notion of 'public policy' is problematic in that it can be used to defeat substantive obligations and rights owned by particular disputants[428]. This can lead to injustice; hence, the dicta by the courts in *Janson v Driefontein Mines*[429] [at 491] where (the then) Lord Halsbury stated:

> "*I deny that any court can invent a new head of public policy*".

In effect, the courts denied the possibility that judicial decisions could be influenced by a change in legal principles flowing from public policy. One could then argue that the danger of incorporating public policy considerations to challenge and vacate arbitration awards is that it raises connotations of obligations and rights being superseded by considerations that fall outside the remit of legal merits[430].

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[422] Ghodoosi, F. 2016. Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts. *Lewis & Clark Law Review*, 20, 237-280.
[423] Egerton v Earl of Brownlow [1853] 4 HLC 484.
[424] Sterk, S. 1980. Enforceability of agreements to arbitrate: an examination of the public policy defense. *Cardozo Law Review*, 2 (3), 481-544.
[425] Stempel, J. 1990. Pitfalls of Public Policy: The Case of Arbitration Agreements. *St. Mary's Law Journal*, 22 (2), 259-356.
[426] Wasserfallen, F. 2010. The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union. *Journal of European Public Policy*, 17(8), 1128-1146.
[427] Harvey, W. 1961. The Rule of Law in Historical Perspective. *Michigan Law Review*, 59, 487-500.
[428] Yelpaala, K. 1989. Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California. *Journal of Transnational Law*, 2 (2), 379-494.
[429] Janson v Driefontein Mines, Ltd. [1902] AC. 484.
[430] Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164; Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736; Ghodoosi, F. 2016. Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts. *Lewis & Clark Law Review*, 20, 237-280...

In fact, a much wider implication is that incorporating *Public Policy and 'Order Public' (public order)* considerations into legal reasoning can – according to Ghodoosi[431] – actually constrain the development of the law. As Winfield[432] suggests, these differing views of public policy ultimately created considerable uncertainties as relates to the assertion of legal rights.

As relates to purpose, some jurors have – as in the case of *Fletcher v Sondes*[433] – expressed a view that public policy considerations should guide judicial decision making where the law was less than clear while others have opined that the legislature should be left to fill the gap where the law was less than clear. The main argument here as stated in *Denny v Denny*[434] is that the judiciary should focus on interpreting the law as against proffering and articulating public policy. However, the thread that appears to be running right through academic commentary is that while the willingness of the courts to make judicial rulings based on public policy considerations remains controversial, the courts are still obliged and (perhaps more so than ever) bound to take public policy into consideration in their judicial rulings. Thus, irrespective of the claims of Lord Haldane the eminent jurist in *Rodriguez v Speyer Bros*[435] that public policy considerations involved "*the opinions of men of the world, as distinguished from opinions based on legal learning*", it is the judiciary that is best placed to objectively articulate public values, which have been determined by the society.

According to Winfield[436] the root of academic commentary on public policy considerations in judicial decision making can be traced to the works of Littleton[437] where, in numerous paragraphs, it was postulated that laws cannot be said to exist if such laws were:

(i) inconsistent with other well-recognised laws, and

[431] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.
[432] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.
[433] Fletcher v Sondes, 3 Bing. 50I (1826).
[434] Denny v Denny [1919] 1 K B. 583 [at 587].
[435] Rodriguez v Speyer Bros. [1919] AC.
[436] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review,* 42(1), 76-102.
[437] Littleton, T. 1854. *Littleton's Tenures*.Pub. London: Day (late Hastings)

(ii) such laws appeared illogical, even to someone not trained in or conversant with the laws.

Underpinning public policy considerations are considerations of the public good[438], in other words, matters which are either repugnant to the society or against any reasonable maxim related to the rule of law. It then transpires that public policy considerations should focus on ensuring that legally protected rights and expectations of and obligations to the public are not interfered with or compromised. The premise for this, as emphasised by the United States Supreme Court in *Trist v Child* [439],is that

> "*No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments*".

Thus, public policy considerations represent a means by which the government enacts its social contract with the society within its jurisdiction[440]. Noting all the above, Winfield[441] suggests that, while it may be challenging to articulate a general understanding of judicial attitude to public policy, it is safe to suggest that judicial attitude gleaned from seminal cases suggests some sort of overall cautious acceptance of the concept of public policy although, as the courts stated [at 507] in *Janson v Driefontein Mines*, public policy remains

> "*...a very unstable and dangerous foundation on which to build until made safe by judicial decision*".

[438] Lascoumes, P. and Le Gales, P. 2007. Introduction: Understanding public policy through its instruments - From the nature of instruments to the sociology of public policy instrumentation. *Governance*, 20(1), 1-21.
[439] Trist v Child, 88 U.S. 441, 450 (1874)
[440] Heckathorn, D. and Maser, S. 1990. The contractual architecture of public policy: A critical reconstruction of Lowi's typology. *Journal of Politics*, 52(4), 1101-1123.
[441] Winfield, P. 1928. Public Policy in the English Common Law. *Harvard Law Review*, 42(1), 76-102.

2.6 Public Policy and 'Order Public' (public order)

Public order is a concept "*embodied by statute in the rules of civil law countries*" (Murphy[442], p. 599) meaning that the concept of public order is primarily applicable to civil law jurisdictions. In these jurisdictions, Wedel et al[443] claims that it refers to "*…police or, more precisely, to organize and regulate the internal order of*". Public order implies "*rules from which parties have no freedom to derogate*" (Kessedjian[444], p. 26). Conversely, '*Public policy'* is a concept primarily applicable to common law jurisdictions[445]. In common law jurisdictions, *public policy* tends to be construed explicitly as fundamental societal values (Hollander[446]) while in civil law jurisdictions, *public order* tended to be construed from a more legalistic perspective based on economic, political and moral regulation. The essence of the public order concept is to provide various stakeholders through judicial pronouncements guidance (through regulation) on how to balance between the rights of the individual and the need to protect and maintain "*national attitudes on morality and political order*" (Murphy[447], p. 599).

As had been noted earlier in the introductory chapter of the thesis, UAE law[448] makes reference to *public order* as against *public policy*. From the extant literature reviewed, the author is not aware at present of any conclusive and universally accepted academic or judicial definition of public *order*[449]. In

[442] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.
[443] Wedel, J., Shore, C., Feldman, G. and Lathrop, S. 2005. Toward an anthropology of public policy. *Annals of the American Academy of Political and Social Science*, 600(1), pp.30-51.
[444] Kessedjian, C. 2007. Public Order in European Law. *Erasmus Law Review*, 1 (1), 25-36.
[445] Enonchong, N. 1993. Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon. *African Journal of International and Comparative Law*, 5 (3), 503-524.
[446] Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50
[447] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.
[448] Article 3 of UAE Federal Law 11 of 1992
[449] The literature reviewed included Bewes, W. 1921. Public Order (Ordre Public). Law Quarterly Review, 37 (3), 315-322; Bernier, J. 1929. Droit Public and Ordre Public. *Transactions of the Grotius Society*, 15, 83-92; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Scott, W. 1940. Private Agreements and Public Order. *Canadian Bar Review*, 18 (3), 159-171; Gualtieri, R. 1952. The Legal Concept of Public Order. *Revue Juridique Themis*, 2 (3), 155-162; Forde, M. 1980. The Ordre Public Exception and Adjudicative Jurisdiction Conventions. *International and Comparative Law Quarterl*y, 29 (2 & 3), 259-273; Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616; Enonchong, N. 1993. Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon. *African Journal of International and Comparative Law*, 5 (3), 503-524; Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. American Journal of Comparative Law, 53 (3), 653-678; Kessedjian, C. 2007. Public Order in European Law. *Erasmus Law Review*, 1 (1), 25-36.

fact, from all indications, *'Public order'* as also in the case of '*Public policy'*[450] is a dynamic and constantly evolving concept. More specifically, in scholarly circles and judicial rulings such as *Richardson v Mellish*[451] , the *public order* concept has been conceptualised as vague. Lloyd[452] had noted for example that "*The limits of external public order are very uncertain, linked as that conception is with such indeterminate notions as the maintenance of social order or public security*" (p.78). Xiao and Huo[453](p. 676) note for example that "…*the wording related to the doctrine sometimes appearing in terms of 'sovereignty, security and social and public interests' and sometimes in terms of 'socio-public interests"*. Similar observations were made earlier by Enonchong[454].In the case of public order, any expectations that a conclusive and universally accepted academic or judicial definition should be possible is unrealistic because what is construed as public order is largely dependent on the facts of each case under consideration by the courts[455].

The non-existence of a conclusive and universally accepted academic or judicial definition of public *order* does not mean that there have been no academic or judicial attempts to define the concept. Bernier[456] had defined public order (*ordre public*) as "… *the collection of conditions-legislative, departmental, and judicial-which assure, by the normal and regular functioning of the national institutions, the state of affairs necessary to the life, to the progress, and to the prosperity of the country and of its inhabitants*" (p. 84). Gualtieri[457](p. 162) stated that "*the concept of public order is a concept comprised of an inner degree of permanency (the notion of public order) and of a peripheral expression of variable relativistic rules (the laws of public order) established for the maintenance of society by*

[450] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616; Gibson, C. 2008. Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law. *Penn State Law Review*, 113 (4), 1227-1268.
[451] Richardson v Mellish, [1824-34] All ER Rep. 258 (1824)
[452] Lloyd, D., 1953. *Public Policy. A Comparative Study in English and French Law*. Pub. Londres.
[453] Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law*, 53 (3), 653-678.
[454] Enonchong, N. 1993. Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon. *African Journal of International and Comparative Law*, 5 (3), 503-524.
[455] Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67.
[456] Bernier, J. 1929. Droit Public and Ordre Public. *Transactions of the Grotius Society*, 15, 83-92.
[457] Gualtieri, R. 1952. The Legal Concept of Public Order. *Revue Juridique Themis*, 2 (3), 155-162.

preserving the public interest". Thus, according to Bewes[458], the focus of public order is on articulating "*…national thought on customs deemed as essential to the existence of the society*" (p. 318). According to Murphy[459], public order refers to positive laws of the state which allow the judiciary limited discretion to nullify private agreements which are deemed as threats to social order or public security. Xiao and Huo[460] claim that public order will generally be implored when the enforcement of a private contract or arbitral award will offend the economic and social interests of the state, or the state's conception of good morals and values and/or principles of justice.

From a practical standpoint, most courts in civil jurisdictions (where the concept is more widely applied) are unlikely to be burdened with detailed guidance on what constitutes public order (apart from a legislative statement as in the case with Article 3 of UAE Federal Law 11 of 1992). Arguably, this concept of '*Public order'* suggests laws focused on accomplishing matters of societal/public interest – whether they be of social, political, economic, moral or religious nature[461]. More specifically, the basis of public order is collective life of which matters such as marriage, human liberty, inviolability of private property and social affiliation lie at its core[462].

Despite the fact that public order has its origins in statute (in civil law jurisdictions) while public policy is largely a derivative of the common law (in common law jurisdictions)[463], both public order and public policy share largely similar ethos. Both focus on actions deemed contrary to public order or public policy that will not be recognised or enforced by national courts. Both concepts represent corrective actions of final resort[464] or what Juenger[465] has referred to as a "*safety valve*" (p. 157). More specifically,

[458] Bewes, W. 1921. Public Order (Ordre Public). *Law Quarterly Review*, 37 (3), 315-322.
[459] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.
[460] Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law*, 53 (3), 653-678.
[461] Bewes, W. 1921. Public Order (Ordre Public). *Law Quarterly Review*, 37 (3), 315-322.
[462] Bernier, J. 1929. Droit Public and Ordre Public. *Transactions of the Grotius Society*, 15, 83-92.
[463] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.
[464] Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law*, 53 (3), 653-678.
[465] Juenger, F. 1993. *Choice of law and multistate justice*, Pub. Springer Netherlands (1st Edition)

Murphy[466] points to both concepts being focused on determining what is "*unacceptable because of its moral attitude, its threat to social order, or some other fundamental defect rendering it unworthy of enforcement in a civilized country*" (p. 615). This has led a number of scholars and commentators including Angell and Feulner[467], Dimitrakopoulos[468], Kantaria[469], Almutawa and Maniruzzaman[470] and Kanakri and Massey[471] to conclude that the notion of public *order* can be equated to public *policy*[472]. This position is supported by judicial findings. Herein, Privy Council in *Evanturel v Evanturel*[473]opined that

> "*…their Lordships will treat 'public order' as identical with what in this country is termed 'public policy', although the latter is perhaps the larger of the two terms*" (p.26).

However, it is important to note that while the two concepts have been construed in various literatures, some scholars opine that both concepts are actually not exact equivalents[474]. In fact, Murphy[475] claims that the differences are not in their substantive elements, but in terms of their structure. Both Husserl[476] and Xiao and Huo[477] point to public order being a broader concept that extends beyond the scope of

[466] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.
[467] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.
[468] Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403.
[469] Kantaria, S. 2012. The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law. *International Arbitration Law Review*, 15 (2), 61 – 66.
[470] Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.
[471] Kanakri, C., and Massey, A. 2016. *Comparison of UAE and DIFC-seated arbitrations*. Global Arbitration News. Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18.
[472] These authors recognise that the two concepts are not completely synonymous.
[473] Evanturel v Evanturel (1874) The Law Reports (Privy Council Appeals) 6 PC 1
[474] Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67; Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616; Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50.
[475] Murphy, K. 1981. The Traditional View of Public Policy and Ordre Public in Private International Law, *Georgia Journal of International and Comparative Law*, 11 (3), 591-616.
[476] Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67.
[477] Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law*, 53 (3), 653-678.

public policy while Scott[478] and Gualtieri[479] suggest that this extension is specific to public order's consideration of morality[480]. Herein, morality focuses on "*rights, obligations, responsibilities and conduct which are valid according to the principles of morality*" (Scott[481], p. 140). However, this claim does not appear to be supported by other literatures; Knight[482], for example, points to early conceptualisation of public policy being related to actions deemed "*immoral or illegal*" (p. 209). Another difference between public order and public policy is the perspective that public policy focuses on practical cases as against the focus of public order on abstract notions of order, peace and security[483]. Most notably, although Kessedjian[484] points out that it is unclear as to whether public order and public policy differ in either content or method, she suggests that a major difference between the two concepts is that while public order generally seeks to intervene *prior* to the legal analysis is undertaken, public policy only appears to intervene *afterwards.* Thus, drawing from the literature on 'public policy' and also that of 'public order', the difference between the two concepts are summarised in the below Table 2 (below).

Table 2: Difference between 'Public policy' and 'Public order'

Attribute	***Public policy***	***Public order***
Focus	Value based	Regulatory based
How it is interpreted	Driven by the courts interpretation of what the society desires.	Driven by the interest of the state to regulate the society based on its interpretation of what is necessary for social harmony.

[478] Scott, W. 1940. Private Agreements and Public Order. *Canadian Bar Review*, 18 (3), 159-171.
[479] Gualtieri, R. 1952. The Legal Concept of Public Order. *Revue Juridique Themis*, 2 (3), 155-162.
[480] We are reminded that in *Evanturel* v *Evanturel* (1874), the Privy Council found that public policy was a much broader concept than public order [*Evanturel* v *Evanturel* (1874) The Law Reports (Privy Council Appeals) 6 PC 1]
[481] Scott, W. 1940. Private Agreements and Public Order. *Canadian Bar Review*, 18 (3), 159-171.
[482] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219.
[483] Gualtieri, R. 1952. The Legal Concept of Public Order. *Revue Juridique Themis*, 2 (3), 155-162.
[484] Kessedjian, C. 2007. Public Order in European Law. *Erasmus Law Review*, 1 (1), 25-36.

Morality (disputed)	Does not encompass morality. However, some literatures[485] do suggest that morality is part of public policy considerations.	Encompasses morality.
Broadness (disputed)	In *Evanturel* v *Evanturel*[486], the Privy Council found that public policy was a much broader concept than public order.	Both Husserl[487] and Xiao and Huo [488]claim that public order is a much broader concept than public policy.
Nature	Focuses on practical cases.	Focus on abstract notions of order, peace and security.

There are two perspectives of public order[489]. One perspective (seen to be akin to public policy in common law jurisdictions) suggests that the courts will not enforce private contractual agreements which are drawn up for individual interests (and which stem from principles of freedom to contract) and are likely to (i) be construed as pernicious or repugnant or (ii) likely to override public interest, social norms, customs and institutions and also the organization and functioning of the state[490]. Neither will the courts seek to enforce private contractual agreements that are likely to override or offend public interest. Conversely, the other perspective (the civil law perspective) suggests that certain legislative provisions cannot be subjugated if doing so will offend fundamental societal norms[491].

As Bewes[492] further notes, one characteristic of the public order notion is that its breach is generally not tolerated by the state for the simple reason that the state construes the maintenance of public order as one of its core functions. As Xiao and Huo[493] claim, when public order is invoked, there

[485] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219.
[486] *Evanturel* v *Evanturel* (1874) The Law Reports (Privy Council Appeals) 6 PC 1
[487] Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67.
[488] Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law*, 53 (3), 653-678.
[489] Forde, M. 1980. The Ordre Public Exception and Adjudicative Jurisdiction Conventions. *International and Comparative Law Quarterly*, 29 (2 & 3), 259-273.
[490] Bernier, J. 1929. Droit Public and Ordre Public. *Transactions of the Grotius Society*, 15, 83-92.
[491] Bewes, W. 1921. Public Order (Ordre Public). Law Quarterly Review, 37 (3), 315-322; Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67.
[492] Bewes, W. 1921. Public Order (Ordre Public). *Law Quarterly Review*, 37 (3), 315-322.
[493] Xiao, Y and Huo, Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law*, 53 (3), 653-678.

is an appearance that the state deemed it necessary to maintain at all costs some moral, legal (justice), economic or social principle.

2.7 Public policy and Arbitrability

2.7.1 Arbitrability

The literature suggests that there are five principles likely to form the basis of arbitration proceedings. These are (i) party autonomy which is underlined by the *Freedom of contract* theory[494], (ii) the principle of separability which allows for arbitration clauses to be deemed separated from the main contact[495], (iii) the principle of non-judicial intervention in arbitration, (iv) the Kompetenz-Kompetenz principle[496] which holds that arbitrators and arbitral tribunals are generally deemed competent to determine their own jurisdiction and (v) the principle of arbitrability. Overall, although the literature on the first four of these factors appears largely well established[497], Idornigie[498] claims that arbitrability seems to have remained a fluid concept because there is no uniformity in terms of how arbitrability is construed in different jurisdictions.

The literature[499] suggests that arbitrability raises the question of whether a specific dispute or controversy from the perspective of domestic national law can be settled exclusively via arbitration or

[494] Pound, R. 1909. Liberty of Contract, *Yale Law Journal*, 18 (7), 454-487; Feinman, J., 1989. The significance of contract theory. *University of Cincinnati Law Review*, 58 (4), 1283-1318; Schwartz, A. and Scott, R. 2003. Contract Theory and the Limits of Contract Law. *Yale Law Journal*, 113 (3), 541-620; Zemach, E. and Ben-Zvi, O. 2017. Contract Theory and the Limits of Reason. *Tulsa Law Review*, 52 (2), 167-212.
[495] Al-Sherman, B. 2016. The Separability of Arbitration Agreement in the Emirati Law, *Arbitration International*, 32 (2), 313-330; Czernich, D. 2018. The Theory of Separability in Austrian Arbitration Law: Is It on Stable Pillars. *Arbitration International*, 34 (3), 463-468.
[496] Dulic, A. 2002. First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle. *Pepperdine Dispute Resolution Law Journal*, 2 (1), 77–97.
[497] Idornigie, P. 2004. The Principle of Arbitrability in Nigeria Revisited. *Journal of International Arbitration*, 21(3), 279-288.
[498] Idornigie, P. 2004. The Principle of Arbitrability in Nigeria Revisited. *Journal of International Arbitration*, 21(3), 279-288.
[499] Kirry, A. 1996. Arbitrability: Current Trends in Europe. *Arbitration International*, 12 (4), 373–390;

exclusively via court based litigation[500]. There are two ambits to this question[501]. First is the question of whether the specific subject matter of a dispute or controversy can according to applicable national law[502], public policy[503] or other political and economic policies[504] be subject to arbitration. This is referred to as 'objective arbitrability'[505] . According to Brekoulakis[506] national law may articulate the scope of arbitrability either through legislation articulated in non-arbitration laws. For example, national legislation may articulate matters deemed to be within the exclusive jurisdiction of national courts. Alternatively, it may through specific arbitration legislation, set out the scope of arbitration.

While we do not have a widely accepted theory of arbitrability[507] nor an exclusive list of arbitrable and non-arbitrable activities[508], it will appear reasonable to assert that the arbitrability will be premised on the basis that the specific dispute does not engage upon matters seen to be within the exclusive sovereign function of the state[509]. Thus, disputes that involve national foreign policy, the enactment of legislation, the administration of justice and national economic policy generally are matters connected to the sovereignty of states and will therefore be inarbitrable. In Muslim countries, this list may be extended to certain banking and commercial activities which may be deemed as incompatible with the principles of *Islamic Sharia*. The second ambit to the arbitrability question enquires as to whether specific individuals, groups or entities are competent or do have the capacity to enter into an

[500] Bantekas, I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law*, 27 (1), 193-224.
[501] Kirry, A. 1996. Arbitrability: Current Trends in Europe. *Arbitration International*, 12 (4), 373–390; Kozubovska, B. 2014. Trends in Arbitrability. *IALS Student Law Review*, 1 (2), 20-27; Hanotiau, B. 2014. The Law Applicable to Arbitrability. *Singapore Academy of Law Journal*, 26 (2014), 874-885; Cozac, S. 2018. Arbitrability of Disputes and Jurisdiction of Arbitrators. *Revista de Stiinte Juridice*, 1(2018), 231-237.
[502] Rogers, A. 1992. Arbitrability. *Asia Pacific Law Review*, 1 (2), 1-17; St. Germain, M. 2005. The Arbitrability of Arbitrability. *Journal of Dispute Resolution*, 2005 (2), 523-538; Hanotiau, B. 2014. The Law Applicable to Arbitrability. *Singapore Academy of Law Journal*, 26 (2014), 874-885.
[503] Fazilatfar, H. 2012. Transnational Public Policy: Does It Function from Arbitrability to Enforcement. *City University of Hong Kong Law Review*, 3 (2), 289-314.
[504] Sinjakli, A. 2001. Commercial Agency Disputes and Related Court Judgments in the UAE. *International Business Lawyer*, 29 (10), 458-461.
[505] Hanotiau, B. 2014. The Law Applicable to Arbitrability. *Singapore Academy of Law Journal*, 26 (2014), 874-885.
[506] Brekoulakis, S. 2009a. *Law applicable to arbitrability: Revisiting the revisited lex fori*. In Mistelis, L. and Brekoulakis, S. (eds), Arbitrability: International and Comparative Perspectives, Pub. International Arbitration Law Library, pp. 19-46.
[507] Bantekas, I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law*, 27 (1), 193-224
[508] Bantekas, I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law*, 27 (1), 193-224
[509] Stempel, J. 1990-1991. Better Approach to Arbitrability. *Tulane Law Review*, 65 (6), 1377-1460.

arbitration agreements and/or participate in arbitration proceedings[510]. This is referred to as 'subjective arbitrability'. In some countries, national legislation either limits or forbids organs of the state from signing contracts with arbitration clauses or actually participating in arbitration proceedings.

It is important to highlight that some literatures have explored arbitrability much broader than what we have identified as either objective arbitrability or subjective arbitrability. For example, some literatures[511] have also identified arbitrability to be dependent upon validity of agreements. Thus, arbitrability will be dependent upon either the existence of a valid agreement to arbitrate. In other instances, scholars have explored arbitrabilitity from a rights perspective[512]. Here, it is opined that arbitration is unsuitable to resolve disputes that may impact on third party rights (that is the rights of parties who are not consensual parties to the arbitration agreement). Cozac[513] has identified eight different means by which arbitral panels/arbitratord may determine arbitrability. These includes the (i) national laws of either the disputants or one of the disputants, (ii) general laws of contract, (iii) national laws applicable at the seat of arbitration, (iv) national laws deemed to be able to competently adjudicate the dispute if not identified within the contracts arbitration clause, (v) national laws applicable where the award is to be enforced, (vi) laws specified in the arbitration agreement, (vii) a combination of the laws identified between (i) and (vi), and (viii) fundamental principles of laws. As arbitrability is a concept that regularly appears in public policy discourse[514], it is important to briefly explore the nature of the relationship between the two concepts.

[510] St. Germain, M. 2005. The Arbitrability of Arbitrability. *Journal of Dispute Resolution*, 2005 (2), 523-538; Fazilatfar, H. 2012. Transnational Public Policy: Does It Function from Arbitrability to Enforcement. *City University of Hong Kong Law Review*, 3 (2), 289-314.
[511] Hanotiau, B. and Caprasse, O. 2008. Arbitrability, Due Process, and Public Policy under Article V of the New York Convention-Belgian and French Perspectives. *Journal of International Arbitration*, 25 (6), 721-742; Badah, S. 2016. Public Policy and Non-Arbitrability in Kuwait. *Asian International Arbitration Journal*, 12 (2), 137-180; Mante, J., 2016. Arbitrability and public policy: an African perspective. *Arbitration International*, 33(2), 275-294.
[512] Brekoulakis, S. 2009b. *On arbitrability: Persisting misconceptions and new areas of concern*. In Mistelis, L. and Brekoulakis, S. (eds), Arbitrability: International and Comparative Perspectives, Pub. International Arbitration Law Library, pp. 19-46
[513] Cozac, S. 2018. Arbitrability of Disputes and Jurisdiction of Arbitrators. *Revista de Stiinte Juridice*, 1(2018), 231-237.
[514] See for example, Curtin, K.1997. Redefining Public Policy in International Arbitration of Mandatory National Laws. *Defence Counsel Journal*, 64, 272-284; Kozubovska, B. 2014. Trends in Arbitrability. *IALS Student Law Review*, 1 (2), 20-27.

2.7.2 'Public policy' and 'Arbitrability'

We had in the previous section not only explored the concept of *public policy*, but also highlighted that UAE law does not make reference to *public policy*, instead, it makes reference to *public order*. Based on this, we had chosen to utilise *Public policy (and/or public order)* as an all encompassing terminology that conveniently captured the essence of both *public policy* and *public order*. At the risk of sounding repetitive, we had identified *Public policy (and/or public order)* as characterised ambiguity[515] and a lack of clarity[516]. It was in essence a dynamic, constantly evolving and intractable concept.

Arbitration is now being utilised as a dispute resolution mechanism on matters, which engages public policy[517]. In fact, as Brekoulakis[518] has observed, arbitrators are now regularly examining and applying public policy provisions in arbitration hearings across a number of countries such as the United States and the United Kingdom. Thus, arbitration is being utilised in public-private disputes[519]. It is also being utilised in diverse areas such as disputes related to tax and securities transactions[520] and also family disputes[521], both traditionally characterised as matters of public policy. In terms of tax and securities disputes, we see public policy engaged on occasions where a substantial number of treaties and trade agreements (which have a direct impact on regulatory sovereignty) utilise arbitration as their preferred

[515] Paulsen, M. and Sovern, M. 1956. Public Policy in the Conflict of Laws. *Columbia Law Review*, 56 (7), 969-1016; Gibson, C. 2008. Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law. *Penn State Law Review*, 113 (4), 1227-1268; Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50.
[516] Paulsen, M. and Sovern, M. 1956. Public Policy in the Conflict of Laws. *Columbia Law Review*, 56 (7), 969-1016; Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50.
[517] Carbonneau, T. and Janson, F. 1994. Cartesian logic and frontier politics: French and American concepts of arbitrability. *Tulane Journal of International and Comparative Law*, 2 (1), 193-222; Kennett, W. 2016. It's arbitration, but not as we know it: Reflections on family law dispute resolution. *International Journal of Law, Policy and the Family*, 30(1), 1-31.
[518] Brekoulakis, S. 2009b. *On arbitrability: Persisting misconceptions and new areas of concern*. In Mistelis, L. and Brekoulakis, S. (eds), Arbitrability: International and Comparative Perspectives, Pub. International Arbitration Law Library, pp. 19-46.
[519] Brekoulakis, S. and Devaney, M. 2017. Public-Private Arbitration and the Public Interest under English Law. *Modern Law Review*, 80(1), 22-56.
[520] Brekoulakis, S. and Devaney, M. 2017. Public-Private Arbitration and the Public Interest under English Law. *Modern Law Review*, 80(1), 22-56; Brekoulakis, S. 2019. The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration. *Oxford Journal of Legal Studies*, 39(1), 124-150.
[521] Kessler, J., Koritzinsky, A., and Schlissel, S. 1997. Why Arbitrate Family Law Matters. *Journal of the American Academy of Matrimonial Lawyers*, 14 (2), 333-352; Kennett, W., 2016. It's arbitration, but not as we know it: Reflections on family law dispute resolution. *International Journal of Law, Policy and the Family*, 30(1), 1-31.

dispute resolution mechanism. Similarly, arbitration is now in a number of countries being utilised to settle family disputes[522]. More specifically, the courts in this case accepted that arbitration may be utilized in family disputes to resolve matters touching upon (i) property (ii) financial settlement and support and (iii) child custody disputes. It will appear therefore that the view that "*Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction*" (Anusornsena[523]; p.9) may no longer hold true.

Despite the fact that Redfern and Hunter[524] suggests that "*The concept of arbitrability, properly so called, relates to public policy*…." (p. 137), implying that both concepts are closely connected[525], they are not synonymous[526], but at best, complementary to each other[527]. A dispute that engages public policy does not necessarily mean that it is not arbitrable. Vice versa, the fact that a dispute is non arbitrable does not necessarily mean that this is so for public policy reasons. Brekoulakis[528] posits that with developments in arbitration law, as relates to arbitrability, the question of public policy is now largely irrelevant.

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[522] Kessler, J., Koritzinsky, A., and Schlissel, S. 1997. Why Arbitrate Family Law Matters. *Journal of the American Academy of Matrimonial Lawyers*, 14 (2), 333-352; Shachar, A. 2008. Privatizing diversity: A cautionary tale from religious arbitration in family law. *Theoretical Inquiries in Law*, 9(2), 573-607; Kennett, W., 2016. It's arbitration, but not as we know it: Reflections on family law dispute resolution. *International Journal of Law, Policy and the Family*, 30(1), 1-31; Ministry of Justice (UK). 2019. *Family Procedure Rules*, https://www.justice.gov.uk/courts/procedure-rules/family, accessed 11/09/19. It is also important to note that in the seminal case of *Dick* v *Dick* [210 Mich. App. 576 (1995)] heard in the Michigan Court of Appeals, the US courts approved the use of arbitration to resolve matters in contested divorce disputes.

[523] Anusornsena, V. 2012. *Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration : the United States, Europe, Africa, Middle East and Asia*. Unpublished SJD Thesis, Golden Gate University School of Law, https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1033&context=theses, accessed 11/09/19.

[524] Redfern, A. and Hunter, M. 1991. Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 2nd ed.

[525] Bantekas, I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law*, 27 (1), 193-224; Indeed, the close connection between arbitrability and public policy is shown in the New York Convention (1958) where arbitrability (Article V(2)(a)) and public policy (Article V(2)(b)) are both identified as defences that can be raised against the enforcement of an arbitration award.

[526] Fazilatfar, H. 2012. Transnational Public Policy: Does It Function from Arbitrability to Enforcement. *City University of Hong Kong Law Review*, 3 (2), 289-314; Kozubovska, B. 2014. Trends in Arbitrability. *IALS Student Law Review*, 1 (2), 20-27.

[527] Bantekas, I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law*, 27 (1), 193-224.

[528] Brekoulakis, S. 2009b. *On arbitrability: Persisting misconceptions and new areas of concern*. In Mistelis, L. and Brekoulakis, S. (eds), Arbitrability: International and Comparative Perspectives, Pub. International Arbitration Law Library, pp. 19-46.

2.7.3 'Public policy' and 'Arbitrability' in the UAE

Under UAE jurisprudence, matters relating to *Public policy (and/or public order)* are not subject to arbitration[529]. They thus fall under the exclusive jurisdiction of the UAE federal courts ('Courts of the UAE'). These matters are extensive. Article 3 of UAE Federal Law 11 of 1992 states that public policy is "…*to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic sharia*". The literature suggests that public policy matters in the UAE apply to a wide range of matters that engages either (i) freedom of trade, (ii) ownership and (iii) the free movement of services and goods[530].

Article 733 of Federal Law (11) of 1992, the Civil Procedure Code (CPC), lists a number of transactions are deemed to be against UAE public order and therefore not arbitrable. These includes (i) the use of a debt to cancel another debt (ii) the reduction of a deferred debt through accelerated repayment. Other matters of public policy in the UAE include investment solicitation[531]; so do agreements for the sale and purchase of off-plan property, land sale and other construction/real-estate contracts, mortgages and foreclosures[532]. In fact, in the UAE, any ownership of real estate[533] is deemed a matter of public policy. Included in matters that are deemed public policy and therefore not arbitrable in the UAE are also matters relating to family law (marriage, divorce, child custody), inheritance and personal status (Angell and Feulner[534], 1988) and also procedural issues in dispute resolution[535]. In *(1)*

[529] Sinjakli, A. 2001. Commercial Agency Disputes and Related Court Judgments in the UAE. *International Business Lawyer*, 29 (10), 458-461.
[530] Ayad, M. 2013. The Doctrines of Public Policy and Competence in Investor-State Arbitration, *Arab Law Quarterly*, 27, 297-341; Kanakri, C., and Massey, A. 2016. *Comparison of UAE and DIFC-seated arbitrations*. Global Arbitration News, Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18; Al Sakkaf, F. 2017. Arbitration Award vs Public Order, *Court Uncourt*, 4, 9-11.
[531] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.
[532] Feulner, G. and Khan, A. 1986. Dispute Resolution in the United Arab Emirates. *Arab Law Quarterly*, 1 (3), 312-318.
[533] Mayew, G. and Morris, M. 2014. Enforcement of Foreign Arbitration Awards in the United Arab Emirates. *Defense Counsel Journal*, 81, 279-287.
[534] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.
[535] See the discussions in (1) Egan (2) Eggert v (1) Eava (2) Efa [2013] DIFC ARB 002 heard by the Judicial Authority of the Dubai International Financial Centre: Court of First Instance on 29 July 2015. This discussion extended to the matter of

Egan (2) Eggert v (1) Eava (2) Efa[536] it was stated that, although each *emirate* within the UAE could freely regulate its judiciary, the extent of the jurisdiction of the various courts within each emirate within the UAE were matters of public policy. Matters relating to registered commercial agency agreements which are covered by Federal Law No. 18 of 1981 Concerning Organizing Trade Agencies are seen to be of public policy matters (although, under the purview of the Ministry of Economy[537]). So are matters relating to labour disputes which, under Federal Law No. 8 of 1980 Regulating Labour Relations (as amended), remain the purview of the Ministry of Labour. However, again, as in the case of the Chambers of Commerce, which have no powers to enforce arbitration awards, the Ministry of Labour can only refer disputes to the courts if an employer disagrees with its findings following arbitration. In addition to this list are applicable foreign judgements. The UAE courts will not enforce foreign judgements as a matter of public policy without a confirmatory/ ratifying judgement from the UAE federal courts[538]. This was confirmed in a number of cases in the UAE including *Abu Dhabi Court of Cassation Judgment 487/18 of 1997, Dubai Court of First Instance Judgment 489 of 2012*. And more recently, (1) Fiske (2) Firmin v Firuzeh[539] heard by the Dubai International Financial Centre, Court of First Instance.

The view from the literature is also that public policy in the UAE is construed much more broadly than by some other countries which adhere to the civil law tradition such as France, Switzerland and Germany[540]. In fact, Almutawa and Maniruzzaman[541] opine that the UAE federal courts ('Courts of the UAE') can (and have) construed public policy to encompass almost any matter. In the past, these matters

language during dispute resolution. One view debated was the extent to which language of dispute resolution will not raise a matter of public order unless a disputant can demonstrate that the use of a specific language during the proceedings prevented that disputant from understanding the proceedings.

[536] (1) Egan (2) Eggert v (1) Eava (2) Efa [2013] DIFC ARB 002

[537] Sinjakli, A. 2001. Commercial Agency Disputes and Related Court Judgments in the UAE. *International Business Lawyer*, 29 (10), 458-461.

[538] Blanke, G. 2015. Ruling of Dubai Court of First Instance Calls into Question UAE Courts' Recent Acquis on International Enforcement of Foreign Arbitral Awards. *Arab Law Quarterly*, 29(1), 56-75.

[539] (1) Fiske (2) Firmin v Firuzeh [2014] [Dubai International Financial Centre, Court of First Instance, 006/2017] ARB 001

[540] Nuss, J. 2013. Public Policy Invoked as a Ground For Contesting the Enforcement of an Arbitral Award, or for Seeking its Annulment. *Dispute Resolution International*, 7, 119-133; Hollander, P. 2016. Report on the Public Policy Exception in the New York Convention. *Dispute Resolution International*, 10, 35-50.

[541] Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.

have ranged from arbitration awards flowing from gambling debts[542] to arbitration awards that involve the transfer of property[543]. To summate, we opine that the intractable nature of public policy in the UAE combined with the lack of an exclusive list of arbitrable and non-arbitrable activities is likely to lead to considerable practical difficulties in terms of arbitration practice within the UAE.

At this point in the thesis, the author has completed a review of the literature on 'what is policy?', policy and public opinion, types and forms of policy, policy and the law and public policy. In the chapter that follows, the specific context of domestic commercial arbitration is explored.

[542] Arab, H. 2002. Execution of Foreign Judgments in the UAE. *Arab Law Quarterly*, 17(2), 208-211.
[543] Husserl, G. 1938. Public policy and public order. *Virginia Law Review*, 25 (1), 37-67.

CHAPTER 3: ARBITRATION

3.1 What is arbitration?

According to Sturges[544] arbitration is a quasi-legal process that involves parties to a dispute submitting their claims to hearing by one or more individuals of their choice to decide on a matter or matters of controversy between parties.

Arbitration is defined under Article 1 of the UAE Federal Law No. 6 of 2018 as

> "*A procedure regulated by law in which a dispute between one or more parties is submitted, by agreement of the parties, to an arbitral tribunal which makes a binding decision on the dispute*[545]".

As a process, literature generally recognises that arbitration represents an attractive alternative and substitute to court-based litigation[546]. For example, studies by Kritzer and Anderson[547] found that when compared to litigation, arbitration[548] in terms of mode of dispute termination, outperformed litigation with approximately 50% of arbitration cases terminated, compared to 5% of cases before the courts.

[544] Sturges, W. 1960. Arbitration--What is it. *New York University Law Review*,35, 1031 – 1047

[545] Unofficial translation obtained under license by the author from two UAE law firms; *Baker & McKenzie Habib Al Mulla* and *Al Tamimi & Co.*

[546] Lippman, M. 1972. Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives. *Maine Law Review*, 24 (2), 215-242; Kritzer, H. and Anderson, J. 1983. The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts. *Justice System Journal*, 8 (1), 6-19; Faure, J. 1985. The Arbitration Alternative: Its Time Has Come. *Montana Law Review*, 46 (1), p.199-216; Edwards, H. 1986. Alternative dispute resolution: Panacea or anathema?. *Harvard Law Review*, 99(3), 668-684; Mustill, M. 1989. Arbitration: history and background. *Journal of International Arbitration*, 6 (2), 43-56; Nalmark, R. and Keer, S. 2002. International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Business People-A Forced-Rank Analysis. *International Business Law Journal*, 30 (5), 203-210; Drahozal, C. and Hylton, K. 2003. The economics of litigation and arbitration: An application to franchise contracts. *Journal of Legal Studies*, 32(2), 549-584; Mulcahy, L. 2013. The Collective Interest in Private Dispute Resolution. *Oxford Journal of Legal Studies*, 33 (1), 59-80; Karamanian, S. 2017. Courts and arbitration: Reconciling the public with the private. *Arbitration Law Review*, 9(1), 65-82; Dayton, B. and Takahashi, S. 2018. Arbitration Developments in the United Arab Emirates. *Asian Dispute Review*, 2018(1), 30-37.

[547] Kritzer, H. and Anderson, J. 1983. The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts. *Justice System Journal*, 8 (1), 6-19.

[548] In this case, arbitration conducted under the auspices of the American Arbitration Association (AAA).

Delikat and Kleiner[549] found that arbitration took about a third of the time less than court litigation did (arbitration was 33% quicker than litigation); arbitration proceedings took around 16.5 months to conclude while comparative litigation proceedings took around 25 months to conclude. Arbitration is, however, a process which owes its existence to contract in that, beyond the limited confines of court-mandated arbitration[550], arbitration proceedings theoretically only require the consent of parties as articulated in contractual provisions[551]. Although framed as an alternative and substitute to court-based litigation, generally not all controversies are subject to arbitration. For matters to be subject to arbitration, they must be *arbitrable*.

3.2 Arbitrability and the problems of jurisdictional concurrency

Taking all these into consideration, the question of whether a dispute is arbitrable has consequences for the *'Jurisdiction of court'* in that it may be invoked by any disputant either partially or in a comprehensive manner before the courts as a ground for *vacatur*. A partial jurisdiction challenge will usually relate to a challenge to the authority of the arbitrator to decide on a specific claim, counterclaim and/or matter. It may also relate to a challenge to the arbitrators' competency to hear matters pertaining to a specific party. Conversely, a comprehensive jurisdiction challenge focuses on challenges to the arbitrators competency to hear all matters of the dispute. Hanotiau and Caprasse[552] herein posits that at any point during arbitration proceedings that the question of jurisdiction arises before the courts, *Public*

[549] Delikat, M. and Kleiner, M. 2003. An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?. *Dispute Resolution Journal*, 58(4), 56-58 & 85.
[550] Hensler, D. 1990. Court-Ordered Arbitration: An Alternative View. *University of Chicago Legal Forum*, 1990, 399-420; Orenstein, M. 1999. Mandatory arbitration: Alive and well or withering on the vine?. *Dispute Resolution Journal*, 54(3), 57-59 & 80-87; Feingold, R., 2002. Mandatory arbitration: What process is due. *Harvard Journal on Legislation*, 39 (2), 281-298; Weston, M. 2015. The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse. *Southern California Law Review*, 89 (1), 103-142. .
[551] Bonn, R. 1972. Arbitration: an alternative system for handling contract related disputes. *Administrative Science Quarterly*, 17 (2), 254-264; Morgan, E. 1986. Contract theory and the sources of rights: An approach to the arbitrability question. *Southern California Law Review*, 60 (4), 1059-1082; Lipsky, D. and Seeber, R. 2003. The social contract and dispute resolution: The transformation of the social contract in the United States workplace and the emergence of new strategies of dispute resolution. *International Employment Relations Review*, 9(2), 87-109; Gelinas, F. 2016. Arbitration as transnational governance by contract. *Transnational Legal Theory*, 7(2), 181-198..
[552] Hanotiau, B. and Caprasse, O. 2008. Arbitrability, Due Process, and Public Policy under Article V of the New York Convention-Belgian and French Perspectives. *Journal of International Arbitration*, 25 (6), 721-742

policy (and/or public order) questions will generally arise. Drawing from choice of law studies[553] , we can opine that *Public policy (and/or public order)* represents a way that a court can side step applying laws or enforcing decisions that it deems contrary to some general principles.

The question of jurisdiction usually arises where two or more courts are deemed to be *simultaneously* empowered by either law, treaty, convention or other mechanisms to adjudicate a specific dispute[554] or to be able to directly bind the disputants (or property) or subject matter of the dispute[555]. Most countries have arbitration laws (inclusive of case laws) that articulate (i) the extent of the primary or sole jurisdiction of its national courts – for example to make determination of matters of *Public policy (and/or public order)* (ii) the extent of the primary or sole jurisdiction of arbitrators/arbitral panels –for example on deciding on procedural matters such as the time/schedule for the hearing, the language of the proceedings and making factual findings (ii) the extent of the concurrent or *simultaneous* jurisdiction of both the courts and the arbitrators/arbitral panels –for example the granting of interim relief [556]and (iv) the extent of the courts supervisory powers over arbitrators/arbitral panels. One area here may relate to a national court (which has no such restrictions[557]) intervening where an arbitrator/arbitral panel for example grants interim relief that touches upon the rights of parties who are either not subject or have not subjected themselves to the jurisdiction of the arbitrator/arbitral panel. Alternatively, an arbitrator/arbitral panel may make an application to a court to compel a third party to produce specific documents.

The problem with the existence of concurrent or simultaneous jurisdiction is that disputants may engage in 'forum shopping' – in order words, they seek to have the dispute adjudicated in a court, either

[553] Paulsen, M. and Sovern, M. 1956. Public Policy in the Conflict of Laws. *Columbia Law Review*,56 (7), 969-1016.
[554] Shelton, T.W., 1928. Concurrent Jurisdiction--Its Necessity and Its Dangers. *Virginia Law Review*, 15, 137-153; Yntema, H. and Jaffin, G., 1931. Preliminary Analysis of Concurrent Jurisdiction Plus Credit Nemo Tota Quam Cordus in Urbe." Cum Sit Tam Pauper, Quo Modo?" Caecus Amat. Martial. *University of Pennsylvania Law Review and American Law Register*, 79(7), 869-919.
[555] Hazard, G. 1965. A General Theory of State-Court Jurisdiction. *Supreme Court Review*, 165, 241-288.
[556] Main, H. 2005. Court Ordered Interim Relief: Developments in English Arbitration Law. *Journal of International Arbitration*, 22 (6), 505-510.
[557] McLachlan, C. 1987. Transnational Applications of Mareva Injunctions and Anton Piller Orders. *The International and Comparative Law Quarterly*, 36 (3), 669-679.

before an arbitrator/arbitral panel or court that they opine is most likely to rule in their favour[558]. As the number of dispute adjudicating and resolution bodies courts have increased (for example, in the UAE free zones such as the DIFC and DIAC now offer quick business dispute resolution services), there is an increasing possibility that different dispute resolution bodies (including national courts) will have *simultaneous* or parallel jurisdiction over a number of disputes. Arguably, such *simultaneousity* may provide a number of benefits such as increased co-operation. For example, in the UAE, a Joint Judicial Committee has been formed between the DIFC Courts and the Dubai Courts to jointly hear matters deemed to entail concurrent jurisdiction between the two parallel courts. *Simultaneousity* may *also* serve as a point of conflict between parallel courts. Onyema[559] opines that jurisdictional matters can be particularly exacerbated where such *simultaneousity* is deemed to exist between national courts and arbitrators/arbitral panels on matters of substantive national law. This can be particularly challenging where both courts are bound by substantively different laws. This situation creates a '*Public policy'* interest in that if parallel courts are bound by substantively different (and perhaps conflicting laws), then there is a potential that the different courts will arrive at substantively different, inconsistent (and perhaps conflicting), decisions on the same matter. Alternatively, as in the case of the UAE federal courts ('Courts of the UAE') on one side and the 'Free Zone' courts such as the DIFC and the DIAC, there is also a potential that the parallel courts will differ in terms of how they interpret either the same or similar legal norms. The problem is that courts are highly unlikely to enforce decisions that it itself would not have reached if faced with the same dispute.

[558] Granger, C. 1974. The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation. *Ottawa Law Review*, 6 (2), 416-437; Field, M. 2013. Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation. *Indiana Law Journal*, 88 (2), 611-668.
[559] Onyema, E. 2017. *The Jurisdictional Tensions between Domestic Courts and Arbitral Tribunals'. International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series no. 19 (Kluwer 2017). Kluwer Law International, pp 481-500.

3.3 Categories of public policy and the functions of arbitration vacatur

Literature conceptualises the application of public policy to arbitration into two main types. The first relates to policy emergent from legal rulings. Here, the literature suggests that arbitration awards should only be challenged and vacated when they can be shown to be in direct conflict with the law or where it can be shown that they manifestly disregard the law leading to the possibility that the law will be violated[560]. Those who support this application of public policy to arbitration suggest that judicial interference with arbitration awards creates uncertainty and poses a risk to finality of disputes (see for example Vestal[561]). The alternative view suggested by Meltzer[562] and Randall[563] suggests that arbitration awards should only be challenged and vacated when it can be shown to be, in any way, in conflict with public policy. The arguments which persist here are that enforcement of public policy is a core role of the courts since a failure of the court to enforce public policy will mean that the interest of the public remains unprotected.

A review of the literature suggests that, as relates to private law and arbitration, there are three categories of such public policy[564]. These are (i) public morality, (ii) public interest, and (iii) public

[560] Edwards, H. 1988. Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain. *Chicago-Kent Law Review*, 64 (1), 3-36; Mouser, D. 1990. Analysis of the Public Policy Exception After Paperworkers v Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator. *Industrial Relations Law Journal*, 12 (1), 89-152; Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164.

[561] Vestal, A. 1965. Preclusion / Res Judicata Variables: Nature of the Controversy. *Washington University Law Review*, 1965 (2), 158-192.

[562] Meltzer, B. 1988. After the Labor Arbitration Award: The Public Policy Defense. *Industrial Relations Law Journal*, 10,241-257.

[563] Randall, B. 1992. The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards. *Brigham Young University Law Review*, 1992 (3), 759-784.

[564] Antoine, T. 1977. Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny. *Michigan Law Review*, 75 (5 & 6), 1137-1161; Meltzer, B. 1988. After the Labor Arbitration Award: The Public Policy Defense. *Industrial Relations Law Journal*, 10,241-257; Parker, J. 1988. Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception. *The Labor Lawyer*, 4(4), 683-714; Galbraith, B. 1993. Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the Manifest Disregard of the Law Standard. *Indiana Law Review*, 27 (1), 241-266; Hayford, S. 1995. Law in Disarray: Judicial Standards for Vacatur of Commerical Arbitration Awards. *Georgia Law Review*, 30 (3), 731-842; Hayford, S. 1997. New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur. *George Washington Law Review*, 66 (3), 443-507; Glanstein, D. 2000. A Hail Mary Pass: Public Policy Review of Arbitration Awards. *Ohio State Journal on Dispute Resolution*, 16 (2), 297-334; Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164; Arfazadeh, H. 2002. In the shadow of the unruly horse: international arbitration and the public policy exception. *American Review of International Arbitration*, 13, 43-197; Sullivan, K. 2002. The Problems of Permitting Expanded Judicial Review

security. The focus of public morality is on the need to safeguard the mutual identities and relationships that exist, shape and maintains the society's principles relating to how it distinguishes between behaviour, which is deemed good or bad.

The public interest on the other hand focuses on ensuring that when citizens arrive at agreements in private, those agreements are not at a lower threshold in terms of expectations of similar agreements if made publicly. This position exists because while arbitration represents a method of private dispute resolution, the awards that flow from its proceedings can sometimes impact upon the public who are arguably not party to a proceeding which is held outside the auspices of a publicly accountable court system[565]. Finally, the public security category focuses on ensuring that the society is protected from threats likely to negatively impact on its well-being and peaceful existence. Arguably, beyond these considerations, because parties to an arbitration have privately contracted to the powers of an arbitrator, regardless of the court's views on the public merits of the case, an arbitrator's award will not be vacated on public policy grounds.

Drawing from Ghodoosi[566], it is safe to suggest that arbitration *vacatur* on the basis of public policy serves three major functions. Firstly, *vacatur* on public policy grounds serves to protect contracting parties to a dispute where one disputant has obtained a judgement which is "*a general mischief to the public*" (Knight[567], p. 208), or in effect violates dominant, established and clearly defined public policy (see *United Paperworkers Int'l Union*[568]).

of Arbitration Awards under the Federal Arbitration Act. *Saint Louis University Law Journal*, 46 (2), 509-560; Helm, K. 2006. The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?. *Dispute Resolution Journal*, 61(4), 16 – 26; Brand, F. 2014. Judicial Review of Arbitration Awards, *Stellenbosch Law Review*, 25 (2), 247-264.

[565] Polanto, M. 2013. For the Good of All Not Involved: The Case for a Public Protection Exception to the Enforcement of Arbitral Awards. *Arbitration Law Review*, 5(1), 459-471.

[566] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.

[567] Knight, W. 1922. Public Policy in English Law. *Law Quarterly Review*, 38 (2), 207-219.

[568] United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 30 (1987).

The second public policy function that arbitration *vacatur* serves relates to third parties to a contract; that is, '*privity*'[569]. At the core of the doctrine of *privity*[570] is the rule that

> "…*when two persons, for a consideration sufficient as between themselves, covenant to do some act, which if done would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other*".

Noting this principle, the second function of public policy has always been to avoid or at worse, limit the public being burdened with obligations emanating from private contracts that individuals enter into. Ghodoosi[571] claims that government plays a role in this second function of public policy by legislating and enforcing laws which prevent such public burdens.

The third (and final) public policy function of arbitration *vacatur* relates to the promotion of distributive justice which focuses on decision outcomes of fairness and equity. Thus, the courts can nullify an arbitration award that imposes penalties that are unfair and unequitable.

3.4 The meaning of the public policy exception

So, what do we mean by public policy exception? The public policy exception is a construct of the courts that stipulates its prohibition from the enforcement of any contract that violates public policy. As applied to arbitration, the public policy exception implies that the courts will not enforce arbitration awards that

[569] Whittaker, S. 1996. Privity of contract and the tort of negligence: Future directions. *Oxford Journal of Legal Studies*, 16(2),191-230; Andrews, N. 1997. Reform of the Privity Rule in English Contract Law: The Law Commission's Report No. 242. *Cambridge Law Journal*, 56 (1), 25-28; Andrews, N. 2001. Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999. *Cambridge Law Journal*, 60(2), 353-381.
[570] As stated in Railroad Co v Curtiss, 8o N. Y. 2I9.
[571] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.

violate public policy[572]. Instead, such awards are 'vacated'. Arbitration *vacatur* on the basis of public policy therefore emanates from the basic notion that the courts will not aid any course of action that the court perceives to be counter to dominant, well established and clearly defined societal norms [573]. Such vacation according to Ghodoosi[574] does not necessarily imply that the award has been voided; it simply means that the award cannot be enforced for public policy reasons. Although this exception is narrow, implying that the courts are largely restricted from reviewing the merits of arbitration awards, Grenig[575] posits that the oversight and supervisory powers of the courts to review, annul and set aside an arbitral award on the grounds of public policy is generally not restricted to the occasions when the award in itself is in violation of societal values. The courts are also likely to annul and set aside arbitration awards (i) which are in conflict with general relevant legal precedent and/or statutory provisions, (ii) where the implementation of specific awards will violate dominant, established and clearly defined public policy, and (iii) where such awards or their implementation will prejudice the rights of either party to the dispute or third-party rights. This position is supported in international case law. In *Renusagar Power Co. v General Electric Co*[576] heard in the Supreme Court of India, the court specified that public policy exceptions applied to arbitration awards where:

(i) the award conflicts with a fundamental policy of national law (fundamental policy of the Indian state);

(ii) the award conflicts with national interest (in other words the interest of India); and

[572] Marcantel, J. 2008. The crumbled difference between legal and illegal arbitration awards: Hall street associates and the waning public policy exception. *Fordham Journal of Corporate & Financial Law*, 14 (3), 597-638.
[573] Hodges, A. 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio State Journal on Dispute Resolution*, 16 (1), 91-164.
[574] Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736.
[575] Grenig, J. 2014. After the Arbitration Award: Not Always Final and Binding. *Marquette Sports Law Review*, 25 (1), 65-100.
[576] R*enusagar Power Co. Ltd vs General Electric Co* on 7 October, 1993; Equivalent citations: 1994 AIR 860, 1994 SCC Supl. (1) 644 (India).

(iii) the award is in conflict with notions of justice or public mortality (in other words, the notion of morality in India).

However, it is observed that the scope of 'fundamental policy' as identified in *Renusagar Power Co. v General Electric Co*[577] was accepted although never espoused in another Indian case, *Oil & Natural Gas Corp. v SAW Pipes Ltd*,[578] where the Supreme Court of India added a fourth public policy criterion as being in a case where:

(iv) the contravention of the provisions of an act of parliament or any additional substantive law governing the contractual relationship between the parties or when such award contravenes the terms of a contract.

Arguably, allowing such judgements to stand might negatively impact on societal harmony and may lead to social duress; for this reason, the courts are obliged to nullify them.

It is important to highlight that the scope of 'fundamental policy' as identified by the Supreme Court of India *Renusagar Power Co. v General Electric Co*[579] and confirmed in *Oil & Natural Gas Corp. v SAW Pipes Ltd*[580] by the Supreme Court of India was only articulated in *Oil & Natural Gas v Western Geco*[581] where the Supreme Court of India ruled that the notion of fundamental policy referred to three principles: these were (i) the application of judicial and reasoning based on legal authorities, (ii) taking cognisance of the principles of natural justice when making judicial rulings, and (iii) appreciating that a

[577] R*enusagar Power Co. Ltd vs General Electric Co* on 7 October, 1993; Equivalent citations: 1994 AIR 860, 1994 SCC Supl. (1) 644 (India).
[578] *Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd* on 17 April, 2003 (India).
[579] R*enusagar Power Co. Ltd vs General Electric Co* on 7 October, 1993; Equivalent citations: 1994 AIR 860, 1994 SCC Supl. (1) 644 (India).
[580] *Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd* on 17 April, 2003 (India).
[581] Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd. (2014) 9 SCC 263 (India).

court could not make judicial rulings that were irrational or perverse . Thus, according to the courts, fundamental policy allowed the courts to step in and vacate arbitral rulings because [at 30]

> "*…[t]he adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified…*".

The difficulty with the approach adopted by the Supreme Court of India is that, generally speaking, to ensure *finality, conclusive and binding nature* in arbitration, it is envisaged that judicial interference in arbitration awards should largely be restricted by law to occasions where awards are vacated; that is, set aside. However, in *Oil & Natural Gas v Western Geco*[582], the Supreme Court of India went as far as actually interfering with the subject matter of the arbitration award by modifying its content on the basis of public policy.

[582] Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd. (2014) 9 SCC 263 (India).

CHAPTER 4: ARBITRRATION IN THE UAE

4.1 The United Arab Emirates (UAE)

To better understand the legal and court system in the UAE, there is a need for a brief overview of the political and legal structures of the country. This will allow for the second research question, that is *What is the scope of the Public policy (and/or public order) exception as applied by the 'UAE Courts'?* to be addressed.

The United Arab Emirates (UAE) is a sovereign, independent, federal state lying at the south east of the Arabian peninsula with a total area covering approximately 32,278 square miles[583]. The UAE consists of seven constituent *emirates* (which equate to religious and political states). These are the *emirates* of Abu Dhabi, Sharjah, Fujairah, Ajman, Ras al Khaimah, Dubai and Umm al Quwain. The *emirate* of Abu Dhabi also serves as the capital of the UAE. The *emirate* of Dubai is arguably, however, the centre of commercial activity in the UAE. The majority (88%) of the UAE's population of 9.4 million is made up of expatriate non-nationals[584] of which 59.4% are from the Indian sub-continent.

4.2 Constitutional arrangements in the UAE

The UAE is governed by a constitution signed on 18 July 1971 which came into effect on 2 December 1971. The constitution ('The UAE Constitution') was permanently accepted as the supreme law in the country by all member *emirates* of the union in May 1996 with the promulgation of UAE Federal Constitutional Amendment Law No.l of 1996. The UAE constitution is divided into 152 articles covering a range of rights, obligations and aspirations. Its principle instruments are divided against a number of provisions which provide, for example, a federal court system[585]. The power of the UAE state is divided into three, consisting of (i) the executive branch, (ii) the judiciary, and (iii) the legislature. The executive

[583] El Mallakh, R. 1970. The challenge of affluence: Abu Dhabi. *The Middle East Journal*, 24 (2), 135-146; Zahlan, R. 2016. *The origins of the United Arab Emirates: A political and social history of the Trucial States*. Routledge.
[584] https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html, accessed 27/05/18
[585] Angell, N. 1986. Regulation of business under the developing legal system of the United Arab Emirates. *Arab Law Quarterly*, 1 (2), 119-140.

branch is further sub-divided into three, among them, a 'Supreme Council' made up of the *Emirs* (Rulers) of the seven member *emirates* of the union. The *Emirs* hold exclusive and unfettered authority within each of their individual *emirates.* While decisions by the 'Supreme Council' are based on a simple majority vote, constitutional provisions provide that, for substantive decisions to be ratified, the majority vote must include that of the *Emir* of Abu Dhabi and *Emir* of Dubai[586]. While the UAE's constitution addresses how the powers of the member *emirates* are balanced against those of the Federation, it makes exclusive provisions for matters to be within the exclusive competency (decision) of either an individual *emirate* or the federal government.

4.3 The legal and court system of the UAE

Article 1 of the Civil Transactions Code (CTC) of the UAE states that the country is primarily guided by its civil constitutional provisions which also encompasses *Sharia.* However, it is important to note as Feulner and Khan[587] and Al-Muhairi[588] emphasise that while *Islamic Sharia* serves as one of the main sources of UAE constitutional and legislative provisions, the focus of the incorporation of *Islamic Sharia* is not on the outcome of judicial rulings. Instead, they assert that the emphasis is on the *process* by which judicial rulings are procured. Thus, while judicial outcomes that encompass *Islamic Sharia* may in fact differ from those procured under western forms of jurisprudence, both forms of jurisprudence are primarily based on similar notions of just and equitable resolution of disputes.

The UAE operates a federal court system ('Courts of the UAE') with the Federal Supreme Court of the UAE (the Union Supreme Court) located in the *emirate* of Abu Dhabi serving as the apex court (equivalent to the United Kingdom Supreme Court). There are two appeals[589] courts which sit in the

[586] Al-Muhairi, B. 1996a. The Development of the UAE Legal System and Unification with the Judicial System. *Arab Law Quarterly*, 11 (2), 116-160.
[587] Feulner, G. and Khan, A. 1986. Dispute Resolution in the United Arab Emirates. *Arab Law Quarterly*, 1 (3), 312-318.
[588] Al-Muhairi, B. 1996b. The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Shari'a. *Arab Law Quarterly*, 11(3), 219-244.
[589] The Appeal Court in Abu Dhabi hears matters on appeal from Court of First Instance seating in Abu Dhabi and the city of Al-Ain. The Appeal Court in Sharjah hears matters on appeal from Court of First Instance seating in Sharjah, Ajman and Fujairah.

emirate of Abu Dhabi and the *emirate* of Sharjah. Matters on appeals from these two courts go to the Union Supreme Court. Exceptions provided for appeals on certain matters (primarily criminal) to be directed to the *Emir* of Abu Dhabi who, based on UAE constitutional provisions, also serves as the President of the UAE. In addition to the federal court systems that exist in the country, there are currently four arbitration centres operating in the UAE. These are the (i) DIFC, (ii) the DIAC, (ii) the Abu Dhabi Commercial, Conciliation and Arbitration Centre, and (iv) the International Islamic Centre for Reconciliation and Arbitration which is located in the *emirate* of Sharjah.

By virtue of Article 105 of the UAE constitution which vests the transfer of courts within each *emirate* to a federal court system only at the behest of individual *emirates*, two *emirates* within the country, the *emirate* of Ras al Khaimah and also the *emirate* of Dubai have opted out of the federal court system and are no longer members. Instead, both *emirates* operate their own independent judicial systems which runs parallel to the federal court system[590]. Furthermore, although the provisions of Article 1 of the Civil Transactions Code (CTC) of the UAE emphasise the role of *Sharia* in UAE law, Luttrell[591] notes that in civil and commercial disputes heard within the *emirates* of Dubai and Ras al Khaimah, *Sharia* subordinates *emirate* law unless among other issues, the dispute touches on matter of public policy. Within these two *emirates*[592], the court system consists of the Court of First Instance, which can hear all commercial matters, the Court of Appeal which hears appeals from the Court of First Instance on matters of fact, and finally the Court of Cassation which hears appeals from the Court of Appeal only on points of law. The decisions reached by the Courts of Cassation in the *emirate* of Dubai and also in the *emirate* of Ras al Khaimah are final and not subject to appeal to the UAE Supreme Court in Abu Dhabi. Any appeals from these courts are directed to the respective *Emirs* (Rulers) of Dubai and that of Ras al Khaimah. Furthermore, under the UAE's constitutional arrangement, each *emirate*

[590] We had earlier alluded to conceptual differences between the Courts of the United Arab Emirates and United Arab Courts. Thus it becomes prudent to make reference in the case of the *emirate* of Dubai to 'Courts of Dubai' and similarly in the *emirate* of Ras al Khaimah to Courts of Ras al Khaimah.
[591] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166; Luttrell, S. 2009b. Arbitration in Dubai, *International Trade and Business Law Review*, 12, 140-184
[592] http://www.dubaicourts.govae/jimage/uploads/manual/e1.pdf

maintains its own local courts (Courts of First Instance), which will exercise jurisdiction on matters deemed to be outside the scope of UAE Federal law[593]. Legal proceedings in all UAE federal courts (Courts of the UAE) are undertaken in the Arabic language (اللغة العربية) only. Only UAE nationals may practise as lawyers before the courts[594] although non-nationals may work as legal 'consultants'. Legal consultants, however, do not have a right of audience before the courts.

4.4 Parallel court systems in the UAE

To support commerce, different emirates within the UAE operate a number of 'free zones'. These free zones are in effect economic zones which are regulated with special rules in order to attract expatriate investors. For example, a large number of free zones within the *emirate* of Dubai offer tax-free or duty-free customs' benefits. They also offer free and quick business dispute resolution services. Two such free zones, the DIFC and the DIAC, operate their own court systems which are in effect parallel to '*the Courts of Dubai*'. Arguably, the operations of parallel court systems in the country reflect the country's rich history (Carballo[595]), the influence of Arabic legal scholarship, and the country's British colonial history (Angell[596]). Although restricted by tenets of *Sharia*, it also reflects the historical exclusive executive, judicial, legislative (Al-Muhairi[597]) and religious authority of the *Emirs*.

The notion of existence of parallel courts in the UAE is well recognised in literature (for example, in Luttrell[598]; Mohtashami and Tannous[599]), various UAE case law and underpinned by statutory provisions such as the Dubai International Financial Centre Law No. 10 of 2004 (Part 53) pertaining to

[593] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[594] United Arab Emirates, Federal Law No. 23 of 1981 regulating the Legal Profession, as amended (Article 6(1)).
[595] Carballo, A., 2007. The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?. *Arab Law Quarterly*, 21(1), 91-104.
[596] Angell, N. 1986. Regulation of business under the developing legal system of the United Arab Emirates. *Arab Law Quarterly*, 1 (2), 119-140.
[597] Al-Muhairi, B. 1996a. The Development of the UAE Legal System and Unification with the Judicial System. *Arab Law Quarterly*, 11 (2), 116-160.
[598] Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial Law and Technology*, 3 (3), 170-177.
[599] Mohtashami, R. and Tannous, S. 2009. Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East. *Arbitration International*, 25(2), 173-186.

the establishment of the Dubai International Financial Centre and the *emirate* of Dubai Law No.12 of 2004 which established the Courts of the DIFC. Interestingly enough, with new DIFC legislation under DIFC Law No. 1 of 2008, the DIFC courts have now been given wider reach within the *emirate* of Dubai which allows it to arbitrate disputes outside the DIFC to the extent that disputants explicitly contract to settle their dispute under DIFC jurisdiction. The need for disputants to explicitly contract to settle their dispute under DIFC jurisdiction was confirmed by the DIFC in *Amarjeet Singh Dhir v Waterfront & Others*[600].

From the case law, the author attests to a distinction between the notion of UAE federal courts (Courts of the UAE) and 'UAE courts'. In *Dr. Lothar Ludwig Hardt and Hardt Trading F.Z.E v DAMAC (DIFC) Company Limited et al* [601], the DIFC Court of First Instance acknowledged that a distinction could be made between '*the Courts of Dubai'* which were established under the *emirate* of Dubai Law No.3 of 1992 and the 'the Courts of the DIFC' which were established under *emirate* of Dubai Law No.12 of 2004 – in effect, the DIFC courts agreed that reference to 'the Courts of Dubai' implied non-DIFC Courts.

Drawing from this case law, the author opines that there is a conceptual difference between UAE federal courts ('Courts of the UAE') and 'UAE courts', with the former referring to federally constituted public courts in the UAE. On the other hand, the author conceptualises the notion of UAE courts as implying the entire range of judicial systems that exist in the UAE (inclusive of the free zone courts). This will include not only the 'Courts of the UAE', but also other ''parallel' courts such as the DIFC, the DIAC, the ADCCAC, and the IICRA. The author is further supported in his adoption of the position that institutions such as the DIFC, the DIAC, the ADCCAC and the IICRA are 'courts' not only by their enabling acts and provisions (such as UAE Federal Law No.8 of 2004 in the case of the DIFC), but also from international case law.

[600] Amarjeet Singh Dhir v Waterfront Property Investment Limited and Linarus FZE, Claim No. CFI 011/2009, Grounds of Decision, 8 July 2009, para. 92.
[601] Dr. Lothar Ludwig Hardt and Hardt Trading F.Z.E v DAMAC (DIFC) Company Limited et al [Dubai International Financial Centre Court of First Instance, 036/2009].

In terms of enabling acts and provisions, the relationship between the 'Courts of the UAE' (such as the UAE Federal Courts of Appeal) and the 'free zone' courts such as the Dubai International Financial Courts (DIFC) and the Dubai International Arbitration Centre (DIAC) has continued to evolve. Firstly is that the 'free zone' courts have consistently drawn disputants challenging their authority to UAE Federal Law No. 8 of 2004 Regarding The Financial Free Zones from which they derive their powers. Second is that (in the case of the DIFC) the DIFC Court of First Instance pointed out in *Isai v Isabelle*[602] that Article 42(1) of the DIFC Arbitration Law which in effect serves as conduit legislation empowers the DIFC to make arbitral awards 'irrespective of the state or jurisdiction in which it is made'. Third is that, based on the provisions of Article 8(2) of Dubai Law No 9 of 2004 (as amended), the DIFC courts were empowered to determine the jurisdiction of the DIFC Courts. Finally, Article 7(2) of the Dubai Judicial Authority Law empowers the DIFC to attach assets that are not only within the DIFC, but also within the *emirate* of Dubai. In effect, from the DIFC's perspective, it maintains separate but concurrent jurisdictions with, at the very least, 'Courts of the *emirate* of Dubai' if not 'Courts of the UAE'.

In terms of international case law, for example, in *Broekmeulen*[603], in determining the criteria to be met for an institution to be deemed a 'court' the Court of Justice of the European Union indicated the factors it would take into account; these included (i) whether the institution was established legally, (ii) whether the institution was permanently seated, (iii) whether the institution enjoyed a degree of independence in its operations, deliberations and decisions, (iv) whether the institution operated under jurisdiction which was compulsory or mandated, (v) whether the institution procedures involved opposing parties, and (vi) whether the institution applied the rules of law.

Although it will appear from the case law of the Court of Justice of the European Union – specifically *Corbiau*[604] – that a key consideration for deeming an institution as a 'court' is judicial

[602] *Isai v Isabelle* [Dubai International Financial Centre, Court of First Instance, 006/2017]
[603] Case 246/80 Broekmeulen [1981] ECR 2311.
[604] Case 24/92 Corbiau [1993] ECR I-1277.

independence, the case law of the Court of Justice of the European Union – specifically *Dorsch v Bundesbaugesellschaft* [605] and *El Yassini v Secretary of State for the Home Department*[606] – stipulates that all six criteria identified in *Case 246/80 Broekmeulen*[607] do not have to be present for an institution to be deemed a court. Arbitration, however, appears to require special consideration. Thus, in *Nordse*[608], the Court of Justice of the European Union suggested that an arbitral tribunal and/or arbitrator is not a court where disputants have decided on the nature of the appointment of the arbitral tribunal and/or arbitrator and there has been no public authority involved in the decision to utilise arbitration. In the UAE the institutions to which the author refers (DIFC, DIAC, ADCCAC and the IICRA) are all constituted by government.

What is of particular interest about the operations of the parallel courts in the UAE is that while most operate within 'free zones' in the *emirate* of Dubai, one, specifically the Dubai International Financial Centre (DIFC) subscribes to common law traditions, arguably reflecting the influence of English legal thinking that has come about from the UAE's historical relationship with the Indian sub-continent emerging from prior British colonial possession of India between 1858 and 1947 at a time where the UAE (as the Trucial states) was also a British protectorate[609]. The DIFC also maintains a particularly pro-arbitration position as articulated in its Practice Direction No. 1 of 2017 (Practice Direction) on 27 February 2017 which seeks to encourage disputants to commit to challenge arbitral awards only on merit. This has to be taken into context because the legal system in the UAE as a whole is predominantly of a civil law tradition (a reflection of the influence of Egyptian jurisprudence in the

[605] Case C-54/96 Dorsch v Bundesbaugesellschaft Berlin [1997] ECR I-4961.
[606] Case 416/96 El Yassini v Secretary of State for the Home Department [1999] ECR I-1209.
[607] Case 246/80 Broekmeulen [1981] ECR 2311.
[608] Case 102/81 Nordsee [1982] ECR 1095.
[609] Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial Law and Technology*, 3 (3), 170-177; Luttrell, S. 2008c. Commentary on the 2008 Arbitration Law of the Dubai International Finance Centre. *International Journal of Private Law*, 2(1), 31-45; Mohtashami, R. and Tannous, S. 2009. Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East. *Arbitration International*, 25(2), 173-186.

country – see Al-Muhairi[610]) – although supplemented by Islamic *Sharia*[611]) and customary law and increasingly, due to market forces, a resurgent spattering of English common law[612].

4.5 ADR, arbitration and its key challenges in the UAE

The cultural outlook towards dispute resolution in the *Arab* Middle East suggests a cultural preference for a negotiated dispute settlement[613]. Alternative Dispute Resolution (ADR) has existed in the *Arab* Middle East in various forms that includes '*Tahkim'* (Arbitration) and '*Sulh'* (Negotiation, mediation and conciliation). The literature suggest that ADR has a long history of application in the *Arab* Middle East, possibly from as far back as the seventh century[614]. However, the literature on *current* usage suggests that, in the *Arab* Middle East business sector, there is considerable scepticism about ADR, with disputants showing a consistent preference for litigation among contracting parties[615]. Yet, as Maita[616] argues, whether litigation is effectively serving to resolve disputes in a timely fashion remains questionable.

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[610] Al-Muhairi, B. 1996a. The Development of the UAE Legal System and Unification with the Judicial System. *Arab Law Quarterly*, 11 (2), 116-160.
[611] Al-Muhairi, B. 1996b. The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Shari'a. *Arab Law Quarterly*, 11(3), 219-244.
[612] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[613] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. Arab Law Quarterly, 3 (1), 19-32; Brower, C. and Sharpe, J. 2003. International arbitration and the Islamic world: The third phase. *American Journal of International Law*, 97(3), 643-656.
[614] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32; Brower, C. and Sharpe, J. 2003. International arbitration and the Islamic world: The third phase. *American Journal of International Law*, 97(3), 643-656; Gemmell, A. 2007. Commercial Arbitration in the Islamic Middle East. *Santa Clara Journal of International Law*, 5 (1), 169-193; Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624; Pely, D. 2008. Resolving clan-based disputes using the Sulha, the traditional dispute resolution process of the Middle East. *Dispute Resolution Journal*, 63(4), 80-88; Islam, M. 2012. Provision of Alternative Dispute Resolution Process in Islam. *IOSR Journal of Business and Management*, 6 (3), 31-36.
[615] Ballantyne, W. 1986. Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study. *Arab Law Quarterly*, 1 (2), 205-215; Feulner, G. and Khan, A. 1986. Dispute Resolution in the United Arab Emirates. *Arab Law Quarterly*, 1 (3), 312-318; Kreindler, R. 1997. An overview of the arbitration rules of the recently established GCC commercial arbitration centre, Bahrain. *Arab Law Quarterly*, 12(1), 3-25; Brower, C. and Sharpe, J. 2003. International arbitration and the Islamic world: The third phase. *American Journal of International Law*, 97(3), 643-656; Maita, A. 2014. Arbitration of Islamic Financial Disputes. *Annual Survey of International & Comparative Law*, 20 (1), 35-71; Kanakri, C., and Massey, A. 2016. Comparison of UAE and DIFC-seated arbitrations. *Global Arbitration News*, Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18.
[616] Maita, A. 2014. Arbitration of Islamic Financial Disputes. *Annual Survey of International & Comparative Law*, 20 (1), 35-71

Scholars provide a very concise historical overview of why there has been such considerable scepticism about ADR in the Middle East, particularly concerning arbitration-citing three notorious arbitration cases[617]. This flowed mainly from the decision by international arbitrators (mainly drawn from the West) to ignore and discredit extensive legal scholarship in Islam which does actually articulate a number of contract law principles. In fact, according to Gemmell[618], a major characteristic of the arbitration awards in these cases was the concoction of

> "*…a unique arbitral stew consisting of one part cynicism for local law and one part disdain for the Islamic parties' ability to enforce rights…. The profound and lasting impact of these arbitrations on the region's arbitral psyche should not be underestimated*" (pp.179-180).

One such case was the problematic dispute[619] between *Sheikh* Zayed, the much-revered *Emir* of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd over the precise scope of a 75-year oil concessionary contract awarded in 1939 by Abu Dhabi which at that time was a British protectorate. Brower and Sharpe[620] and Kutty[621] opine that other important historical arbitration awards that may have framed such considerable scepticism about arbitration in the Middle East include the dispute between Saudi Arabia[622] and the Arabian American Oil Company (ARAMCO) prior to its nationalisation by Saudi Arabia, and the dispute between the *Emir* of Qatar[623] and the International Marine Oil Company.

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[617] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly,* 3 (1), 19-32; Brower, C. and Sharpe, J. 2003. International arbitration and the Islamic world: The third phase. *American Journal of International Law*, 97(3), 643-656; Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624; Gemmell, A. 2007. Commercial Arbitration in the Islamic Middle East. *Santa Clara Journal of International Law*, 5 (1), 169-193.
[618] Gemmell, A. 2007. Commercial Arbitration in the Islamic Middle East. *Santa Clara Journal of International Law*, 5 (1), 169-193.
[619] Petroleum Dev. (Trucial Coast) Ltd. v Sheikh of Abu Dhabi, *International and Comparative Law Quarterly*, 247 (1952).
[620] Brower, C. and Sharpe, J. 2003. International arbitration and the Islamic world: The third phase. *American Journal of International Law*, 97(3), 643-656.
[621] Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624
[622] Saudi Arabia v Arabian Am. Oil Co. (ARAMCO), 27 ILR.
[623] 15 Ruler of Qatar v Int'l Marine Oil Co., 20 ILR 534,545 (1957).

Although such scepticism about arbitration existed, as Angell and Feulner[624] and Luttrell[625] pointed out, prior to the promulgation of Federal Law 11 of 1992, the Civil Procedure Code (CPC) (Luttrell[626]), there were no permanent courts in what is today the UAE (then the Trucial States). The administration of justice and the resolution of disputes was undertaken at the tribal level under the auspices of *Sharia* (derived from the *Quran,* Islam's holy text and the *Sunnah* which represents records of the living examples of the Prophet Mohammed and his sayings which are known as the *Hadith*).

As the economy of the country grew, dispute resolution and settlement was primarily undertaken under the auspices of either the executive council of individual *emirates* or in commercial matters, under the various Chambers of Commerce in individual *emirates*. An example being the Sharjah Chamber of Commerce and Industry and the Abu Dhabi Chamber of Commerce and Industry. However, even with the best intentions, attempts to settle disputes 'quickly' and ensure *finality, conclusive and binding nature* via arbitration under the auspices of the various Chambers of Commerce was generally not successful and, in some cases, arbitration proceedings took considerably longer than similar cases which were brought straight to the courts[627]. Angell and Feulner[628], for example, reported that by mid-1985, while arbitration disputes were taking on average four years to resolve, similar cases in the courts were taking on average two years or less to resolve. One possible reason for this situation was identified by Feulner and Khan[629] who highlighted that while playing a significant role in arbitration, the Chambers of Commerce generally had no powers of enforcement. However, in their inherent jurisdiction, since the courts were still empowered to review the legal merits of each award, what was meant to be in effect a straightforward confirmatory/ ratification formality often ended up in effect as a new and substantial legal proceeding in its own right.

[624] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.
[625] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[626] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[627] Angell and Feulner (1988) found for example instances where arbitration proceedings lasted approximately four years while similar disputes brought before the courts on average were decided within two years.
[628] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.
[629] Feulner, G. and Khan, A. 1986. Dispute Resolution in the United Arab Emirates. *Arab Law Quarterly*, 1 (3), 312-318.

Cognisant of these challenges, and noting the concern of foreign business entities to participate in litigation – particularly where they were largely unfamiliar with the local system of justice, the UAE government soon recognised – as pro-competition sentiment grew within the country – that to drive economic growth, there was a need for the promulgation of formalised legislative provisions that were (i) objectively predictable[630], and (ii) effectively brought together the constitutional provisions, traditions and *Islamic Sharia* jurisprudence with formalised legislative provisions. This led to the promulgation of the Federal Law 11 of 1992, the Civil Procedure Code (CPC). Within this 'new' law, arbitration provisions were contained within Articles 203 to 218, 235 to 238, and 239 to 243. In Article 203(1), parties to a contract were explicitly provided with rights to refer disputes to arbitration to the extent that such agreements were in writing (Article 203(1)).

One of the key challenges with ADR conducted under the provisions of Federal Law 11 of 1992 was that national courts construed arbitration in a restricted manner[631]. For example, in *Dubai Court of Cassation Judgment 393 of 1998* the courts opined that arbitration served only as an exception to the inherent jurisdiction of the courts to settle disputes. Primarily, this outlook may have been due to judicial concerns (which, as earlier pointed out, also does exist in other jurisdictions) that the arbitration process could usurp judicial authority and arguably certainity in the law. As Greco and Meredith[632] highlight, such concerns are not unheard of in countries where there has been recent rapid economic development, such as the UAE and India.

Thus, for example, the requirements that any intention of parties to engage in arbitration must be precise and unequivocal with the capacity for such an agreement are only applicable where duly entered by a duly authorised representative of the organisation with the appropriate authority[633]. In *Dubai Court of Cassation Judgment 393 of 1998*, the courts also held that an arbitration clause did not bind the

[630] Stovall, H. 2008. Recent Revisions to Commercial Agency Law in the United Arab Emirates. *Arab Law Quarterly*, 22 (3), 307-330.
[631] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[632] Greco, M. and Meredith, I. 2007. Getting to Yes Abroad: Arbitration as a tool in effective commercial and political risk management, *Business Law Today*, 16(4), 22-27.
[633] UAE Federal Law No. 2 of 2015 on Commercial Companies, as amended.

company in question and only bound the partners who signed the agreement because (i) their rights under the article of incorporation/association/formation did not confer such rights to arbitrate matters, and (ii) that the company in question was a separate juristic person from the partners. The courts reiterated that it was within the inherent jurisdiction of the courts to settle civil and commercial disputes, and any presumption within an article of incorporation/association/formation contracting out this right from the courts to private arbitration must be precise and unequivocal with the capacity of clearly authorised representative of the organisation. This also meant that it was always preferable in arbitration cases heard in the UAE that disputants, not their legal representatives, signed any arbitration agreement. The reason, according to Dimitrakopoulos[634], is that while recognising that a Power of Attorney conferred rights on legal representatives to undertake arbitration proceedings on the clients' behalf, the UAE courts did not perceive a Power of Attorney as conferring any right for legal representatives to bind their clients to arbitration agreements. In *Dubai Court of Cassation Judgment 91 of 1993*, the courts held that an arbitration clause was not binding on parties to an agreement where the agreement was signed by the legal representative unless the legal representative was specifically authorised to do so under the company's article of incorporation/association/formation. The ruling in *Dubai Court of Cassation Judgment 91 of 1993* has to be considered in light of a later ruling in *Dubai Court of Cassation Judgment 249 of 1996*, where the court found that innocent third parties could maintain a liability claim against an organisation whose actions or omissions leads members of the public or another innocent party to reasonably believe that a certain individual does have the required authority to act on behalf of the aforementioned organisation.

Another key challenge faced by arbitration within the UAE relates to the existence of parallel legal systems operating within the UAE at both *emirate* level and *within* specific *emirates*. The existence of such parallel systems has often resulted in various challenges to arbitration awards by, for example,

[634] Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403.

individual 'free zone' courts. Thus, for example, in *ITF v DWS*[635], *National Bonds Corporation PJSC v Taaleem PJSC & Deyaar Development PJSC*[636] and *Hardt v Damac*[637], the question of whether the DIFC Courts were part of the 'the Courts of Dubai' was questioned.

In *Hardt v Damac*[638], the DIFC Court of First Instance acknowledged that a distinction could be drawn between '*the Courts of Dubai*' which were established under the *emirate* of Dubai Law No.3 of 1992 and the '*the Courts of the DIFC'* which were established under Law No.12 of 2004 – in effect, the DIFC courts agreed that reference to 'the Courts of Dubai' implied non-DIFC Courts. However, Sir Anthony Colman sitting found that there was still a recognised option for disputants to pursue claims outside the *emirate* of Dubai courts to arbitration under DIFC rule; although this was dependent on claimants successfully demonstrating a contractual agreement to contract-out disputes from the DIFC Courts. The matter, however, appears contentious following the ruling of Justice Nabil Omran in the *Abu Dhabi Court of Cassation Judgement 118 of 2014* that

> "…*litigants have the right to resort to the regular courts regarding the disputes relating to the performance of the temporal and precautionary procedures or the summary matters*".

The scepticism about ADR across the *Arab*[639] Middle East is also reflected in other countries such as in Saudi Arabia where, for example, Decree No. 58 of 1963 prohibits any government institution from entering into an arbitration agreement without prior government authorisation. Going back to the UAE, Federal Law No. 2 of 2015 (New Companies Law) prohibits UAE public companies from entering into contracts with an arbitration clause unless such a power was registered in its Articles of Association.

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[635] ITF v DWS [Dubai International Financial Centre Court of First Instance, 2/2012]
[636] *National Bonds Corporation PJSC v Taaleem PJSC & Deyaar Development* PJSC [Dubai International Financial Centre Court of Appeal, 2011/CA 001].
[637] *Dr. Lothar Ludwig Hardt and Hardt Trading F.Z.E v DAMAC (DIFC) Company Limited et al* [Dubai International Financial Centre Court of First Instance, 036/2009].
[638] *Dr. Lothar Ludwig Hardt and Hardt Trading F.Z.E v DAMAC (DIFC) Company Limited et al* [Dubai International Financial Centre Court of First Instance, 036/2009].
[639] The study does not extend to non-Arab countries in the Middle East which include Israel and Iran.

4.6 The scope of the public policy exception under the repealed sections of Federal Law 11 of 1992

Although this thesis seeks more clarity on the public policy exceptions application by the UAE courts, the following facts are understood. Prior to its repeal on 3 May 2018 by the UAE Federal Arbitration Law No. 6 of 2018, statutory provisions for Alternative Dispute Resolution (ADR) in the UAE were articulated within Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 Federal Law 11 of 1992[640], the Civil Procedure Code (CPC). Federal Law 11 of 1992, the Civil Procedure Code (CPC) had been developed as part of UAE constitution and had sought to replace prior dispute resolution mechanisms in the country which had been primarily based on *Sharia* and customary law[641].

At this juncture, it is important to highlight that the development of arbitration law in the UAE distinct from *Sharia* does not infer any opposition by *Sharia* to arbitration provisions. While not being the case, the literature[642] identifies fundamental differences between *Sharia* and civil proceedings as articulated by Federal Law 11 of 1992, the Civil Procedure Code (CPC). These differences are primarily in the following areas. First, as relates to the qualification of an arbitrator, under *Sharia*, such an arbitrator was expected to adhere to the Muslim faith and be an adult male who is learned in *Sharia*. Second, under *Sharia*, arbitrators do have wide powers to intervene in arbitration proceedings which are not provided for under the Civil Procedure Code (CPC). Third, under *Sharia*, an arbitration agreement can only apply to prior and not future disputes. Thus, under *Sharia,* contractual provisions that stipulate that future disputes will be subject to arbitration are null and void. Fourth, under *Sharia*, a party who is insolvent is incapable of entering into arbitration as this will lead to a further reduction of their assets.

[640] http://www.diac.ae/idias/rules/uae/chapter3/
[641] Angell, N. 1986. Regulation of business under the developing legal system of the United Arab Emirates. *Arab Law Quarterly*, 1 (2), 119-140.
[642] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32; Foster, N. 1998. Guarantees in the UAE: a Comparative Analysis in the Light of English Law, French Law and the Shari'a. *Yearbook of Islamic and Middle Eastern Law*, 5, pp. 42-87; Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166; Qouteschat, O. and Alawamleh, K. 2017. The enforceability of electronic arbitration agreements before the DIFC Courts and Dubai Courts. *Digital Evidence & Electronic Signature Law Review*, 14, 47-60.

Fifth, Qouteschat and Alawamleh[643] note that, under *Sharia*, an arbitration agreement does not need to be in written form, but the proof of agreement should be done '*by a statement of witnesses and by drawing back from the oath'*. Under Article 203 (2) of Federal Law 11 of 1992, the Civil Procedure Code (CPC), "*No agreement for arbitration shall be valid unless evidenced in writing*". The final difference in terms of *Sharia* and civil proceedings as articulated by Federal Law 11 of 1992, the Civil Procedure Code (CPC) relates to how guarantees are constructed. In terms of *Sharia*, since documentary evidence does not play a prominent part of transactions, there is not particular form required for guarantees. Federal Law 11 of 1992, the Civil Procedure Code (CPC), however, provides for required forms for guarantee. Table 3 below provides an overview of this now repealed legislation. The provisions within this legislation which touch on both *vacatur* and public policy are highlighted.

[643] Qouteschat, O. and Alawamleh, K. 2017. The enforceability of electronic arbitration agreements before the DIFC Courts and Dubai Courts. *Digital Evidence & Electronic Signature Law Review,* 14, 47-60.

Table 3: Overview of Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992

Article/s	Scope	Important provisions of interest
203	The Arbitration Agreement	Articulates that an arbitration agreement must be in writing. States that arbitration cannot be utilised to adjudicate matters not capable of being reconciled. These are construed as implying criminal matters and matters that relate to or impact upon public policy.
204	Matters relating to disputes on matters to be referred to arbitration	Articulates the courts' right to intervene and settle the dispute on appropriate procedure.
205	Names of arbitrators	Stipulates that an arbitrator must be specifically cited prior to commencing of proceedings.
206	Competency of arbitrators	Articulates who is competent to serve as an arbitrator and the number of arbitrators required for an arbitral tribunal.
207		Addresses the disqualification of arbitrators.
208	Challenging the appointment of an arbitrator	Provides 30 days for a party to challenge the appointment of an arbitrator.
209	Arbitration proceedings	Suspension of arbitration proceedings for example where an application has been made to the court to intervene in the arbitration proceedings.
210		Fixing of dates for arbitration hearings.

211		Witnesses in arbitration hearings; oath taking and perjury during arbitration proceedings.
212		Establishes that arbitration awards must conform to legal provisions.
213		Provides that arbitration awards must be confirmed and ratified in a national court.
214		Establishes that the courts can order an arbitrator or arbitral tribunal to reconsider its decision or award.
215	Enforcement of arbitral awards	Establishes that arbitration awards can only be enforced through the national courts.
216	Challenge and *vacatur*	Articulates the conditions to which a party may apply to the courts for an arbitral award to be 'nullified'.
217		Posits that arbitral awards are not subject to appeal; however, an appeal may be made *against* the judgement of the court that ratified the said award.
218	Arbitrator fees	Stipulates that while an arbitrator may set his/her fees, the courts may on application of a disputant amend the fees.
235 - 238	Execution of foreign judgments	Stipulates that arbitral awards made outside the UAE may be applied in the UAE through an application to the UAE courts.
239 - 243	Execution procedures	Mandates the manner within which an arbitral award may be executed.

It is, however, important to highlight, as Gemmell[644] points out as in the case of other mainstream religions, that there are four different schools[645] of Islamic *Sharia* philosophy. The implication of this is that, under *Sharia,* arbitrability differs by school of thought and philosophy. In fact, according to Kutty[646] the very fact on what is subject to arbitration (as relates to public policy) has drawn conflicting judicial rulings in the UAE. It remains that public policy is construed subjectively in the UAE[647].

Dimitrakopoulos[648] posits that, under UAE Federal Law 11 of 1992, a popular reason for invoking Article 216 and Article 217 to challenge arbitration awards in the UAE related to cited procedural deficiencies. It is important, however, to highlight that, based on review of UAE case law, it does not appear that Article 216 does not make provisions for the annulment of arbitration awards on the ground of *Public policy (and/or public order)*. However, the general trend appears to suggest that *Public policy (and/or public order)* considerations is a criterion that is taken into consideration when the courts are seeking to ratify an arbitration award.

Arbitration in the UAE can be undertaken through the courts or without the courts' interference. If arbitration is undertaken through the courts (or parallel courts) then, as stated in *Dubai Court of Cassation Judgment 67 of 2009,* the arbitration process needs to take into consideration Articles 213 (1) and 213 (2). If, however, the arbitration process is not under the auspices of the courts, then the arbitration process needs only to take into consideration Article 213 (3). These provisions are supported

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644 Gemmell, A. 2007. Commercial Arbitration in the Islamic Middle East. *Santa Clara Journal of International Law*, 5 (1), 169-193.

645 Due to political and historical reasons, as with other world religions, Islam has different branches. There are two main branches of Islam. These are *Shia* Islam and *Sunni* Islam. There is a third branch of Islam – *Ibadi* – which is predominantly practiced in the Sultanate of Oman. *Shia* Islam is primarily practiced in Iran while the majority of Arab states in the Middle East such as the UAE, adhere to *Sunni* Islam. Within *Sunni* Islam, there are four main schools of Islamic *Shariah* philosophy - the Hanafi School (which is based on the teachings of Abu Hanifa - AD 699-767) the Maliki School (which is based on the teachings of Malik ibn Anas - AD 715-795), the Shafi'i School (which is based on the teachings of Muhammad ibn Idris al-Shafii - AD 767-820) and the Hanbali School (which is based on the teachings of Ahmad ibn Hanbal - AD 780-855). In the UAE, the order of precedence of application of the four different schools of thought to *Sharia* jurisprudence is set out in Article 1 of the Civil Transactions Code (CTC) of the UAE which articulates that the order of precedence starts with the Maliki philosophy, then secondly the Hanbali philosophy and then thirdly the Shafi'i and Hanifa philosophies together.

646 Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624

647 Mayew, G. and Morris, M. 2014. Enforcement of Foreign Arbitration Awards in the United Arab Emirates. *Defense Counsel Journal*, 81, 279-287.

648 Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403.

by case law, more specifically *Dubai Court of Cassation Judgment 40 of 2004* and *Dubai Court of Cassation Judgment 88 of 2004* where it was stated that,

"*The award of the arbitrators may not be contested by any manner of appeal*".

However, while it appears that DIFC arbitration awards may not be readily challenged and vacated in '*the Courts of Dubai*' because of the provisions of the earlier-discussed enabling Federal Law No.8 of 2004, it will appear that DIAC awards can be readily appealed to the Dubai courts ('*the Courts of Dubai'*). In effect, it is safe to suggest, as shown in *International Electromechanical Services Co LLC v Al Fattan Engineering LLC & Al Fattan Properties LLC*[649], that the enforcement of arbitration agreements in the UAE (in this case the *emirate* of Dubai) is dependent on the scope and validity of the arbitration agreement clearly being aligned with UAE Federal Law 11 of 1992. In sum, while arbitration awards may not be appealed (Article 217) as also reiterated by the courts in *Dubai Court of Cassation Judgment 180 of 2006,* provisions for its challenge existed under Article 216. Ibrahim[650] has interpreted Article 217 of UAE Federal Law 11 of 1992 as implying that once parties agree to arbitration, they implicitly expressly waived their rights to file an appeal. Angell and Feulner[651] suggest that, under UAE Federal Law 11 of 1992, there were six grounds for challenging arbitration awards. These are:

(i) Where the arbitration agreement was found to be invalid or illegal;

(ii) Where it was found that the arbitrators were not competent to adjudicate over the subject matter of the dispute or had exceeded their authority in adjudicating over the subject matter of the dispute;

(iii) Where disputants had not been properly served with notice of the arbitration proceedings;

[649] *International Electromechanical Services Co. LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC* [2012] DIFC CFI 004, Oct 14, 2012 | Court of First Instance.
[650] Ibrahim, A. 2014. Arbitration in the UAE, *Court Uncourt*, 1, 17 - 19.
[651] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.

(iv) Where the arbitration award was procured through deception or by fraud;

(v) Where the arbitration award was contrary to UAE law, UAE *Public policy (and/or public order)* or national morals; and

(vi) Where the award was contrary to the general principles of UAE national civil, customary or Islamic law.

Of particular interest to this thesis, however, are provisions for *Public policy (and/or public order)* exceptions. Under the now repealed Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of UAE Federal Law 11 of 1992, the following public policy exception provisions are made. Article 203(4) had stated that

> "*Arbitration shall not be permissible in matters, which are not capable of being reconciled…*".

In addition, Article 212 (2) had stated that

> "*The arbitrators award shall be in conformity with the provisions of law unless the arbitrator was authorized to reconcile the dispute, in which event he shall not be bound to comply with such rules except in matters which concern public order*".

Furthermore, Article 235 (2) (e) had stated that an arbitration award may only be enforced where it has been shown that

> "*It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order*".

4.7 UAE case law on the scope of the public policy exception

Taking note that (i) the UAE courts have been traditionally reluctant to ratify arbitration awards deemed to unfairly burden an economically weaker party[652], and (ii) as constitutionally an adherent to civil law traditions, the principles of *stare decisis* do not apply to UAE federal courts[653], judges in the 'Courts of the UAE are expected to decide cases on the individual merits of each case. However, there is always a chance that disparities may exist in terms of how *Public policy (and/or public order)* is construed in judicial decisions. These differences could emanate from the nature of principles applied and legal training of individual judges (Feulner and Khan[654]), and differences in how judges may construe the interpretation of UAE federal law in a manner that it enforces arbitration awards to the extent deemed not to be in conflict with federal law, *Islamic Sharia,* local customs (in that order – see Luttrell[655]), and rules of natural justice and equity. Noting the above, scholars such as Al-Enazi[656](p. 127) suggest that a major concern with the notion of *Public policy (and/or public order)* in the UAE is that its definition is extremely broad and therefore

> "*…susceptible to arbitrary interpretations by the courts*".

Thus, in *International Bechtel Co. Ltd. v Department of Civil Aviation of the Government of Dubai[657][Dubai Court of Cassation, 2004]*, an arbitration award of £20 million in favour of *International Bechtel Co. Ltd* was overruled by the Dubai Court of Cassation. The judgement cited as reason the ground that witnesses during the arbitration hearings were not sworn in in the manner consistent with

[652] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.
[653] Foster, N. 1998. Guarantees in the UAE: a Comparative Analysis in the Light of English Law, French Law and the Shari'a. *Yearbook of Islamic and Middle Eastern Law*, 5, pp. 42-87.
[654] Feulner, G. and Khan, A. 1986. Dispute Resolution in the United Arab Emirates. *Arab Law Quarterly*, 1 (3), 312-318.
[655] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[656] Al-Enazi, M. 2013. *Grounds for refusal of enforcement of foreign commercial arbitral awards in GCC states law with special reference to (Bahrain and UAE)*. Unpublished PhD Thesis, Brunel University, London.
[657] International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai [Emirate of Dubai Court of Cassation, 2004].

UAE law. This ruling was made despite earlier case ruling in *Abu Dhabi Court of Cassation Judgment 433/17 of 1997* where the courts ruled that it was not against public policy in the UAE for an arbitrator to depart from strict procedural rules regarding witnesses, production of evidence, and documentation. Arbitrators were empowered to establish their own processes and procedures pertaining to, for example, the production of evidence. Process and procedures could also extend to an arbitration proceeding deciding on a point of law which is either not relevant to the dispute or which has not been cited by parties to the dispute. This was the case in *Modern Engineering v Miskin*[658], *Pacol v Rossakhar*[659] and Lloyd's Rep 135; and *Sanghi v The International Investor*[660] heard in the English courts. On the other hand, in terms of the substantive essence of the law itself, a key manifestation relates to the inarbitrability of certain disputes; these may include, for example, disputes over matters which are illegal. Nuss[661] identifies contracts for perpetual servitude as one such example of an inarbitrabile dispute.

The following are also known from UAE case law which is based on the now repealed Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of UAE Federal Law 11 of 1992.

In *Dubai Court of Cassation Judgment 43 of 2009*, it was found that the sale of off-plan housing units that do not comply with mandatory requirements for registration of ownership via Dubai Land and Property Department was contrary to public policy. Public policy demands meant that the developer could only submit documentation for registration, but the duty to complete the registration process resided solely with the Dubai Land and Property Department. In this instance, because a failure on the part of the developer to register the property through the Dubai Land and Property Department could impair the rights of home owners, the dispute could not be subject to arbitration.

In *Dubai Court of Cassation Judgment 180 of 2011*, the courts reiterated that arbitration on the subject of interim property registers relating to land sale/acquisition could not, because of public policy,

[658] Modern Engineering v Miskin, [1981] 1 Lloyd's Rep 135.
[659] Pacol v Rossakhar [2000] 1 Lloyd's Rep 135.
[660] Sanghi v The International Investor (KCFC), [2000] 1 Lloyd's Rep 480.
[661] Nuss, J. 2013. Public Policy Invoked as a Ground For Contesting the Enforcement of an Arbitral Award, or for Seeking its Annulment. *Dispute Resolution International*, 7, 119-133.

be subject to arbitration. Similar findings were made by the courts in *Dubai Court of Cassation Judgment 14 of 2012* on three earlier arbitration awards relating to private property secured through DIAC where it was yet again reiterated that relevant provisions on property law were not subject to arbitration for reasons of public policy.

In *Abu Dhabi Court of Cassation Judgment 663 of 2012*, the courts ruled that they could intervene (again in a property dispute). The courts opined that this was possible on the grounds that even though the basis of challenging the arbitration award did not meet the threshold set in Article 216, the arbitrator had exceeded his authority under UAE law by venturing into matters of public policy. This was also the position in *Banyan Tree*[662] where the Dubai Court of First Instance nullified an earlier arbitration award made by the DIFC courts on the grounds that, in seeking to enforce an arbitration award[663] outside the DIFC free zone, the DIFC courts had exceeded their jurisdiction. The courts went further to identify such public policy issues as matters which were of basic concern to society and the state. The author contends that the notion of public policy or order within the UAE is drawn particularly wide. However, while this may be the case, there are a number of cases which suggest a tightening of the public policy exception. In both *Dubai Court of Cassation Judgment 282 of 2012* and *Abu Dhabi Court of First Instance Judgment 2847 of 2013* the courts found that failure to comply with property sale and purchase agreements were only matters of *private* interest and therefore could not be construed as matters of *public* policy. The courts reiterated that contracts were only liable for *vacatur* when proper process and procedures relating to land registration were not fulfilled. The main point to note here, according to Arab[664], is that land registration in the UAE is deemed a matter of public policy not because it is deemed part of a sale and purchase agreement, but because it is a legal formality which ensures that title is transferred to the purchaser.

[662] Banyan Tree Corporate Pte Ltd. v Meydan Group LLC, Case No. 1619 of 2016.
[663] Banyan Tree Corporate Pte Ltd v Meydan Group LLC (Case ARB 003/2013 judgment 2 April 2015.
[664] Arab, H. 2015. Ground-breaking ruling on public policy by the Abu Dhabi Court of First Instance, *Arbitration Newsletter*, 20 (1), 39-42.

4.8 UAE Federal Arbitration Law No. 6 of 2018

Notwithstanding the earlier alluded-to scepticism with ADR in the *Arab* Middle East business sector, globalisation of international commerce and increasing influences have led to a number of Middle Eastern countries enacting new stand-alone arbitration legislation. In fact, evidence of the increasing recognition of the importance of arbitration to the region is demonstrated by the establishment of the GCC Commercial Arbitration Centre seated in Bahrain. The centre commenced operations in 1995 and seeks to provide arbitral services to contracting parties who primarily conduct business in the GCC region[665].

According to Luttrell[666] Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 Federal Law 11 of 1992[667], the Civil Procedure Code (CPC) had been developed to replace prior dispute resolution mechanisms in the UAE that had been primarily based on *Sharia* and customary law. It had been noted earlier by Angell[668] that the modernisation of UAE arbitration laws was primarily being driven by a desire of the government to further attract increased levels of foreign investment in the country. Such modernisation, it had been posited, was likely to be achieved if two things were in place: Firstly, a dedicated legislation exclusively focused on arbitration and secondly, a modern legal framework aligned to international arbitration jurisprudence. Of course, this does not mean, as Kutty[669] explicitly argues, that *Sharia* is an unsophisticated, obscure, or defective system. In fact, as in the case of western legal philosophy, *Sharia* is a positive system of law which means that *Sharia* obliges specific actions and rights for individuals and groups. It is also a system of jurisprudence that is in constant evolution[670].

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[665] Kreindler, R. 1997. An overview of the arbitration rules of the recently established GCC commercial arbitration centre, Bahrain. *Arab Law Quarterly*, 12(1), 3-25.
[666] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166
[667] http://www.diac.ae/idias/rules/uae/chapter3/
[668] Angell, N. 1986. Regulation of business under the developing legal system of the United Arab Emirates. *Arab Law Quarterly*, 1 (2), 119-140.
[669] Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624
[670] Fyzee, A. 1964. *Outlines of Muhammadan Law*, Vol. 1, Oxford University Press, 3rd edition.

Along these lines, as earlier stated, the need to develop a modern and robust stand-alone arbitration legal framework has been well recognised in academic commentary[671] and practitioner commentary[672]. The primary interest is to develop such a framework that is able to support domestic and cross-border commercial and economic activities by drawing upon best practice from around the world. Thus, on 3 May 2018, UAE Federal Law No. 6 of 2018 on Arbitration was promulgated as the first independent stand-alone arbitration legislation in the UAE. Following its promulgation, arbitration provisions as stipulated in Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of UAE Federal Law 11 of 1992 were repealed.

The new law is reflective of what Brower and Sharpe[673] refer to as the 'The third phase' of arbitration in the Middle East and is reflected in Middle East countries in that, due to globalisation and the need to support free flow of capital, there is a need to support international commerce by affording not only reciprocal legal protection, but more speedy means of dispute resolution that is able to ensure confidentiality.

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[671] See for example, Angell, N. 1986. Regulation of business under the developing legal system of the United Arab Emirates. *Arab Law Quarterly*, 1 (2), 119-140; Ballantyne, W. 1986. Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study. *Arab Law Quarterly*, 1 (2), 205-215; Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32; Luttrell, S. 2008a. Choosing Dubai: A comparative Study of Arbitration Under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC', *Business International*, 9 (3), 254-292; Luttrell, S. 2008b. The Arbitration Law of the Dubai International Finance Centre. *Journal of International Commercial Law and Technology*, 3 (3), 170-177; Luttrell, S. 2008c. Commentary on the 2008 Arbitration Law of the Dubai International Finance Centre. *International Journal of Private Law*, 2(1), 31-45; Mohtashami, R. and Tannous, S. 2009. Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East. *Arbitration International*, 25(2), 173-186; Lagarde, M. 2015. Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration. *ASA Bulletin*, 33(4), 780-807; Dayton, B. and Takahashi, S. 2018. Arbitration Developments in the United Arab Emirates. *Asian Dispute Review*, 2018(1), 30-37.

[672] AlMulla, H., and Mackenzie, A. 2018. *The UAE introduces Long-awaited Stand-alone Arbitration Law*, https://www.bakermckenzie.com/en/people/m/mackenzie-andrew, accessed 26/06/18; Al Tamimi, E., Arab, H., and Snider, T. 2018. *UAE issues Federal Arbitration Law no. 6/2018*, http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfeb-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D, accessed 26/05/18; BouMalhab, N., Reeves, J. and Sahab, D. 2018. *The UAE's New Arbitration Law*, https://www.clydeco.com/insight/article/the-uaes-new-arbitration-law, accessed 26/05/18; Smith, B. and Mazzawi, M. 2018. *UAE approves arbitration law after 11 years*, https://www.out-law.com/en/articles/2018/march/uae-law-on-arbitration-in-commercial-disputes-is-approved-after-11-years-of-anticipation-/, accessed 26/05/18; Turrini, M., Robottom, L., Bailey, J., Cuffe, C., Roshan, A. and Raza, H. 2018. *The New UAE Arbitration Law: an incremental shift towards international norms*. https://www.whitecase.com/publications/alert/new-uae-arbitration-law-incremental-shift-towards-international-norms, accessed 26/05/18

[673] Brower, C. and Sharpe, J. 2003. International arbitration and the Islamic world: The third phase. *American Journal of International Law*, 97(3), 643-656.

On review, the new law seeks to exert a stand-alone arbitration philosophy within current UAE legislative provisions but does so by retaining an element of supervisory provisions by higher courts. Arguably, one of the major objectives of the drafters of the new UAE Federal Law No. 6 of 2018 on Arbitration was to limit the wide-ranging supervisory role the courts had previously exerted (see, for example, Ballantyne[674]) under the now repealed Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of UAE Federal Law 11 of 1992. One of the main concerns with the arbitration provisions of the now repealed Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of UAE Federal Law 11 of 1992 was that, because of the inherent jurisdiction to examine factual matters in disputes, referral to the courts when arbitration awards were challenged for any number of reasons implied a repeat of hearings on matters of fact previously heard during arbitration proceedings in the courts[675]. The effect of this is that arbitration proceedings under UAE Federal Law 11 of 1992 began to experience the same limitations as those experienced by the various Chambers of Commerce prior to the promulgation of UAE Federal Law 11 of 1992; in that a number of arbitration proceedings ended up taking (again) considerably longer than similar cases which were brought straight to the courts[676]. In addition, the drafters of the new law have sought to designate a single superior court (The Court of Appeal) to deal with matters relating to challenges and *vacatur* petitions. This is in line with international standards and currently the practice in other Middle Eastern countries such as Egypt and Djibouti[677].

As such, the provisions of the new arbitration law, which is framed to align with the UNCITRAL Model Law, are structured against six sections involving 61 different articles. Of particular interest are the following. Article 1 provides the various definitions and scope of application of the new law. For example it articulates the definition of arbitration and establishes that references to the courts of the UAE imply ‘federal or local Court of Appeals agreed upon by disputants. Article 2 stipulates the applicability

[674] Ballantyne, W. 1986. Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study. *Arab Law Quarterly*, 1 (2), 205-215.
[675] Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403.
[676] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166; Seidenberg, S. 2009. The Long Dubai: Even in the business-friendliest Mideast, arbitration can take forever. *ABA Journal*, 95 (12), 17-18
[677] El-Ahdab, A. 2011. *Arbitration With the Arab Countries*, Kluwer Law International Third Edition.

of the new law to all arbitration proceedings conducted within the UAE (Article 2(1)) and those conducted outside the country (Article 2(2)) where the parties have explicitly contracted to subject the proceedings under its provisions. While the new law makes provisions for parties to arbitration proceedings in the UAE to contract out its provisions, this will only be possible where (i) such contract or proceedings is not in conflict with *public order* and morality as construed in the country, and where (ii) as stated in Article 2(1), according to Turrini *et al*. (2018[678]) the parties have agreed to subject their dispute to, for example, either DIFC or DIAC jurisdiction. Table 4 below provides an overview of the new legislation. The provisions within this legislation which touch on both *vacatur* and public policy are highlighted.

[678] Turrini, M., Robottom, L., Bailey, J., Cuffe, C., Roshan, A. and Raza, H. 2018. *The New UAE Arbitration Law: an incremental shift towards international norms*. https://www.whitecase.com/publications/alert/new-uae-arbitration-law-incremental-shift-towards-international-norms, accessed 26/05/18

Table 4: Overview of UAE Federal Law No. 6 of 2018 on Arbitration

Section	Provisions	Article	Scope	Important provisions of interest
Section I	Definitions and Scope of Application	Article 1	Definitions	Defines arbitration; Defines a 'court' as federal or local Court of Appeals (as such *emirate* of Dubai Law No.3 of 1992 laws applies).
		Article 2	Scope of Application of the Law	Stipulates that the law applies to arbitration conducted within the UAE or other country if parties agree to subject the proceedings to UAE law or to another jurisdiction within the UAE (such as the DIFC – UAE Federal Laws Federal Law No. 8 of 2004 Regarding The Financial Free Zones, Dubai International Financial Centre Law No. 10 of 2004 (Part 53) and *emirate* of Dubai Law No.12 of 2004 laws applies) to the extent that the arbitration proceedings are not in '***conflict with the public order and morality of the State'***.
Section II	The Arbitration Agreement	Article 3	International arbitration proceedings	Articulates the modalities for determining whether a particular arbitration proceeding will be deemed as international when connected to more than one country. It is, however, noted that under Article 20 of the Civil Procedure Code (CPC), the UAE retains jurisdiction to hear cases involving foreigners (natural or juristic persons) who are domicile or who live in the UAE. Similarly, Article 82 of the CPC provides that if a natural or juristic person conducts business or carries out a profession in the UAE, the UAE courts have jurisdiction to hear

		matters of dispute relating to the business or profession of such a natural or juristic person. This jurisdiction extends to branches or sub-units of the said entity (Article 33).
Article 4	Capacity to Enter into an Arbitration Agreement	Of particular relevance is Article 4 (2) which stipulates that "2. Arbitration is not permitted in matters which do not permit compromise". This is deemed from prior literature as relating to questions of public policy.
Article 5	Form of Arbitration Agreement	Stipulates that an agreement to enter into arbitration may be concluded after a dispute has arisen.
Article 6	Autonomy of the Arbitration Agreement	Mandates that an arbitration clause in a contract is independent from other provisions of the same contract. Thus the fact that a contract is null and void does not necessarily imply that arbitration proceedings may be stayed.
Article 7	A written Arbitration Agreement	Now stipulates that an arbitration agreement although it must be in written form, can also be in an electronic form if it conforms to UAE Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce.
Article 8	Resolution of a Dispute that is Subject to an	

			Arbitration Agreement	
Section III	The Arbitral Tribunal	Article 9	Composition of the Arbitral Tribunal	Article 19 now allows an arbitrator (or arbitral panel) to rule on its jurisdiction to conduct proceedings, but allows in Article 19 (2) disputants to challenge the jurisdiction of an arbitral tribunal within 30 days from the date the arbitrator (or arbitral panel) rules on its jurisdiction.
		Article 10	Qualifications Required of Arbitrators	
		Article 11	Composition of Arbitral Tribunal	
		Article 12	Arbitral Decision Making	
		Article 13	Violation of the Procedure for Appointing the	

	Arbitral Tribunal
Article 14	Challenging an Arbitrator
Article 15	Challenge Procedure
Article 16	Termination of the Mandate of the Arbitral Tribunal
Article 17	Appointment of Substitute Arbitrator
Article 18	General Jurisdiction to Consider

			Arbitral Measures	
		Article 19	The Arbitral Tribunal's Competence to Rule on its Own Jurisdiction	
		Article 20	Time Limit for a Plea to the Jurisdiction of the Arbitral Tribunal	
		Article 21	Interim or Conservatory Measures	
Section IV	Arbitral Proceedings	Article 22	Intervention and Joinder of New	Article 23 states that parties are free to agree on the arbitration procedure. Parties are free to agree on the place of arbitration (Article 28). Under Article

	Parties in an Arbitration	36, the arbitral tribunal may appeal to the courts to make an order to compel a witness to appear before the tribunal.
Article 23	Determination of Rules of Procedure	
Article 24	Notice	
Article 25	Waiver of Right to Object	
Article 26	Equality of the Parties	
Article 27	Commencement of Arbitral Proceedings	
Article 28	Place of Arbitration	
Article 29	Language of Arbitration	

			a Request for Evidence	
Section V	The Arbitral Award	Article 37	Rules Applicable to Substance of Dispute	The parties are free to decide on choice of law which will be applied to the subject matter of the dispute.
		Article 38	Power of the Arbitral Tribunal to Determine the Law to Govern the Subject-Matter of the Dispute	
		Article 39	Interim and Partial Awards	
		Article 40	Consent Award	The arbitral award shall be made in writing.

Article 41	Form and Contents of Award	
Article 42	Time for Issuing a Final Award	
Article 43	Ruling on Preliminary Questions	
Article 44	Notification of Arbitral Award	
Article 45	Termination of Arbitral Proceedings	Arbitral proceedings become terminated once an award is made.
Article 46	Costs of Arbitration	
Article 47	Withholding Delivery of Award Pending Payment of Fees	An arbitrator/arbitral tribunal is empowered to withhold delivery of its final award until it receives payment for the proceedings.

Article 48	Confidentiality of Arbitrators' Awards	
Article 49	Interpretation of Award	
Article 50	Correction of Material Errors in Award	Sets out that an arbitral tribunal can correct material errors in any award it makes.
Article 51	Additional Award	
Article 52	Binding Force	Sets out that arbitral awards are binding and enforceable as a ruling confirmed from the courts.
Article 53	Challenging Arbitral Awards	Sets out eight grounds for challenging arbitration awards. Sets out the position on public policy exceptions,
Article 54	Action to Set Aside Award	Action to Set Aside Award.
Article 55	Enforcement of Award	Sets out that arbitration awards can only be enforced through actions taken by the courts.

		Article 56	Stay of Enforcement of Award	
		Article 57	Recourse Against Enforcement of Award	
Section VI	Final provisions	Article 58	Code of Professional Conduct and Lists of Arbitrators	Explicitly articulates the repeal of the previsions of Articles 203-218 of said Federal Law No. 11 of 1992 and any other law which is in conflict with the new arbitration law.
		Article 59	The Temporal Dimension of this Law	
		Article 60	Repeal of Arbitration Provisions of	

	the Civil
	Procedure Law
Article 61	Publication and
	Entry into Force

Of particular interest is that although retaining its emphasis that arbitration agreements should be in writing, in acknowledging the growth in e-Commerce, the new legislation stipulates that such written agreements can now be in electronic form to the extent that such agreements meet statutory provisions stated within UAE Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce. This development is particular interesting and is driven by a recognition by the UAE government that technology will change the way in which not only business is conducted, but also the way that arbitration and, more generally, dispute resolution will be conducted in the future[679]. The new provisions within UAE Federal Law No. 6 of 2018 in relation to electronic arbitration agreements are in line with the UNCITRAL e-Commerce Model Law; more specifically Article 6 of the UNCITRAL e-Commerce Model Law which stipulates that on the occasion that there is a legal requirement for information to be in writing, such information will retain its legal effect if in data (electronic) form. It also aligns national law in the UAE with Article 12(5) of Dubai International Financial Centre Law No. 1 of 2008 which provides that arbitration agreements can be entered into via "*any communication that the parties make by means of data message*". The new provisions within UAE Federal Law No. 6 of 2018 in relation to electronic arbitration agreements also emphasise that it will no longer be possible to draw on the evidence provided by witnesses where there is no written documentary evidence to demonstrate the existence of an arbitration agreement. This provision is in line with provisions within UAE Federal Law No. 10 of 1992 promulgating the Law of Proof in Civil and Commercial Transactions (as amended) which emphasises documentary evidence over witness testimonial evidence. It is also in line with Article 2 of UAE Federal Law No. 18 of 1993 on Commercial Transactions Law.

Article 9 of the UNCITRAL e-Commerce Model Law also provides evidential protection for electronic information; stipulating that such information is admissible in legal proceedings as evidence. As suggested by the global consultancy A.T Kearney [680], despite low penetration of e-Commerce in the

[679] Jeker, J., Anwar, H., Cabral, M. and Mannan, F. 2006. E-transaction law and online dispute resolution: a necessity in the Middle East. *Arab Law Quarterly*, 20(1), 43-76.
[680] A.T Kearney. 2016. *Getting in on the GCC E-Commerce Game*. AT Kearney Publication, http://www.middle-east.atkearney.com/documents/787838/8908433/Getting+in+on+the+GCC+E-Commerce+Game.pdf, accessed 03/06/18.

GCC region (0.4% of the GCC's GDP compared to, for example, 3.5% in the case of the United Kingdom), the market is likely to be valued at approximately US$20 billion by 2020. Recent studies by Ojiako[681] have explored how online dispute resolution (ODR) is likely to impact on dispute resolution in the UAE. It is observed that while commercial businesses are likely to derive advantages from the exploitation of technology, being able to resolve disputes using technology-mediated interfaces will provide commercial businesses with more avenues for even quicker and more convenient forms of dispute resolution among geographically dispersed disputants[682]. This is particularly important in an era where a considerable number of businesses operating in the UAE maintain both physical and online outlets[683]. This position was recognised by the DIFC courts which, on 10 October 2016, announced the launch of their 'smart' small claims adjudicating tribunal.

The new UAE Federal Law No. 6 of 2018 on Arbitration also now attempts to restrict how arbitration awards are challenged. For example, in Article 8 of the new law, the lodging of a court application on provisions set out in an arbitration agreement will not mitigate against commencing or continuing either the arbitration proceedings or in fact the conferring of an award. This provision can be contrasted to previous provisions in Article 203(5) of the now repealed Civil Procedure Code which allowed parties to a dispute to assert objections to the jurisdiction of an arbitration panel at its initial seating. Article 19 now allows an arbitrator (or arbitral panel) to rule on its jurisdiction to conduct proceedings, in Article 19 (2), but allows disputants to challenge the jurisdiction of an arbitral tribunal within 30 days from the date the arbitrator (or arbitral panel) rules on its jurisdiction. The new law seeks to strengthen the arbitration process by stipulating, in Article 52, that arbitration awards are binding upon disputants. There is, however, still a requirement that the award must be confirmed and ratified by a

[681] Ojiako, U. 2017. *Using Online Dispute Resolution Platforms to Resolve Small and Low-Valued Construction Project Claims Disputes: An Examination of the Rule of Law and Justice Implications*. Unpublished LLB Thesis, University of London; Ojiako, U., Chipulu, M., Marshall, A., and Williams, T. 2018. An examination of the 'Rule of law' and 'Justice' implications in Online Dispute Resolution in the Construction Industry, *International Journal of Project Management*, 36 (2), 301-316..

[682] Raines, S. 2006. Mediating in your pajamas: the benefits and challenges for ODR practitioners. *Conflict Resolution Quarterly*, 23 (3), 359–369.

[683] A.T Kearney. 2016. *Getting in on the GCC E-Commerce Game*. AT Kearney Publication, http://www.middle-east.atkearney.com/documents/787838/8908433/Getting+in+on+the+GCC+E-Commerce+Game.pdf, accessed 03/06/18.

competent court. Article 53 sets out a number of grounds on which the validity of an arbitration award may be challenged.

On review, it is safe to suggest that the grounds for challenging arbitration awards as stipulated in the new UAE Federal Law No. 6 of 2018 on Arbitration are largely a restatement of prior grounds for challenging arbitration awards as stated in Article 216 of UAE Federal Law 11 of 1992. However, in a marked departure from the provisions of the now repealed UAE Federal Law 11 of 1992, under UAE Federal Law No. 6 of 2018, any challenge to an arbitration award must – in line with Article 54 – be brought before the courts within 30 days of the arbitral award being finalised. Such a challenge can only be brought before a UAE Court of Appeal and not a Court of First Instance[684].

The extent to which other provisions in the new law simultaneously limit the challenge and *vacatur* of arbitration awards while improving the enforcement of arbitration awards in the UAE is therefore only a matter that time will tell. A number of scholars have highlighted that, in a number of instances, enforcement of arbitration awards in the UAE has been an arduous process because of the tendency for disputants to attempt to appeal matters right through the different levels of the UAE courts. The reason for the new law is to ensure that disputants can no longer delay enforcement of arbitration awards by pursuing various appeals through the three different tiers of the Courts of the UAE. It is, however, noted that Dimitrakopoulos[685] does justify court interference in UAE arbitration on the basis that in a good number of cases challenging arbitration awards in the country, the courts have found that, because arbitrators had been focused on the technical merits at dispute, legal, procedural and public policy considerations which are important within UAE jurisprudence have been inadvertently missed or misinterpreted by arbitrators. The new law states in Article 56 that while an award may be challenged, interim relief may be sought and obtained until the courts validate the final award. As earlier mentioned, reference to public policy in the new UAE Federal Law No. 6 of 2018 is made in Article 2 (1) which

[684] Equivalent to a High Court in England and Wales.
[685] Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403.

basically states that arbitration can be applied to all matters of dispute; but only to the extent that such matters do not conflict with UAE *public order* and morality. This provision is in line with Article 1 of the Civil Transactions Code (CTC) of the UAE which states:

> "*The legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning in the case of provisions of definitive import. If the judge finds no provision in this Law, he must pass judgment according to the Islamic Sharia. Provided that he must have regard to the choice of 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 as dictated by expediency….****if the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morals, and if a custom is particular to a given emirate, then the effect of it will apply to that Emirate***" [emphasis by author].

Arguably, it will appear that, without the notion of *public order* being defined in Article 1 of UAE Federal Law No. 6 of 2018, the interpretation of what *public order* encompasses remains vague and can be widely applied although – as earlier stated in this thesis – it is defined in Article 3 of the UAE Federal Law 11 of 1992. This is a point, which, again, was highlighted earlier in this thesis based on academic scholarship[686].

[686] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32; Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403; Kantaria, S. 2012. The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law. *International Arbitration Law Review*, 15 (2), 61 – 66; Al-Enazi, M. 2013. *Grounds for refusal of enforcement of foreign commercial arbitral awards in GCC states law with special reference to (Bahrain and UAE).* Unpublished PhD Thesis, Brunel University, London; Ghodoosi, F. 2015. The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements. *Nebraska Law Review*, 94 (3), 685-736; Kanakri, C., and Massey, A. 2016. Comparison of UAE and DIFC-seated arbitrations. *Global Arbitration News*, Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18.

4.9 Key differences between UAE Federal Law No. 6 of 2018 and the repealed arbitration provisions in UAE Federal Law 11 of 1992

There are other key differences between the new UAE Federal Law No. 6 of 2018 on Arbitration and the now repealed Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992. In Articles 8 and 15 of the new law, any petition to the Courts of the UAE that seeks to challenge an arbitrator or an arbitral tribunal will no longer serve as a ground for suspending of arbitral proceedings unless the courts deem such a need. This is envisaged only to relate to criminal complaints being cited as a reason to challenge the arbitrator or arbitral tribunal. The now repealed Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992 had made no provisions for interim relief. This has been reiterated by the courts; for example in *Dubai Court of Cassation Judgement 201* of 2001, it was found that arbitrators had no power to order such summary or precautionary measures. In the new law (Article 21), an arbitrator or an arbitral tribunal can make an award for interim relief. The purpose of this revision to the law is to provide a party who is due an award some form of relief in the case that the opposing party seeks to challenge either the arbitrator or an arbitral tribunal or in fact the award under Articles 53 or 54. Dimitrakopoulos[687] points out that, under the prior provisions of UAE Federal Law 11 of 1992, arbitration proceedings were considered stayed when interrupted or suspended by court intervention. This inevitably meant that particular disputants could purposely prolong arbitration proceedings by progressing various appeals through the three different tiers of the Courts of the UAE in order to force settlement. The effect of this is the likelihood that the core aim of arbitration – that is *finality, conclusive and of binding nature* – was likely to be defeated.

The now repealed Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992 had made no provisions for a restatement of the finality of an arbitral award beyond provisions set out in Article 217 (1) that stated perhaps conflictingly that arbitral awards were not appealable; although at the same time providing that such awards could be indirectly appealed against through an appeal

[687] Dimitrakopoulos, A. 2001. Arbitration Practice in the UAE. *Arab Law Quarterly*, 16(4), 398-403.

against the court's ratification of the award. Article 52 now explicitly states that arbitration awards are final and binding and will take the same effect as a judgement rendered by a competent Federal Court of Appeal. Of particular interest to this thesis in terms of key differences between the new UAE Federal Law No. 6 of 2018 on Arbitration and the now repealed Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992 relates to the grounds for challenging arbitration awards. Under the prior law, the various grounds were spread across the different provisions of Articles 203 to 218, 235 to 238 and 239 to 243 of Federal Law 11 of 1992. The new UAE Federal Law No. 6 of 2018 on Arbitration now provides very limited grounds for such challenges. There are seven such grounds[688]:

(i) Where the is no substantive agreement between the parties to subject the matter to arbitration or such agreement of void has expired/lapsed.

(ii) Where a party does not have the legal capacity to engage in an agreement to conclude an arbitration agreement.

(iii) Where a party does not have the legal capacity to dispose of the disputed matter via arbitration.

(iv) Where a party to an arbitration proceeding has not been served with proper notice of the said proceedings.

(v) Where the arbitral award excludes an application of the choice of law of the parties to the dispute. Where the arbitral tribunal or the arbitrator was undertaken in a manner that contravenes UAE law[689] or the agreement of the disputants.

(vi) That there were substantial procedural irregularities during the arbitral proceedings which impacted on the integrity of the award.

(vii) That matters outside the scope of the dispute were deliberated and awards rendered. If this occurs, then the courts are empowered to set aside any arbitral award if it finds that:

[688] As the law is written in Arabic, what is stated here is a direct quotation of the English translation of the law based on an unofficial translation obained under license by the author from two UAE law firms; *Baker & McKenzie Habib Al Mulla* and *Al Tamimi & Co*.

[689] In this case, UAE Federal Law No. 6 of 2018 on Arbitration.

a. The subject-matter of the dispute is not capable of settlement by Arbitration.
b. The arbitral award is in conflict with the *public order* and morality of the State.

Furthermore, reference to public policy grounds for such challenges is also restricted (Article 2(1)) to where the arbitration proceeding or subject matter is in

"…*conflict with public order and morality of the State*".

In sum, on 3 May 2018, the UAE government promulgated UAE Federal Law No. 6 of 2018 on Arbitration, repealing previous arbitration provisions contained within Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992. With the new law in place, UAE arbitration law became supported by explicitly stand-alone statutory provisions as in other major developed countries such as the United Kingdom (UK) in terms of the Arbitration Act 1996 and the United States in terms of the United States Federal Arbitration Act of 1925. Of particular interest is that, within the new dispensation in the UAE, arbitration proceedings as applied to both international and local proceedings are now drawn upon in a manner consistent with UNCITRAL Model Law. For example, in the new arbitration law (Article 6 (2)), any application for a total or partial annulment of an arbitration award will not necessarily lead to the stay of any proceeding to enforce the arbitral award.

CHAPTER 5: THEORY

5.1 The applicable theories

To best explain how public policy may serve as a ground for challenging domestic arbitral awards, two theories are drawn upon. These theories serves as a means of ensuring that all knowledge drawn from existing literature is combined into a single and concise body of applicable knowledge area of interest. The first is *Freedom of contract* theory[690], as espoused within contract-based/party autonomy theory[691]. The second is *social contract* theory[692]. All two theories have been applied to arbitration. For example, in the case of *social contract* theory, studies include those by scholars such as Carlston[693], Kochan and Jick[694], Thomson[695], Speidel[696], Macneil[697], and Lipsky[698]. They have also been drawn upon for their explanatory functions

[690] Pound, R. 1909. Liberty of Contract, *Yale Law Journal*, 18 (7), 454-487; Feinman, J., 1989. The significance of contract theory. *University of Cincinnati Law Review*, 58 (4), 1283-1318; Schwartz, A. and Scott, R. 2003. Contract Theory and the Limits of Contract Law. *Yale Law Journal*, 113 (3), 541-620; Zemach, E. and Ben-Zvi, O. 2017. Contract Theory and the Limits of Reason. *Tulsa Law Review*, 52 (2), 167-212.
[691] Morgan, E. 1986. Contract theory and the sources of rights: An approach to the arbitrability question. *Southern California Law Review*, 60 (4), 1059-1082; Barnett, R. 1992. Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract. *Virginia Law Review*, 78, 1175-1206; Brunet, E. 1999. Replacing Folklore Arbitration with a Contract Model of Arbitration. *Tulane Law Review*, 74 (1), 39-86; Aragaki, H. 2015. Does Rigorously Enforcing Arbitration Agreements Promote Autonomy. *Indiana Law Journal*, 91 (4), 1143-1190; Gelinas, F. 2016. Arbitration as transnational governance by contract. *Transnational Legal Theory*, 7(2), 181-198.
[692] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge; Locke, J. 1690. *Second Treatise of Government*. Indianapolis: Hackett, 1980; Locke, J. 1992. *Second Treatise of Government. Classics of Moral and Political Theory*, 768-69, Michael L. Morgan ed; Roussseau, J. 1762. *The Social Contract*. London: Penguin Books; Rousseau, J. 1920. *The Social Contract: & Discourses*. Pub. JM Dent & Sons; Gough, J. 1937. The Social Contract: A Critical Study of Its Development. *Philosophy*, 12 (47), 362-363; Kahn, C. 1981. The Origins of social contract theory. *Hermes*, 44, 92-108; Riley, P., Goldie, M. and Wokler, R. 2006. *Social contract theory and its critics. The Cambridge history of eighteenth-century political thought*. Pub. Cambridge University Press, 347-376.
[693] Carlston, K. 1952. Theory of the arbitration process. *Law and Contemporary Problems*, 17(4), 631-651.
[694] Kochan, T. and Jick, T. 1978. The public sector mediation process: A theory and empirical examination. *Journal of Conflict Resolution*, 22(2), 209-240.
[695] Thomson, D. 1994. Arbitration theory and practice: A survey of AAA construction arbitrators. *Hofstra Law Review*, 23, 137-172.
[696] Speidel, R. 1996. Contract Theory and Securities Arbitration: Whither Consent. *Brooklyn Law Review*, 62 (4), 1335-1364.
[697] Macneil, I. 1999. Relational contract theory: challenges and queries. *Northwestern University Law Review*, 94 (3), 877-908.
[698] Lipsky, D. and Seeber, R. 2003. The social contract and dispute resolution: The transformation of the social contract in the United States workplace and the emergence of new strategies of dispute resolution. *International Employment Relations Review*, 9(2), 87-109; Lipsky, D. 2007. Conflict resolution and the transformation of the social contract, *Proceedings of the Fifty-Ninth Annual Meeting of the Labor and Employment Relations Association*. Presidential Address, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1025&context=conference, accessed 22/09/17.

5.1.1 Freedom of contract

The academic literature stipulates arbitration as a private[699] and non-judicial [700] form of alternative dispute resolution[701]. Through *contract*, two or more parties may seek to resolve a dispute using arbitration. The contract to arbitrate generally restricts the state to from interfering with the arbitration proceedings or awards, bar two functions. The first is to ensure that the contract to arbitrate is enforced and the second is to enforce the finding/award or decision of the third party – chosen by the parties to conduct the arbitral proceedings. While in effect disputants are at liberty to contract on how to resolve their disputes (for example, through arbitration), that agreement is in reality limited to the extent that, as Carlston[702] points out, public policy and the law allows the state to decide on the types of disputes that are arbitrable. Thus, as earlier discussed, in the UAE (for public policy reasons) certain disputes, particularly those that touch upon property rights, are not subject to arbitration.

A contract can be construed as a legally enforceable promise or agreement which two or more individuals may enter into[703]. Parties will enter into contracts for a number of reasons. In commercial circles, this may be driven by a need to regulate their business transactions and provide a framework for their engagement – in other words, their social interaction[704]. It may also be to establish mechanisms for resolving disputes. In that sense (that is, from a dispute resolution perspective), the literature construes a contract as a distinct social process that may be free from the coercive powers of the state[705]. This

[699] Mattli, W. 2001. Private justice in a global economy: from litigation to arbitration. *International Organization*, 55(4), 919-947.
[700] Sturges, W. 1960. Arbitration--What is it. *New York University Law Review*, 35, 1031 – 1047; Bonn, R. 1972. Arbitration: an alternative system for handling contract related disputes. *Administrative Science Quarterly*, 17 (2), 254-264; Lippman, M. 1972. Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives. *Maine Law Review*, 24 (2), 215-242; Drahozal, C. 2006b. Is arbitration lawless. *Loyola of Los Angeles Law Review*, 40, 187-215.
[701] Sander, F. 1985. Alternative methods of dispute resolution: an overview. *University of Florida Law Review*, 37 (1), 1-18; Edwards, H. 1986. Alternative dispute resolution: Panacea or anathema?. *Harvard Law Review*, 99(3), 668-684; Sander, F. and Goldberg, S. 1994. Fitting the forum to the fuss: A user friendly guide to selecting an ADR procedure. *Negotiation Journal*, 10, 49–68; Menkel-Meadow, C. 2015. *Mediation, Arbitration, and Alternative Dispute Resolution (ADR),* International Encyclopaedia of the Social and Behavioral Sciences, Elsevier Ltd. 2015; UC Irvine School of Law Research Paper No. 2015-59.
[702] Carlston, K. 1952. Theory of the arbitration process. *Law and Contemporary Problems*, 17(4), 631-651.
[703] Tsuruda, S. 2017. Contract, Power, and the Value of Donative Promises. *South Carolina Law Review*, 69 (2), 479-532.
[704] Feinman, J., 1989. The significance of contract theory. *University of Cincinnati Law Review*, 58 (4), 1283-1318.
[705] Feinman, J., 1989. The significance of contract theory. *University of Cincinnati Law Review*, 58 (4), 1283-1318; Schwartz, A. and Scott, R. 2003. Contract Theory and the Limits of Contract Law. *Yale Law Journal*, 113 (3), 541-620.

freedom implies that contracts are mutually voluntary and consensual engagements which allow individual parties the right to create, design and articulate the nature of the terms of their engagement with other parties[706].

The idea that individuals maintain an unlimited freedom to make promises as a natural right is a legal doctrine traced to the works of the Scottish economist and philosopher, Adam Smith[707]. Identified by Marshall[708] as one of the most important forms of human development to be achieved, *freedom of contract* which implies that individuals are empowered to create, design and articulate their obligations to others in a manner that they construe is in their own interest, has long attracted the attention of legal scholars[709]. According to Rosenfeld[710], *Freedom of contract* primarily operates in the domain of private forms of justice, and implies that individuals have at their disposal the required institutional factors that allow them to engage in contracts, determine their choice of contract, and determine who they may choose to engage in a contract with. In its most classical form, Kimel[711] alludes to *freedom of contract* entailing very limited or no restriction in an individual's ability to contract and have such contracts enforced. This view of *freedom of contract* suggests that contracts will be enforced even when there are other considerations – whether for public policy, economic or moral reasons – which may justify that it should not. Among the various reasons why contracts will be enforced is that, through their enforcement, economic efficiency and social welfare are ensured[712].

[706] Ben-Shahar, O. 2004. Freedom from contract. *Wisconsin Law Review*, 2, 261-270
[707] Smith, A. 1776. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Pub. MetaLibri, Pub. 2007 Edition.
[708] Marshall, R. 1913a. Freedom of Contract, *Canadian Law Times*,33 (6), 542-554
[709] See Knowlton, J. 1904-1905. Freedom of Contract, *Michigan Law Review*, 3 (8), 619-633; Pound, R. 1909. Liberty of Contract, *Yale Law Journal*, 18 (7), 454-487; Marshall, R. 1913a. Freedom of Contract, *Canadian Law Times*, 33 (6), 542-554; Marshall, R. 1913b. Freedom of Contract, *Law Magazine and Review: A Quarterly Review of Jurisprudence*, 38 (3), 278-293; Marshall, R. 1913c. Freedom of Contract, *Law Magazine and Review: A Quarterly Review of Jurisprudence*, 38 (4), 401-413; Marshall, R. 1913d. Freedom of Contract, *Law Magazine and Review: A Quarterly Review of Jurisprudence*, 39 (1), 23-42; Williston, S. 1920-1921. Freedom of Contract, *Cornell Law Quarterly*, 6 (4), 365-380; Fridman, G. 1967. Freedom of Contract, *Ottawa Law Review*, 2 (1), 1-22; Micklitz, H-W. 2015. On the Intellectual History of Freedom of Contract and Regulation, *Penn State Journal of Law and International Affairs*, 4 (1), 1-32.
[710] Rosenfeld, M. 1985. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, *Iowa Law Review*, 70 (4), 769-900.
[711] Kimel, D. 2001. Neutrality, Autonomy, and Freedom of Contract, *Oxford Journal of Legal Studies*, 21 (3), 473–494.
[712] Zemach, E. and Ben-Zvi, O. 2017. Contract Theory and the Limits of Reason. *Tulsa Law Review*, 52 (2), 167-212.

Core to the law of contracts is that individual parties have voluntarily assumed benefits and obligations that flow from the contract[713]. *Freedom of contract* is rooted in the ideas of individual *autonomy* – in effect, the notion that individuals should be allowed (with minimal interference) to decide their own destinies and in the process make decisions on the activities they will engage in and the relationships they will form[714].

Unlike tort whereby liability is imposed by law, liability in contracts emanates from the *voluntary* nature of the obligations which the parties would have assumed as part of their exchange of promise or agreement.

While a classical view of contracts as a private agreement free from state interference and coercion is well espoused within the academic literature, studies by Feinman[715], Kimel[716] and Schwartz and Scott[717] opines that it can be somewhat problematic. First, the notion of party autonomy to contract is not universally accepted. Pound[718] for example had suggested that 'freedom of contract' as espoused by the courts tended to project a view that justice was individually construed and, as a result, it "*exaggerates private right at the expense of public right*" (p. 457). Second is that the state (through the courts) can actually interfere in private contracts. Feinman[719] notes that sometimes, for public policy reasons, the courts may be willing to impose legal obligation for social/public interest reasons on parties to a contract. The courts are able to impose such obligations particularly when called upon to do so when adjudicating contractual disputes to, for example, define the extent of party liability. Schwartz and

[713] Kimel, D. 2001. Neutrality, Autonomy, and Freedom of Contract, *Oxford Journal of Legal Studies*, 21 (3), 473–494; Treitel, G. and Peel, E. 2011. *The law of contract*. London: Sweet and Maxwell, 13th edition; Furmston, M. 2012. *Cheshire, Fifoot and Furmston's law of contract*. Oxford: Oxford University Press, 16th edition; McKendrick, E. 2013. *Contract law*. London: Palgrave Macmillan, 10th edition; Fried, C., 2015. *Contract as promise: A theory of contractual obligation*. Oxford University Press, USA; O'Sullivan, J. and Hilliard, J. 2016. The law of contract. Oxford University Press.
[714] Kimel, D. 2001. Neutrality, Autonomy, and Freedom of Contract, *Oxford Journal of Legal Studies*, 21 (3), 473–494; Meng, Z. 2014. Party Autonomy, Private Autonomy, and Freedom of Contract. *Canadian Social Science*, 10(6), 212-216..
[715] Feinman, J., 1989. The significance of contract theory. *University of Cincinnati Law Review*, 58 (4), 1283-1318.
[716] Kimel, D. 2001. Neutrality, Autonomy, and Freedom of Contract, *Oxford Journal of Legal Studies*, 21 (3), 473–494.
[717] Schwartz, A. and Scott, R. 2003. Contract Theory and the Limits of Contract Law. *Yale Law Journal*, 113 (3), 541-620.
[718] Pound, R. 1909. Liberty of Contract, *Yale Law Journal*, 18 (7), 454-487.
[719] Feinman, J., 1989. The significance of contract theory. *University of Cincinnati Law Review*, 58 (4), 1283-1318.

Scott[720] on the other hand point out that if the state is not able to intervene and enforce contracts, and in effect in the process support the regulation of economic transactions, commercial parties are likely to be less willing to engage in business transactions, which will inevitably expose them to risk. This is likely to have a negative impact on the viability of economic activity. Third, there are also other reasons why the state (through the courts or legislative measures) may seek to restrict an individual's *freedom of contract.* For example, the courts may decide to restrict such freedoms where such contracts are engaged in under duress[721], fraud[722], when it is deemed to be unconscionable[723] or where, for example, the parties or a party to the contract is deemed not to have the capacity (out of age or mental incapacity) to enter into such contract[724]. In such circumstances, such contracts may not be enforceable or declared illegal, void or voidable either to protect specific parties to such contracts, or for public policy reasons. Kimel[725] and Meng[726] highlights two possible reasons to justify such interference. The first is to ensure social justice and the second is to protect vulnerable individuals. More specifically, Kimel[727] offers a perspective that state interference with individual autonomy and, by extension, freedom of contract can be justified on the grounds that such interference actually protects such autonomy by the prevention of such autonomy to be compromised through an individual's poorly construed decision to enter into such contracts. In the case of commercial contracts, such state 'protection' is provided on the basis that

[720] Schwartz, A. and Scott, R. 2003. Contract Theory and the Limits of Contract Law. *Yale Law Journal*, 113 (3), 541-620.
[721] Littlewood, M. 1985. Freedom from Contract: Economic Duress and Unconscionability, *Aukland University Law Review*, 5 (2), 164-179; Feldman, S. 2015b. Pre-Dispute Arbitration Agreements, Freedom of Contract, and the Economic Duress Defense: A Critique of Three Commentaries, *Cleveland State Law Review*, 64 (1), 37-82.
[722] Jiang, H. 2017. Freedom to Mislead: The Fictitious Freedom to Contract around Fraud under Delaware Law. *New York University Journal of Law and Business*, 13 (2), 393 - 424.
[723] Stuntebeck, C. 1967. The Doctrine of Unconscionability, *Maine Law Review*, 19 (1), 81-91; Goldberg, G. 1979. Arbitration of Claims of Contract Unconscionability, *North Dakota Law Review*, 56 (1), 7-30; Littlewood, M. 1985. Freedom from Contract: Economic Duress and Unconscionability, *Aukland University Law Review*, 5 (2), 164-179; Sears, J. 1989. Mental Retardation and Unconscionability, *Law and Psychology Review*, 13, 77-90; Smithson, S. 2013. A Delicate Balancing of Paternalism and Freedom to Contract: The Evolving Law of Unconscionability in Missouri, *Missouri Law Review*, 78 (1), 321-350.
[724] Sears, J. 1989. Mental Retardation and Unconscionability, *Law and Psychology Review*, 13, 77-90; Deakin, S. 2006. 'Capacitas': Contract law and the institutional preconditions of a market economy. *European Review of Contract Law*, 2(3), 317-341; Watts, P., 2015. Contracts Made by Agents on Behalf of Principals with Latent Mental Incapacity: The Common Law Position. *Cambridge Law Journal*, 74(1), 140-154.
[725] Kimel, D. 2001. Neutrality, Autonomy, and Freedom of Contract, *Oxford Journal of Legal Studies*, 21 (3), 473–494.
[726] Meng, Z. 2014. Party Autonomy, Private Autonomy, and Freedom of Contract. *Canadian Social Science*, 10(6), 212-216.
[727] Kimel, D. 2001. Neutrality, Autonomy, and Freedom of Contract, *Oxford Journal of Legal Studies*, 21 (3), 473–494.

commercial contract are otherwise not formed in cases where essential supporting structures of a personal nature exist. Thus, state interference serves to assure parties to a contract that the state will enforce legitimate interests and expectations of the contracting parties[728]).

From an arbitration perspective, freedom of contract in the case law as stated by the United States Supreme Court in *Volt Inf. Sciences v Stanford Univ*[729]

> *"…is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate … so too may they specify by contract the rules under which that arbitration will be conducted*" (at 2).

This position was reiterated by United States Court of Appeals (Seventh Circuit) in *Baravati v Josephthal, Lyon & Ross*[730] who opined:

> "*Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract*" [at 10].

However, as opined by the Supreme Court in *Jivraj v Hashwani*[731], arbitrators are not employees of disputants. Instead they are

[728] Zemach, E. and Ben-Zvi, O. 2017. Contract Theory and the Limits of Reason. *Tulsa Law Review*, 52 (2), 167-212.
[729] Volt Information Sciences, Inc. v Board of Trustees, Leland Stanford Junior University, 489 U.S. 468 (1989).
[730] Baravati v Josephthal, Lyon & Ross, 28 F.3d 704, 709 (7th Cir. 1994).
[731] Jivraj v Hashwani [2011] UKSC 40.

"…*independent providers of services who are not in a relationship of subordination with the person who receives the service* [at 68].

They (arbitrators) derive their 'power' to arbitrate from a contract which the disputants have entered as part of their '*freedom to contract*'[732] and autonomy which as Brunet[733] points out is " *a significant feature of all ADR, and constitutes an especially critical underpinning to arbitration theory and practice*" (p.65). This implies a right to objective autonomy in terms of their freedom to seek to resolve disputes in a manner of their choosing[734]. According to Ghodoosi[735], party autonomy to an extent implies that contracting parties are able to contracts in a way and manner that excludes the court's jurisdiction to adjudicate on their dispute. However, this is only to the extent that the dispute is not solely excluded from publicly accepted competency of arbitration.

The notion of party autonomy to contract is however not universally accepted within the context of alternative dispute resolution (ADR). Extending earlier assertions by Pound[736], as applied to arbitration, Helm[737] claims that arbitration contractual clauses that seek to remove all possibility for judicial review should be unenforceable because the courts cannot be expected to simply affirm arbitration findings and awards without examining the merits of such awards. In effect, it can be posited that not only is individual autonomy limited to what is acceptable to the society, but also once the dispute is brought to the attention of the courts. This is because, in reality, it is the court acting as an organ of

[732] The idea that individuals maintained an unlimited freedom to make promises as a natural right is a legal doctrine traced to the works of the Scottish economist and philosopher, Adam Smith. See Smith (1776) Bk. IV, Chap. IX; see further, Pound, R. 1909. Liberty of Contract, *Yale Law Journal*, 18 (7), 454-487.
[733] Brunet, E. 1999. Replacing Folklore Arbitration with a Contract Model of Arbitration. *Tulane Law Review*, 74 (1), 39-86.
[734] Morgan, E. 1986. Contract theory and the sources of rights: An approach to the arbitrability question. *Southern California Law Review*, 60 (4), 1059-1082; Barnett, R. 1992. Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract. *Virginia Law Review*, 78, 1175-1206; Brunet, E. 1999. Replacing Folklore Arbitration with a Contract Model of Arbitration. *Tulane Law Review*, 74 (1), 39-86; Aragaki, H. 2015. Does Rigorously Enforcing Arbitration Agreements Promote Autonomy. *Indiana Law Journal*, 91 (4), 1143-1190; Gelinas, F. 2016. Arbitration as transnational governance by contract. *Transnational Legal Theory*, 7(2), 181-198.
[735] Ghodoosi, F. 2016. Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts. *Lewis & Clark Law Review*, 20, 237-280.
[736] Pound, R. 1909. Liberty of Contract, *Yale Law Journal*, 18 (7), 454-487.
[737] Helm, K. 2006. The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?. *Dispute Resolution Journal*, 61(4), 16 - 26.

the state that is the true guarantee of individual autonomy[738]. However, the state can also represent a threat to such autonomy as it retains the power to interfere in private contractual obligations and disputes – albeit under the guise of 'public policy' or, in the case of the UAE – '*public order*. As relates to arbitration, it is the courts alone who will decide whether they will review the arbitration awards, and to what extent. Thus, another view of the autonomy debate is that the courts are able to review arbitral findings and awards because the power of arbitrators flows from the state and not the disputants. This opinion is in line with earlier suggestions by Carlston[739] that arbitration is in reality an organ of the judicial law systems.

Irrespective of the debates at hand that relate to contractual rights, we opine that the process of arbitration derives its existence from both contractual rights and judicial deference.

The process of arbitration derives its existence from contractual rights in that parties to a dispute are from the perspective of individual autonomy allowed to enter into any contract of their choice relating to matters of personal interest. This is, however, qualified to the point that the matters contracted into (i) are not illegal or reprehensible to society, (ii) do not make obligation on third parties who are not parties to the contract (*privity*) and (iii) do not venture into matters which are against public policy. However, the problem with such contracts is that a party may decide *not* to fulfil obligations it has contracted to. On other occasions, there may be a controversy between the contracting parties as to the essence of the contract entered into. Although one party may rely on contractual provisions to call upon a non-judicial body (such as an arbitrator) to ensure that obligations are fulfilled by the opposing party, that third-party non-judicial body will still ultimately have to rely on the coercive political power of the state to ensure that the findings of the non-judicial body are enforced. Herein resides our argument that ultimately, irrespective of contract rights and autonomy, arbitration will derive its existence not only from contractual rights, but also from judicial deference. It is after all the judges who, through their rulings,

[738] Cotterrell, R. 2011. Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?. *Social & Legal Studies*, 20(1), 3-20.
[739] Carlston, K. 1952. Theory of the arbitration process. *Law and Contemporary Problems*, 17(4), 631-651.

have ensured that arbitrator findings and awards are enforced. Carlston[740] highlights that an alternative thesis on arbitration and contractual rights may well claim that the very essence of arbitration assumes the absence of any agreement between disputants bar an agreement on the mode of disputes settlement.

5.1.2 Social contract theory

As discussed earlier, fundamental to *freedom of contract* is the idea of individual *autonomy*. The *freedom of contract* entails that individuals are free to enter into agreements to owe positive obligations to other individuals. *Freedom to contract* does not entail freedom *from* other individuals. The challenge, however, to the idea of individualism in contracts is that, ultimately, individuals exist within social orders. Rosenfeld[741] provides a more eloquent articulation on how *freedom of contract,* individualism and the society can be reconciled by advancing the idea that while the individual is autonomous and independent, *individualism* implies that the individual should be free from interference by other individuals (or institutions) within the society to the extent that the activities undertaken by that individual do not *interfere* either with the activities undertaken by other individuals or the wider society. To this extent, it can be construed that while individuals retain a *freedom of contract*, these freedoms are tempered by the individual's obligations towards the wider society. This is so because, as indicated in various literature, individuals are fully embedded within a series of social relationships and networks[742].

Social contract theory is construed as theory that may provide an explanation for how public policy may serve as a ground for challenging domestic arbitral awards. It does so by addressing the core

[740] Carlston, K. 1952. Theory of the arbitration process. *Law and Contemporary Problems*, 17(4), 631-651.
[741] Rosenfeld, M. 1985. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, *Iowa Law Review*, 70 (4), 769-900.
[742] MacIver, R. 1914. Society and "The Individual", *The Sociological Review*, 7 (1), 58-64; Jones, E. 1935. The Individual and Society, *Sociological Review*, 27 (3), 245-263; Rosenfeld, M. 1985. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, *Iowa Law Review*, 70 (4), 769-900; Bevir, M. 1996. The Individual and Society, *Political Studies*, 44 (1), 102-114; Antonucci, T., Berkman, L., Börsch-Supan, A., Carstensen, L., Fried, L., Furstenberg, F., Goldman, D., Jackson, J., Kohli, M., Olshansky, S. and Rother, J. 2016. *Society and the Individual at the Dawn of the Twenty-First Century*. In Handbook of the Psychology of Aging, 8th Edition, pp. 41-62.

question as to why an individual who is autonomous may be expected to owe obligations to the society. This question, it is argued, is central to *social contract theory*.

Modern *social contract theory* is largely drawn from the works of the philosophers, Thomas Hobbes[743], John Locke[744] and Jean-Jacques Rousseau[745]. At its basic level, social contract theory suggests that an individual's political, legal and moral obligations depend on agreements (the contract) between that individual and the society in which they reside[746]. It provides that individuals are prepared to cede their unfettered freedom in exchange for security provided by the rule of law within a society. Drawing from Allen[747], the notion of a social contract has attracted different judicial meanings. For example, some judicial rulings have conceptualised social contracts as contracts that are just and fair, others as a range of positive laws, and others as legal principles that should be acceptable to the rational individual. According to Friend[748] the basic idea in *social contract theory* is that an individual's moral obligations to the society are largely dependent on a contract (agreement) to be part of the wider society within which they exist. In effect, it creates the picture of the individual becoming part of the society based on a contract that is *freely* and *voluntarily* entered into.

Hobbes[749] for example had argued that human beings were primarily self-interested. Individuals will in reality only pursue matters perceived to advance their personal interests. In effect, they will pursue what was deemed desirable to their interests and ignore what is deemed to be adverse to their interests.

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[743] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge; Ritchie, D. 1891. Contributions to the History of the Social Contract Theory, *Political Science Quarterly*,6 (4), 656-676; Riley, P. 1973. How Coherent is the Social Contract Tradition?, *Journal of the History of Ideas*, 34 (4), 543-562; Kahn, C. 1981. The Origins of social contract theory. Hermes, 44, 92-108; Kary, J. 2000. Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke", Ottawa Law Review, 31 (1), 73-92; Fish, S. 2017. Thomas Hobbes: The Father of Law and Literature. Law & Literature, 29(1), 151-156.
[744] Locke, J. 1690. Second Treatise of Government. Indianapolis: Hackett, 1980.
[745] Roussseau, J. 1762. The Social Contract. London: Penguin Books.
[746] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge; Locke, J. 1690. *Second Treatise of Government*. Indianapolis: Hackett, 1980; Locke, J. 1992. *Second Treatise of Government*. Classics of Moral and Political Theory, 768-69, Michael L. Morgan ed; Roussseau, J. 1762. *The Social Contract*. London: Penguin Books; Rousseau, J. 1920. *The Social Contract: & Discourses*. Pub. JM Dent & Sons; Allen, A. 1999. Social Contract Theory in American Case Law, *Florida Law Review*, 51 (1), 1-40.
[747] Allen, A. 1999. Social Contract Theory in American Case Law, *Florida Law Review*, 51 (1), 1-40.
[748] Friend, C. 2004. *Social contract theory*. www.iep.utm.edu/soc-cont/. Accessed 13/07/18.
[749] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge.

Put more simply, Hobbes[750] had claimed that all actions taken by an individual are designated to advance their personal circumstances. In order to explain why individuals were prepared to become part of a society that entailed subjugating 'unhinged' individual rights to collective societal values (the common good of the society), Hobbes[751] and later on Ritchie[752] claimed that self-interest was generally mitigated by reason and rational assessments by the individual on how to ensure their self preservation. In effect, the individual was only prepared to *freely* and *voluntarily* subject themselves to societal values, norms and common laws that advanced their interests and ensured their survival[753]. Fundamentally, Hobbes believed that obligations were based on individual decisions which were articulated in contracts[754].

The social contract that emerged from this arrangement is that by *freely* and *voluntarily* of their own volition choosing to subject oneself to societal values, norms and common laws[755], the individual also expected that these values, norms and common laws will serve as avenues to protect personal interests[756]. The individual who made such sacrifice to consent to the limits of such freedom being determined by the values, norms and common laws of the wider society did so on the basis of a tacit understanding (contract) that the same society will regulate the interaction between all individuals who were part of the society to ensure that harmony prevailed[757]. Thus, essentially, *social contract theory* is based on the premise that the relationship between individual members of a society and the laws that

[750] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge.
[751] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge.
[752] Ritchie, D. 1891. Contributions to the History of the Social Contract Theory, *Political Science Quarterly*,6 (4), 656-676.
[753] Riley, P. 1973. How Coherent is the Social Contract Tradition?, *Journal of the History of Ideas*, 34 (4), 543-562; Kahn, C. 1981. The Origins of social contract theory. *Hermes*, 44, 92-108..
[754] Kary, J. 2000. Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke, *Ottawa Law Review*, 31 (1), 73-92.
[755] Bester, H. and Warneryd, K. 2006. Conflict and the Social Contract. *Scandinavian Journal of Economics*, 108 (2), 231-249.
[756] Skyrms, B. 2016. Evolution, Norms, and the Social Contract. *Arizona State Law Journal*, 48 (4), 1087-1100; Tutunaru, M. 2016. Social Contract Theory and the Theory of Separation of Powers. *Journal of Law and Administrative Sciences*, 5, 74-83..
[757] Ritchie, D. 1891. Contributions to the History of the Social Contract Theory, *Political Science Quarterly*,6 (4), 656-676.

govern that society are driven by mutual consent[758] and reciprocity[759]. Both are, however, primarily derived out of self-interest because, arguably according to Kary[760] , the individual can still choose to repudiate the contract if this is deemed to serve his interest.

Freedom of contract and individual autonomy mean that while the individual *freely* and *voluntarily* of their own volition makes the choice to subject oneself to societal values, norms and common laws, they maintain a simultaneous obligation not to seek the imposition of their own interest on other individuals[761]. At the core of the theory of *social contract* is that the relationship between individuals in relation to other individuals and institutions (the social relationship) is primarily driven by utility; in other words, it is based on the idea that individuals engage in social relationships in order to derive the greatest value possible from the least amount of obligations[762]. Via a social contract, individuals make a decision to be part of a specific society. Doing so, however, is associated with an obligation from the individual to abide by the laws and social values that are deemed pertinent to the specific society. It is also associated with a reciprocal obligation from the society to protect the basic interests of the individual concerned. Thus, based on a *freedom of contract,* both the individual and the society choose to consent to mutually self-imposed obligations[763]. However, due to freedom of choice, individuals may decide e not to abide by such a contract and leave the society.

While this thesis advances the notion that *social contract theory* represents one of the theories that may best explain how public policy may serve as a ground for challenging domestic arbitral awards, *social contract theory* is not without its critics. Drawing from Allen[764], for example, the flexibility of its

[758] Riley, P. 1973. How Coherent is the Social Contract Tradition?, *Journal of the History of Ideas*, 34 (4), 543-562; Kary, J. 2000. Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke, *Ottawa Law Review*, 31 (1), 73-92; Bester, H. and Warneryd, K. 2006. Conflict and the Social Contract. *Scandinavian Journal of Economics*, 108 (2), 231-249.
[759] Rosenfeld, M. 1985. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, *Iowa Law Review*, 70 (4), 769-900.
[760] Kary, J. 2000. Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke, *Ottawa Law Review*, 31 (1), 73-92.
[761] Rosenfeld, M. 1985. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, *Iowa Law Review*, 70 (4), 769-900.
[762] Gauthier, D. 1977. The Social Contract as Ideology, *Philosophy & Public Affairs*, 6 (2), 130-164.
[763] Riley, P. 1973. How Coherent is the Social Contract Tradition?, *Journal of the History of Ideas*, 34 (4), 543-562.
[764] Allen, A. 1999. Social Contract Theory in American Case Law, *Florida Law Review*, 51 (1), 1-40.

interpretation leads to a lack of clarity as relates to the desire for relational power between individual over the society or, conversely, the society over individuals. It is also worth mentioning that Kary[765] cautions on the importance of recognising that contracts as conceptualised by Hobbes [766] is very different from its more modern conceptualisation. One key difference in terms of how Hobbes addressed contracts and their more modern conceptualisation is that he viewed contracts as agreements defined by customary practice which involved parties ceding their rights to another[767]. This differs from more modern views of contracts which emphasise the acquisition of rights based on a mutually legally enforceable promise between two (or more parties). In sum, the central tenet of the social contract theory is that:

(i) individuals are originally born into a natural state within which their views of right and wrong, morality, ethics and acceptable behaviour is of their own choice, and that

(ii) these individuals begin to organise into groups – in effect as they begin to form part of the wider society, they begin to enter into social contracts where their previous 'power' to determine right and wrong, morality, ethics and acceptable behaviour gradually ceases to be of their own choice.

(iii) Instead, the social contracts they form means that their previous 'powers' are now delegated to the wider society.

This reasoning has been supported by judicial opinions; for example the United States Supreme Court in *Kennett v Chambers*[768] stated that

"…every citizen is a portion of [the government], and is himself personally bound by the laws…".

[765] Kary, J. 2000. Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke, *Ottawa Law Review*, 31 (1), 73-92.
[766] Hobbes, T. 1651. *Thomas Hobbes*. 2016 Leviathan (2016 reprint), Longman Library of Primary Sources in Philosophy. Routledge.
[767] Kahn, C. 1981. The Origins of social contract theory. *Hermes*, 44, 92-108.
[768] *Kennett v Chambers*, 55 U.S. 38, 11 (1852).

A brief review of the literature on *social contract theory* shows interest among scholars on the application of this theory to arbitration[769].

Kary[770] had earlier posited that scholars intent on using *social contract theory* to explain the phenomenon (as is undertaken in this thesis) have mainly adopted either of two approaches. The first approach emphasises the meaningfulness of *social contract theory*. Scholars who adopt this approach tend to draw upon *social contract theory* as a means of enhancing their study of how societal values may be best understood. The second approach on the other hand focuses on how *social contract theory* may explain how social contract is enhanced through the creation of new institutions. This is the approach adopted herein. This approach is adopted because it supports the idea that individuals out of self-interest will conceptualise their rights (and obligations) in a manner that also supports the rights (and obligations) that they will ascribe to others.

The classical interpretation of social contract theory suggested that that the resolution of disputes between individual members of a society was the sole responsibility of the state acting through the courts system[771]. Thus, this view of the social contract does not allow for private forms of justice. This view is however, changing for a number of reasons, including the practical needs for commercial transactions to be supported by more speedy resolution of disputes. Herein, arbitration is construed as one such form

[769] Carlston, K. 1952. Theory of the arbitration process. *Law and Contemporary Problems*, 17(4), 631-651; Kochan, T. and Jick, T. 1978. The public sector mediation process: A theory and empirical examination. *Journal of Conflict Resolution*, 22(2), 209-240; Thomson, D. 1994. Arbitration theory and practice: A survey of AAA construction arbitrators. *Hofstra Law Review*, 23, 137-172; Speidel, R. 1996. Contract Theory and Securities Arbitration: Whither Consent. *Brooklyn Law Review*, 62 (4), 1335-1364; Macneil, I. 1999. Relational contract theory: challenges and queries. *Northwestern University Law Review*, 94 (3), 877-908; Lipsky, D. and Seeber, R. 2003. The social contract and dispute resolution: The transformation of the social contract in the United States workplace and the emergence of new strategies of dispute resolution. *International Employment Relations Review*, 9(2), 87-109; Lipsky, D. 2007. Conflict resolution and the transformation of the social contract, *Proceedings of the Fifty-Ninth Annual Meeting of the Labor and Employment Relations Association*, Presidential Address, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1025&context=conference, accessed 22/09/17.

[770] Kary, J. 2000. Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke, *Ottawa Law Review*, 31 (1), 73-92.

[771] Lipsky, D. and Seeber, R. 2003. The social contract and dispute resolution: The transformation of the social contract in the United States workplace and the emergence of new strategies of dispute resolution. *International Employment Relations Review*, 9(2), 87-109.

of private justice that will serve the individual interests of its users. According to Marcantel[772], the wider society now chooses officers (in the context of this study, arbitrators) who act on behalf of the society[773], not only to create and enforce laws to protect the society, but also to create the means for adjudicating disputes between individual members of the society. It therefore holds that a contracting party to an arbitration proceeding based on a *freedom of contract* has a choice to enter into an arbitration contract (or to include an arbitration clause in a contract). On exercising that freedom, they become bound as determined by societal values (rules) which are enforceable by the coercive power of the society – in effect, *the law*. Individual parties who resort to arbitration do so because, in exercising their *freedom of contract*, they have determined that arbitration is more likely to protect their interests and increase utility as they (the individual) are more able to limit their obligations only to those parties who are subject to the specific contract. Drawing from Rosenfeld[774], this can occur in two different ways. First, arbitration as a dispute resolution mechanism allows parties within reason to specify their obligations to other contracting parties. Second, parties are able to protect their interests by largely specifying the range of options and awards available to the arbitrator. They can also choose to dispense with the rigid and complex rules associated with litigation giving the arbitrator more discretion. This ensures that their interests are largely protected irrespective of the outcome of the arbitration hearing. This is against the position the parties may find themselves in where the state (acting through the courts) may arrive at rulings which in effect are not in the interest of any of the disputants. Therefore, as Ghodoosi [775]points out, disputants engaged in arbitration are more likely to protect their interest than when engaged in litigation in the courts. Conversely, drawing from Rosenthal's[776] espousing of *Social contract theory*, it follows that if an individual *freely* and *voluntarily* of their own volition makes the choice to subject

[772] Marcantel, J. 2008. The crumbled difference between legal and illegal arbitration awards: Hall street associates and the waning public policy exception. *Fordham Journal of Corporate & Financial Law*, 14 (3), 597-638.
[773] Either formally – when appointed for example by the courts; or informally – when appointed by disputing parties.
[774] Rosenfeld, M. 1985. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, *Iowa Law Review*, 70 (4), 769-900.
[775] Ghodoosi, F. 2016. Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts. *Lewis & Clark Law Review*, 20, 237-280.
[776] Rosenthal, M. 1998. Two Collective Action Problems in Spinoza's Social Contract Theory. *History of Philosophy Quarterly*, 15 (4), 389-409.

themselves to arbitration and its primary rule of law principle of *finality, conclusive and binding nature* and then seeks to challenge and vacate an arbitration award made under the same social contract, such an individual may be seen to have reneged on a key social obligation. This could lead to a loss of trust required in contract formation.

5.2 Reflections

The social nature of arbitration implies that it now represents a well recognised social reality in modern jurisprudence. For scholars to understand arbitration, there is thus a need to undertake socially bound lines of enquiry that take cognisance of not only its history, but also its potential (as against litigation) to repair broken-down social relationships between disputants. It is thus safe to surmise that arbitration is largely determined by the nature of the social context in which its proceedings exist. As in the case of the law[777], it is safe to posit that arbitration does not appear to maintain specific theories or methodologies although Yu[778] identifies approximately five theories that are widely applicable; rather, arbitration is contextual in that its operations are not specific to any particular cultural, jurisdictional or legal tradition. Yet, in a large section of the literature, arbitration has been construed as an institution extolling a somewhat single understanding of and specific approach to its interpretation – particularly of its more contentious elements which include how its proceedings and awards can be challenged and vacated. Thus, our intention is to introduce an interpretation of arbitration as a primary feature of the social environment within which it is conducted.

This view puts the various ideas discussed into an intellectual context that allows the identification of other relationships and other connections. While this context is primarily private, it can be drawn into the public domain when parties for a number of reasons disagree on the very nature of the

[777] Cotterrell, R. 1998. Why must legal ideas be interpreted sociologically?. *Journal of Law and Society,* 25(2), 171-192.
[778] Yu, H. 2004. Explore the void - an evaluation of arbitration theories: Part 1. International Arbitration Law Review, 7 (6), 180-190; Yu, H. 2005. Explore the void - an evaluation of arbitration theories: Part 2. International Arbitration Law Review, 8 (1), 14-22; Yu, H. 2008. A Theoretical Overview of the Foundations of International Commercial Arbitration. Contemporary Asia Arbitration Journal, 1 (2), 255-286.

contract that enables arbitration proceedings to occur. Herein, the state on the basis of public policy can intervene to ensure that contractual obligations are enforced. The state takes on this role primarily for public policy reasons for, if contractual obligations can be circumvented or avoided, markets are unlikely to function properly.

CHAPTER 6: PUBLIC POLICY AND PARALLEL UAE COURTS

6.1 Overview

To address the third (and final) research question (*How does the existence of different parallel courts within the 'UAE Courts system impact on how the Public policy (and/or public order) exception is construed and how is its impact on the finality, conclusive and binding nature of arbitration?*), a pragmatic fact-finding research methodology is adopted. Thus, in order to address the third research question, this study has made reference to prior studies that emphasise the need for law studies and research that draws upon real-world *empirical* data.

6.2 Empirical research in law

From the literature (see Heise[779], Schuck[780], George[781] and Franck[782]), a traditional definition of what is 'empirical' will involve studies that employ techniques and analyses of a statistical nature as applied to data that includes "systematically coded judicial opinions" (Heise[783], p. 810). For some scholars, this implies that 'empirical' meant quantitative studies (Llewellyn[784]; George[785]; Kastellec[786]), geared towards the facilitation of "descriptions of or inferences to a larger sample or population as well as replication by other scholars" (Heise[787], p.821). For example, Schuck[788] had cautioned that

[779] Heise, M. 1999. Importance of Being Empirical. *Pepperdine Law Review*, 26, 807 – 834; Heise, M. 2002. Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism. *University of Illinois Law Review*, 2002 (4), 819-850.
[780] Schuck, P. 1989. Why don't law professors do more empirical research. *Journal of Legal Education*, 39, 323-336.
[781] George, T. 2006. An empirical study of empirical legal scholarship: the top law schools. *Indiana Law Journal*, 81 (1), 141-162.
[782] Franck, S. 2008. Empiricism and international law: Insights for investment treaty dispute resolution. *Virginia Journal of International Law*, 48 (4), 767-816.
[783] Heise, M. 1999. Importance of Being Empirical. *Pepperdine Law Review*, 26, 807 - 834.
[784] Llewellyn, K. 1931. Some Realism about Realism-Responding to Dean Pound, *Harvard Law Review*,44 (8), 1222-1264.
[785] George, T. 2006. An empirical study of empirical legal scholarship: the top law schools. *Indiana Law Journal*, 81 (1), 141-162.
[786] Kastellec, J. 2010. The statistical analysis of judicial decisions and legal rules with classification trees. *Journal of Empirical Legal Studies*, 7(2), 202-230.
[787] Heise, M. 2002. Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism. *University of Illinois Law Review*, 2002 (4), 819-850.
[788] Schuck, P. 1989. Why don't law professors do more empirical research. *Journal of Legal Education*, 39, 323-336.

"*The neglect of empirical work is a bad, increasingly worrisome thing for our scholarship and teaching*" (p. 323).

Baldwin and Davis[789] claim that the need for empirical studies in law is being driven by the reality that

"*…it is principally through empirical study of the practice of law ... and in studying the way legal processes and decisions impact upon the citizen, that the disciplines of sociology and, to a lesser degree, philosophy, psychology, and economics have entered into and enriched the study of law"* (p. 881).

However, irrespective of the research methodology, method or approach adopted when undertaking research, it is imperative that it is recognised that

"*... no theory can be proven true by empirical data*" (Greenwald *et al*.[790]).

The literature suggests that a broader scope of the notion of *empiricalism* in legal research implies any and/or all observations made about the 'real world'[791]. Herein, empirical research can be either of a qualitative (where textual or in effect, non-numerical data are collected) or quantitative (where numerical

[789] Baldwin, J. and Davis, G. 2003. *Empirical research in law*. In Cane, P and Tushnet, M (eds). The Oxford handbook of legal studies. Oxford: Oxford University Press, pp. 880-900.
[790] Greenwald, A., Pratkanis, A., Leippe, M. and Baumgardner, M. 1986. Under what conditions does theory obstruct research progress?. *Psychological Review*, 93(2), 216-229 (p. 226).
[791] George, T. 2006. An empirical study of empirical legal scholarship: the top law schools. *Indiana Law Journal*, 81 (1), 141-162; Boyd, C., 2015a. In defense of empirical legal studies. *Buffalo Law Review*, 63 (2), 363-378; Indulekha, T. 2018. Empiricism in the Indian Arbitration Landscape. *Indian Journal of Arbitration Law*, 6 (2), 1-17.

data are collected) nature[792]. Heise[793] states that as applied to legal research, empirical research is largely of three forms consisting of (i) case content analysis or judicial opinion coding, (ii) inferential research, and (iii) descriptive research.

6.3 Case content analysis (judicial opinion coding)

Increasingly content analysis has become popular in the laws[794]. Examples of instances of the use of content analysis includes Sisk *et al*. [795] who sought to explore how among other factors, social background impacted on judicial decision making. Describing the *"...study [of] legal reasoning in action through opinions written or joined by [] judges that resolved nearly identical legal questions*" (p. 1382), their study involved a content analysis of district court decisions (made by 293 district court judges) involving questions on the constitutionality of sentencing guidelines. In emphasising content analysis of judicial opinions as a form of empirical research, Webley[796] had highlighted the critical importance of understanding the law and judicial decision-making through case-based analysis of legal precedent.

Earlier cited literature suggests that case content analysis or judicial opinion coding represents a popular systematic method of research that focuses on the documentary study of judicial decisions. Its popularity

[792] Drahozal, C. 2006b. Is arbitration lawless. *Loyola of Los Angeles Law Review*, 40, 187-215; George, T. 2006. An empirical study of empirical legal scholarship: the top law schools. *Indiana Law Journal*, 81 (1), 141-162; George, T. 2006. An empirical study of empirical legal scholarship: the top law schools. *Indiana Law Journal*, 81 (1), 141-162; Fortney, S. 2009. Taking empirical research seriously, *Georgetown Journal of Legal Ethics*, 22 (4), 1473-1484; Webley, L. 2010. *Qualitative approaches to empirical legal research*. In Cane, P and Kritzer, H. (eds), The Oxford Handbook of Empirical Legal Research. Oxford: Oxford University Press, pp. 926-950; Boyd, C., 2015a. In defense of empirical legal studies. *Buffalo Law Review*, 63 (2), 363-378; Wulf, A. 2016. The Contribution of Empirical Research to Law. *Journal Jurisprudence*, 29, 29-49.

[793] Heise, M. 1999. Importance of Being Empirical. Pepperdine Law Review, 26, 807 - 834.

[794] Sisk, G., Heise, M. and Morriss, A. 1998. Charting the influences on the judicial mind: An empirical study of judicial reasoning. *New York University Law Review*, 73 (5), 1377-1500; Lim, Y. 2000. An Empirical Analysis of Supreme Court Justices' Decision Making. *Journal of Legal Studies*, 29(2), 721-752; Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122; Shapiro, C. 2008. Coding complexity: Bringing law to the empirical analysis of the Supreme Court. *Hastings Law Journal*, 60 (3), 477-540; Befort, S. 2013. An empirical examination of case outcomes under the ADA Amendments Act. *Washington and Lee Law Review*, 70 (4), 2027-2072...

[795] Sisk, G., Heise, M. and Morriss, A. 1998. Charting the influences on the judicial mind: An empirical study of judicial reasoning. *New York University Law Review*, 73 (5), 1377-1500.

[796] Webley, L. 2010. *Qualitative approaches to empirical legal research*. In Cane, P and Kritzer, H. (eds), The Oxford Handbook of Empirical Legal Research. Oxford: Oxford University Press, pp. 926-950.

according to Hall and Wright[797] derives from its wide applicability and use across a broad range of subject areas of law. Its main aim according to Sparker[798] and Vaismoradi *et al*.[799] is to analytically examine textual narratives.

Case content analysis or judicial opinion coding (*hencewith* 'Content analysis') focuses on text analysis. Content analysis is regarded as one of the most important[800] and in fact flexible[801] social research techniques. Its flexibility comes from the fact that the way and manner within which codes are selected and developed are at the discretion of the interpretation and judgement of the specific researcher undertaking the study. Content analysis is a popular research approach that has been used within its traditional realms, which include communications and journalism research[802]. Such textual analysis can involve documents (for example, press reports) or text generated from research. It can also include transcripts from interviews or legal cases[803]. Scholars assert that Content analysis involves separating text into short units of content[804] and then subjecting it to systematic descriptive coding[805]. It involves a process which Gibbs[806] alludes, seeks to "*identify[ing] and recording one or more passages of text or*

[797] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122. They note that content analysis is not useful as an empirical analytical approach for all types of research. For the approach to enhance the value of research, the study has to focus on understanding a large number of judicial decisions where "…*each decision has roughly the same value*" (p. 78).
[798] Sparker A. 2005. *Narrative analysis: exploring the whats and hows of personal stories*. In: Holloway I (ed.). Qualitative Research in Health Care, 1st edn. Berkshire: Open University Press.
[799] Vaismoradi, M., Turunen, H. and Bondas, T. 2013. Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study. *Nursing & Health Sciences*, 15(3), 398-405.
[800] Krippendorff, K. 2004. *Content Analysis: An Introduction to Its Methodology*. Thousand Oaks, 2nd edition, CA: Sage.
[801] Webley, L. 2010. *Qualitative approaches to empirical legal research*. In Cane, P and Kritzer, H. (eds), The Oxford Handbook of Empirical Legal Research. Oxford: Oxford University Press, pp. 926-950.
[802] Berelson, B. 1952. *Content Analysis in Communication Research*. Glencoe: Free Press.
[803] Webley, L. 2010. *Qualitative approaches to empirical legal research*. In Cane, P and Kritzer, H. (eds), The Oxford Handbook of Empirical Legal Research. Oxford: Oxford University Press, pp. 926-950.
[804] Kracauer, S. 1952. The challenge of qualitative content analysis. *Public Opinion Quarterly*, 16 (4), 631-642; Hsieh, H. and Shannon, S. 2005. Three approaches to qualitative content analysis. *Qualitative Health Research*, 15(9), 1277-1288; Sparker A. 2005. *Narrative analysis: exploring the whats and hows of personal stories*. In: Holloway I (ed.). Qualitative Research in Health Care, 1st edn. Berkshire: Open University Press; White, M. and Marsh, E. 2006. Content analysis: A flexible methodology. *Library trends*, 55(1), 22-45; Vaismoradi, M., Turunen, H. and Bondas, T. 2013. Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study. *Nursing & Health Sciences*, 15(3), 398-405.Cho, J. and Lee, E. 2014. Reducing confusion about grounded theory and qualitative content analysis: Similarities and differences. *The Qualitative Report*, 19(32), 1-20; Elo, S., Kääriäinen, M., Kanste, O., Pölkki, T., Utriainen, K. and Kyngäs, H. 2014. Qualitative content analysis: A focus on trustworthiness. *SAGE Open*, 4(1), 2158244014522633.
[805] Downe-Wamboldt, B. 1992. Content analysis: method, applications, and issues. *Health Care for Women International*, 13(3), 313-321; Morgan, D. 1993. Qualitative content analysis: a guide to paths not taken. *Qualitative Health Research*, 3(1), 112-121.
[806] Gibbs, G. 2007. *Analyzing Qualitative Data*. Thousand Oaks Ca, Delhi, Singapore: Sage Publications Ltd.

other data items such as the parts of pictures that, in some sense, exemplify the same theoretical or descriptive idea" (p. 38). Such coding and categorisation also seeks to identify not only trends in used words, but also their frequency and relationships.

The focus of content analysis is to describe, through analysis, " *who says what, to whom, and with what effect*"[807]. However, it is important to note that such description does not happen or occur in isolation. The literature[808] suggests that any analysis of judicial decisions must take cognisance of the legal context within which judges construct their interpretation of statute and legislation. Green and Thorogood[809] posit that content analysis is also useful for undertaking research where there may be a need to report common matters of interest. This is a particularly important point reiterated by Hall and Wright[810] who highlighted that the use of content analysis is particularly suitable to studies that involve the analysis of judicial opinions that address matters of essential value to a wide range of cases. Such matters include statutory interpretation (a key focus of interest in this study[811]). Herein, it is opined that where possible, an in-depth understanding of the rationale of UAE judges (gleaned from UAE case law) on whether or not to vacate domestic arbitral awards on the basis of public policy is particularly suitable for content analysis in that the study seeks to understand "*the legal context and reasoning of the opinions through which judges express their views*" (Heise[812]).

[807] Vaismoradi, M., Turunen, H. and Bondas, T. 2013. Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study. *Nursing & Health Sciences*, 15(3), 398-405 (p. 400).
[808] Epstein, R., 1990. The Independence of Judges: The Uses and Limitations of Public Choice Theory. *Brigham Young University Law Review*, 1990 (3), 827-856; Lane, J. 1990. The epistemological foundations of public choice theory. *Scandinavian Political Studies*, 13(1), 65-82; Rubin, E. 1993. Public Choice in Practice and Theory. *California Law Review*, 81 (6), 1657-1672; Orchard, l., and Stretton, H. 1997. Public choice, *Cambridge Journal of Economics*, 21 (3), 409-430.; Farber, D., 2017. *Public Choice Theory and Legal Institutions*. The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts, Chapter 9, pp. 181-201, Pub. Oxford University Press, 1st edition....
[809] Green J, and Thorogood, N. (2004), *Analysing qualitative data*. In: Silverman D (ed.). Qualitative Methods for Health Research (1st edn). London: Sage Publications, 173–200.
[810] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.
[811] In this study, how UAE judges interpreted Articles 216 and 217 of UAE Federal Law 11 of 1992 and how they will interprete Articles 53 and 54 of UAE Federal Law No. 6 of 2018 on Arbitration.
[812] Heise, M. 2002. Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism. *University of Illinois Law Review*, 2002 (4), 819-850 (p. 841).

6.4 Case content analysis; the focus on written judicial opinions

It is also important to recognise that a focus on textual narratives implies that such content analysis must be of *written* judicial opinions[813]. A point of caution on written judicial decisions: that being the concern expressed by a number of scholars about both the impact of unexpressed ideology, bias or personal policy preferences on written judicial decisions and also the reality that most written judicial decisions are retrospective in nature. For example, in terms of the question of unexpressed ideology, Keele *et al*.[814] conducted an assessment of the impact of ideology on unpublished and published (written) judicial opinions, finding that (i) judges in appellate courts based their rulings on their ideological inclinations in published (written) opinions, but not so when such opinions were not published. However, they found that (ii) in lower courts; there were generally no decisional differences between unpublished and published (written) opinions. Overall, they found that (iii) published (written) judicial decisions may not necessarily be reflective of the ideology or bias of judges in appellate courts. This finding has implications for the current study in that arbitration awards in the UAE can only be vacated by appellant courts. Perhaps the main message that emanates from the study by Keele *et al*. [815] is that scholars undertaking case content analysis of published (written) judicial decisions may actually end up not being able to glean an accurate understanding of the intricate factors that influence the decisions appellant judges make. Another point of caution with written judicial opinions is their retrospective nature[816]. More specifically, Frank[817] deemed them to be often "…*unreal, artificial, distorted [and] …in large measure an after-thought*" (p. 653). Furthermore, he suggested that written judicial opinions were

[813] Sisk, G., Heise, M. and Morriss, A. 1998. Charting the influences on the judicial mind: An empirical study of judicial reasoning. *New York University Law Review*, 73 (5), 1377-1500; Boyd, C., 2015a. In defense of empirical legal studies. *Buffalo Law Review*, 63 (2), 363-378.
[814] Keele, D., Malmsheimer, R., Floyd, D. and Zhang, L. 2009. An analysis of ideological effects in published versus unpublished judicial opinions. *Journal of Empirical Legal Studies*, 6(1), 213-239.
[815] Keele, D., Malmsheimer, R., Floyd, D. and Zhang, L. 2009. An analysis of ideological effects in published versus unpublished judicial opinions. *Journal of Empirical Legal Studies*, 6(1), 213-239.
[816] Frank, J. 1932. What Courts Do in Fact - Part One. *Illinois Law Review*, 26 (6), 645-666; Rubin, E. 1991. The concept of law and the new public law scholarship. *Michigan Law Review*, 89(4), 792-836; Cross, F. 1997. Political science and the new legal realism: A case of unfortunate interdisciplinary ignorance. *Northwestern University Law Review*, 92 (1), 251-326; Boyd, C., 2015a. In defense of empirical legal studies. *Buffalo Law Review*, 63 (2), 363-378.
[817] Frank, J. 1932. What Courts Do in Fact - Part One. *Illinois Law Review*, 26 (6), 645-666 (p.653).

"…*often ex post facto; they are censored expositions*" (p. 653). This position is supported by Rubin[818] who opined that in providing written opinions, judges were "…*not trying to recreate her actual thought patterns, but to justify her conclusion by showing that it proceeds from accepted sources by legitimate, properly argued steps*" (p. 801). On the same vein, Cross[819] claimed that written judicial opinions were "…*post-facto rationalizations of results dictated by judicial ideology*" (p. 267).

In sum, it will appear that a number of scholars opine that written judicial opinions may not provide a real rationale or correct explanation on how some judges draw their conclusions. Judges in civil law jurisdictions mainly serve to interpret the law[820]; thus, it can be argued that in a UAE policy context, a content analysis of written judicial decisions may not actually be the best way to capture an in-depth understanding of (i) the legal reasoning and manner in which UAE judges examine the relationship (and impact) of cultural, religious and constitutional norms issues, and public policy, (ii) how UAE law interacts with UAE judicial ideology, (iii) whether the nature of these interactions varies on a case-by-case basis between individual judges, and finally (iv) what individual policy attitudes of individual UAE judges may actually be.

6.5 Case content analysis; advantages and disadvantages

Heise[821] identified a number of advantages associated with case content analysis or judicial opinion coding. For example, he cites its significance in terms of the persuasive and influential nature of drawing legal inferences and generalisations from real-life case law data. Hall and Wright[822] on the other hand, cited the ability of content analysis to both (i) unravel patterns of judicial opinion-making that has previously not been noticed and also at the same time (ii) correct incorrect impressions of such judicial

[818] Rubin, E. 1991. The concept of law and the new public law scholarship. *Michigan Law Review*, 89(4), 792-836.
[819] Cross, F. 1997. Political science and the new legal realism: A case of unfortunate interdisciplinary ignorance. *Northwestern University Law Review*, 92 (1), 251-326.
[820] Lim, Y. 2000. An Empirical Analysis of Supreme Court Justices' Decision Making. *Journal of Legal Studies*, 29(2), 721-752.
[821] Heise, M. 1999. Importance of Being Empirical. *Pepperdine Law Review*, 26, 807 - 834.
[822] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.

opinion-making. They claim that both enable content analysis to facilitate greater understanding of the law than is available through interpretive and subjective research.

However, while these advantages exist, the usefulness of content analysis can be limited in that actual assessment and interpretation of case law during coding and analysis is largely a subjective exercise irrespective of measures that are put in place and/are adopted to limit bias and ensure accuracy. Furthermore, the validity and reliability of such studies remain questionable. For example, Sisk *et al.*[823] points to the invariable weakness associated with studying judicial decision-making, noting that the cases involve different disputants and different facts and controversies, and that they are adjudicated in different time periods. Noting that policy changes over time (as attitudes, propositions, moral standards and values also change), it is reasonable to question whether judicial decisions can be studied without taking into account the prevailing legal context at the time of the ruling was made. It is recalled that this thesis had adopted an underlying philosophy rooted in *sociological jurisprudence* (the central tenet of which is that how legitimate laws are depends largely on their relevance to the society within which such laws are constructed[824]). It had also been noted that the *sociological jurisprudence* philosophy rejects any abstract application of the law[825].

However, the only other alternative to conduct such studies would have been to undertake a content analysis of hypothetical cases. However, such an option will imply judicial decision-making content analysis disconnected from real-world cases. By implication, such studies are not empirical[826].

Either way, there are two general difficulties and one specific difficulty involved in conducting empirical research and more specifically content analysis on the use of public policy to challenge and vacate domestic arbitral awards in the UAE. In terms of the general difficulties, one is that while there are studies which discuss whether and how such public policy may influence judicial reasoning, because

[823] Sisk, G., Heise, M. and Morriss, A. 1998. Charting the influences on the judicial mind: An empirical study of judicial reasoning. *New York University Law Review*, 73 (5), 1377-1500.
[824] Ehrlich, E. and Ziegert, K. 2017. *Fundamental principles of the sociology of law*. Routledge.
[825] Pound, R. 1911. The Scope and Purpose of Sociological Jurisprudence. I. Schools of Jurists and Methods of Jurisprudence. *Harvard Law Review*, 24(8), 591-619 (p. 612).
[826] Miles, T. and Sunstein, C. 2008. The new legal realism. *University of Chicago Law Review*, 75 (2), 831-851.

of the reality that the UAE does not operate under *Res Judicata* and because of the private nature of arbitral proceedings, there are very limited empirical studies available on how arbitral/arbitrator behaviour is influenced by public policy considerations and the precise nature of judicial reasoning when vacating arbitral awards in the UAE on the basis of public policy. The second is the reality that there is, arguably, a lack of coincise and exhaustive data on arbitration awards made within the UAE (Almutawa and Maniruzzaman[827]). In terms of the specific difficulties, as earlier alluded to, legal proceedings in all UAE federal courts (Courts of the UAE) and written legal opinions are undertaken and provided only in the Arabic language (اللغة العربية). As the researcher is unfamiliar with this language (اللغة العربية), only reported judgements that were translated into English and reported in legal databases such as *Lexis Middle East Law* , *WestlawGulf* and *Kluwer Arbitration* were examined.

6.6 The approach

Hall and Wright[828] provided guidelines on the use of content analysis in judicial decision-making research and, in the process, opined that

> "…*content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research. The method combines a disciplined focus on legal subject matter with an assumption that other investigators should be able to replicate the research results*" (pp. 64-65).

Although widely used, it is important to recognise that content analysis is not a single research method. A review of its application by Hsieh and Shannon[829], for example, suggests that there are three

[827] Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.
[828] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.
[829] Hsieh, H. and Shannon, S. 2005. Three approaches to qualitative content analysis. *Qualitative Health Research*, 15(9), 1277-1288.

distinct ways within which content analysis has been utilised – which they refer to as (i) conventional, (ii) directed, and (iii) summative – noting that their differences only emanate from for, example, coding – more specificallythe way and manner in which coding schemes are developed and the origin of such codes, among other factors. For example, they highlight that as relates to conventional content analysis, the categories of codes emanate unmediated from text.

A review of the literature[830] suggests that the process of case content analysis will involve;

(i) identification of case selection criteria.

(ii) searches within various databases[831](see Shapiro[832]; Befort[833]).

(iii) identification of relevant cases that fit the selection criteria. The cases selected should be reproducible[834].

(iv) collating the *written* judgements that fit selection criteria.

(v) systematic analysis of the selected cases.

(vi) drawing meaning from the coding (via analysis).

[830] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122; Befort, S. 2013. An empirical examination of case outcomes under the ADA Amendments Act. *Washington and Lee Law Review*, 70 (4), 2027-2072.

[831] These databases include the High Courts Judicial Database (http://artsandsciences.sc.edu/poli/jurilhighcts.htm), the United States Supreme Court Database, Westlaw (http://www.next.westlaw.com), Lexis Middle East Law (https://www.lexismiddleeast.com/), WestlawGulf (http://westlawgulf.com/), Kluwer Arbitration (http://www.kluwerarbitration.com), the UN treaty database (https://treaties.un.org/), BAILII (http://www.bailii.org/), the British and Irish Legal Information Institute website, SAFLII (http://www.saflii.org/), the Southern African Legal Information Institute website and NZLII (http://www.nzlii.org/), the website of the New Zealand Legal Information Institute.

[832] Shapiro, C. 2008. Coding complexity: Bringing law to the empirical analysis of the Supreme Court. *Hastings Law Journal*, 60 (3), 477-540.

[833] Befort, S. 2013. An empirical examination of case outcomes under the ADA Amendments Act. *Washington and Lee Law Review*, 70 (4), 2027-2072.

[834] As in the study undertaken by Shapiro and Levy (1995), this study will focus solely on cases involving judicial review following a *Westlaw* search covering a well-defined time period.

6.6.1 Identification of case selection criteria

As indicated earlier, the process of case content analysis was adopted from Hall and Wright[835]. The first step in the case content analysis involved the identification of case selection criteria. Herein, the scope of review was generally arbitration provisions contained within Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992; more specifically, Articles 216 and 217 of this law[836].

6.6.2 The database search

Having identified Articles 216 and 217 of UAE Federal Law 11 of 1992 as the scope of review, the next stage of the study involved the identification and selection of relevant databases that will support case selection. It was the researcher's intention to obtain the widest sample of cases and also ensure that the cases were heterogeneous in nature (and thereby, eliminate potential bias emanating from obtaining data from a single data source). Thus, efforts were made to examine online court records from not only the 'Courts of the UAE', but from 'parallel' courts as well.

'Courts of the UAE' searches were conducted through those UAE federal courts with online presence in English. These were the Dubai Courts (https://www.dc.gov.ae) and the Abu Dhabi Judicial Department (https://www.adjd.gov.ae). The searches suggested that, in the Dubai Courts (https://www.dc.gov.ae), available written legal opinions were only provided in Arabic (اللغة العربية) which the researcher was unfamiliar with. Searches were attempted via the Abu Dhabi Judicial Department (https://www.adjd.gov.ae); however this portal did not allow for general searches where the case reference number was unknown. The same applies to searches attempted via the Ras al Khaimah courts (https://grpportal.rak.ae/irj/portal/court_civil_inquiry/). Here again, this portal did not allow for

[835] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.
[836] As earlier stated, this study focuses on these specific provisions as the author is not aware of any arbitration appeals in the UAE federal courts ('Courts of the UAE') that had been decided on the basis of UAE Federal Law No. 6 of 2018 on Arbitration, which repealed previous arbitration provisions contained within Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992. It is observed that UAE Federal Law No. 6 of 2018 on Arbitration, repealing previous arbitration provisions contained within Articles 203 to 218, 235 to 238 and 239 to 243 of UAE Federal Law 11 of 1992, was promulgated as law in the UAE on 3 May 2018 at the time of writing this thesis.

general searches in the absence of a specific case reference number. Neither did the portal for the Ajman courts (https://moj.gov.ae/web/ejusticesite/status-search). No web portal seemed to exist for the courts of Umm al Quwain, Fujairah or Sharjah. 'Courts of the UAE' searches were conducted over three discrete periods (in February 2018, September 2018 and February 2019) in order to reduce the possibility of duplicate cases being identified.

'Parallel' court searches were then conducted on the online website (https://www.difccourts.ae/judgements/court-of-appeal/) of the *Judicial Authority of the Dubai International Financial Centre: Court of Appeal*. This body is the appellant arbitration court dealing with appeals against arbitration judgements and awards made by the *Judicial Authority of the Dubai International Financial Centre: Court of First Instance*. As in the case of the 'Courts of the UAE' searches, searches were conducted over three discrete periods (in February 2018, September 2018 and February 2019). In April 2019, a further search was conducted, expanded to cover awards made by the by the *Judicial Authority of the Dubai International Financial Centre: Court of First Instance*. This decision was made following initial review of DIFC case law. During this review, it became apparent that appeals against domestic arbitration awards made within the DIFC and in fact, by other arbitral institutions such as DIAC were being filed and heard by this court[837].

Other searches were undertaken in a number of legal search engines/databases including *Kluwer Arbitration*, *Lexis Middle East Law*, *Westlaw* and *WestlawGulf*. No searches were conducted in, for example, legal search engines/databases such as BAILII, NZLII, SAFLII and the UN treaty database. The reason for this was that these search engines/legal databases are usually jurisdiction-specific.

[837] In particular, reference was made to the *emirate* of Dubai Law No.12 of 2004 which established the Courts of the DIFC and DIFC case law, specifically as earlier stated, *Amarjeet Singh Dhir v Waterfront & Others* which stated that DIFC-enabling law allowed disputants to explicitly contract to settle their dispute under DIFC jurisdiction. Based on DIFC law, the Dubai International Financial Centre: Court of Appeal has exclusive jurisdiction when parties have contracted as such, over appeals filed in relation to judgments and awards made by the DIFC Court of First Instance.

6.6.2.1 The WestlawGulf search

For searches focused on cases heard in UAE federal courts ('Courts of the UAE'), *WestlawGulf* was employed as the search engine. Noting that the objective of the search was to capture the widest body of listed cases, suffixes such as '*UAE*', '*Dubai'* and '*Abu Dhabi'* were not utilised in the search against the three keyword strings '*arbi**', '*arbitr**', and '*arbitration'*. Another reason for not including suffixes in the *WestlawGulf* search related to different English spellings being attributed to the constituent *emirates* of the UAE. For example, arguably أبو ظبي *(Abu Dhabi)* could be reported as '*Abu Dhabi'*, '*AbuDhabi*' or '*Abu-Dhabi'*. The initial search in *WestlawGulf* resulted in 374 listed court decisions. These decisions had been drawn from the courts of a number of Gulf countries such as the Kingdom of Saudi Arabia, the United Arab Emirates, the Sultanate of Oman and the Kingdom of Bahrain. A few reported cases were also drawn from the Arab Republic of Egypt and the Lebanese Republic. Of the 374 *WestlawGulf* cases, 210 were drawn from the United Arab Emirates (UAE). A further review of the 210 cases pointed to a number of duplicate case reports. Following a review and identification of such duplication, 34 cases were identified as duplicates leaving the total number of useable reported UAE cases as 176. Included in this list of 176 cases obtained from *WestlawGulf* were 6 cases drawn from the Judicial Authority of the Dubai International Financial Centre. Apart from the advantage that the obtained cases had already been transcribed from Arabic (اللغة العربية) into English, drawing from Befort[838], it is reasonable to argue that the inclusion of these cases in the *WestlawGulf* search engines/database is indicative that legal commentators does consider the specific cases to be of significance.

6.6.2.2 The DIFC search

For searches focused on cases heard in the parallel courts, searches were undertaken directly on the online site of the *Judicial Authority of the Dubai International Financial Centre* using five keyword

[838] Befort, S. 2013. An empirical examination of case outcomes under the ADA Amendments Act. *Washington and Lee Law Review*, 70 (4), 2027-2072.

strings '*arbi**', '*arbitr**', '*arbitration'*, '*public order'* and '*public policy'*. A total of 53 cases were initially identified. When dealing with this search, there was no need to consider arbitration *vacatur* as a key search string as both the DIFC courts serve as appellant courts. For example, the DIFC Court of First Instance can hear appeals against arbitration awards made by independent arbitrators on matters connected with the DIFC. In other instances, the DIFC Court of Instance has heard matters relating to arbitration awards made by the DIAC. Furthermore, the DIFC Court of Appeal serves as an appellant court for arbitration matters heard in the DIFC Court of First Instance. No search was conducted against DIAC cases as their website did not appear to provide any link to reported cases (http://www.diac.ae/idias/). No search was also conducted against ADCCAC (http://www.adccac.ae/English/Pages/Default.aspx) or the IICRA (http://iicra.com/arbitration/how-to-enforce-award-in-iicra/).

6.6.3 Identification of relevant cases that fit the selection criteria and collation

According to Hall and Wright[839], this step should include a discussion on the sources of the cases and why such specific cases were selected for discussion. Generally, the basis for case selection should be that these are the cases that most clearly articulate the legal dispute or phenomenon under exploration. In the case of this study, this will imply making a decision on which written judgements best capture how UAE judges construe the relationship (and impact) of various competing norms (whether they be cultural, religious or constitutional in nature), on *Public policy (and/or public order)*. Doing this will facilitate this study's research question to be addressed. By implication, identifying the legal dispute or phenomenon under exploration enables the researcher to address the research question/s. It was important as part of the study to identify reported cases that touched upon the scope of review, which had been identified as arbitration cases heard in both UAE federal courts ('Courts of the UAE') and

[839] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.

parallel courts such as the Judicial Authority of the Dubai International Financial Centre that largely involved Articles 216 and 217 of UAE Federal Law 11 of 1992 as impacted by Article 203(4)[840] and Article 235 (2) (e)[841] of the UAE Civil Procedure Law.

In terms of the UAE federal courts ('Courts of the UAE'), to therefore identify reported court decisions that addressed the dual provisions of *Public policy (and/or public order)*on one hand and arbitration *vacatur* on the other, each transcript of the remaining 176 reported cases was examined and rated to determine whether the specific case involved *Public policy (and/or public order)* and arbitration *vacatur*, or not. Some of the more frequent reasons that could have been drawn upon for elimination of specific cases were (i) where the transcript was too brief to ascertain the focus of the case, (ii) where it was clear from reading through the transcript that the decided case had no relevance to either *Public policy (and/or public order)* or arbitration *vacatur,* or (iii) where the reported case was only a restatement of UAE law. However, as the process did not reveal any cases that fell within these criteria, no cases were eliminated.

When dealing with the *DIFC* search, there was no need to consider arbitration *vacatur* as a key search string. On review, nine cases were eliminated from the 53 cases earlier identified from the *Judicial Authority of the Dubai International Financial Centre* search. Elimination was primary where, on review, it was found that the case simply restated UAE law. Thus in total, 44 cases from the DIFC search were deemed usable for the study. Final cross-checks were made to ensure that there was no cross-over in terms of cases reported in either the *WestlawGulf search* or the DIFC search. From this process, a total number of 220 cases formed the core of cases to be utilised in the study consisting of 170 UAE federal courts ('Courts of the UAE') cases drawn from the *WestlawGulf* search and 50 drawn from the *DIFC* search dealing with the parallel courts. In effect, the Judicial Authority of the Dubai International Financial Centre.

[840] Article 203(4) states that *Arbitration shall not be permissible in matters, which are not capable of being reconciled…*".
[841] Article 235 (2) (e) states that "*It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order*".

6.6.4 Systematic analysis of the selected cases

Of the 220 cases that formed the core of cases to be utilised in the study (consisting of 170 cases drawn from the *WestlawGulf* and 50 cases drawn from the *DIFC* search), in terms of the federal courts ('Courts of the UAE') cases drawn from the *WestlawGulf* search, the earliest case had been decided in 1992 while the latest case had been decided in 2018. This is a timespan of approximately twenty-six years and, arguably, serves as an opportunity to better understand a broad perspective of the interplay between *Public policy (and/or public order)* on one hand and arbitration *vacatur* on the other. The selected cases had been heard in the following courts: (i) *Union Supreme Court*, (ii) *Abu Dhabi Court of Cassation* (iii) *Abu Dhabi Court of First Instance* (iv) *Abu Dhabi Commercial Court* and the (v) *Dubai Court of Cassation* (vi) *Judicial Authority of the Dubai International Financial Centre: Court of Appeal* (vii) *Judicial Authority of the Dubai International Financial Centre: Court of First Instance* and (viii) *Judicial Authority of the Dubai International Financial Centre: Joint Judicial Committee of Dubai Courts and DIFC Courts*. In total, for both *WestlawGulf* and *DIFC* search, a breakdown of the number of cases heard in each of the courts is shown in Table 5, below.

Table 5: Breakdown of cases heard per Court (from the WestlawGulf and DIFC search)

Court	Number of cases
Union Supreme Court	51
Abu Dhabi Court of Cassation	48
Abu Dhabi Court of First Instance	1
Abu Dhabi Court of Cassation	1

Dubai Court of Cassation	69
Judicial Authority of the Dubai International Financial Centre: Court of Appeal	12
Judicial Authority of the Dubai International Financial Centre: Court of First Instance	33
Judicial Authority of the Dubai International Financial Centre: Joint Judicial Committee of Dubai Courts and DIFC Courts	5
Total	220

Systematic analysis of the selected cases involved the identification and recording of similar and comparative features of each selected case via a system of coding. Coding according to Hall and Wright[842] will involve creation of a coding scheme which ultimately ensures that the analysis is more objective. This implied content analysis of translated case reports to highlight frequently occurring and therefore easily distinguishable lexicon (vocabulary) on *Public policy (and/or public order)* and arbitration *vacatur*. Although it would have been arguably more beneficial to examine individual words within the context of their individual use, content analysis of translated case reports proceeded on the basis of an examination of the individual words utilised in the case judgements. By adopting this approach, the potential of dealing with a wide variety of word combinations that would have been analytically unmanageable was avoided. Furthermore, attempting to code word combinations would have required the researcher to introduce *a priori* judgements on the nature of appropriate combinations. In effect, this would have introduced bias into the analysis. The case judgements obviously contained many different words. For this reason, analysis proceeded as follows. *First*, reference was made to the pre-determined case labels (which are referred to herein as *first-order codes*) utilised to classify each case. *Second*, to facilitate a tractable analysis of text, efforts were made to identify words that were

[842] Hall, M. and Wright, R. 2008. Systematic content analysis of judicial opinions. *California Law Review*, 96 (1), 63-122.

sufficient to form a distinguishing lexicon. Earlier, when faced with the challenge of facilitating a tractable analysis of text, Nag *et al*. [843] had chosen to exclude all words that appeared less than ten times from their textual database, their reason being that the use of such words was too limited to be deemed as constituent of any distinguishing lexicon. In this study, words that were not *regularly* repeated[844] in the pre-determined case labels were excluded as deemed not to represent any distinctive lexicon. *Third*, a lexicographic analysis of each of the cases was then undertaken from which 'distinctive vocabulary' consisting of thirty words deemed associated with the scope of the *Public policy (and/or public order)* exception in arbitration *vacatur* were identified (shown in Table 6).

Table 6: Frequently appearing words/phrases in the selected cases

'Invalid'	*'Defect'*	*'Wrong'*
'Null'	*'Misapplication'*	*'Void'*
'Cancel'	*'Error'*	*'Jurisdiction'*
'Limit'	*'Exceed scope'*	*'Authority'*
'Prejudice'	*'Objection'*	*'Vacate'*
'Scope'	*'Flawed'*	*'Challenge'*
'Appeal'	*'Public harmony'*	*'Unacceptable'*
'Public policy'	*'Public peace'*	*'Impermissibility'*
'Public order'	*'Acceptable'*	*'Violation'*
'Stay'	*'Inadmissible'*	*'Setting aside'*

The final stage of coding involved the consolidation of the different variations of the most frequently appearing words in the selected cases. Via a system of consolidation of the different variations of the

[843] Nag, R., Hambrick, D. and Chen, M. 2007. What is strategic management, really? Inductive derivation of a consensus definition of the field. *Strategic Management Journal*, 28(9), 935-955.

[844] After careful consideration, a decision was made not to 'count' words that were in the pre-determined case labels. There were a number of reasons for this decision, one being that it was recognised that the pre-determined case labels still represented translated labels from Arabic to English. Furthermore, there was no evidence of 'standard' case labels being used.

frequently appearing words in the selected cases shown in Table 6, nine parent codes (themes) were developed, as shown in Table 7.

Table 7: Parent codes (themes)

'Abuse of court process'	*'Appointment of arbitrators'*	*'Arbitrators award'*
'Arbitration procedure'	*'Determining the subject matter of the arbitration'*	*'Effects and limits of agency'*
'Jurisdiction of court'	*'Null, void and cancelled awards'*	*'The arbitration contract'*

6.6.5 Drawing meaning from the coding (via analysis)

In total, data on 220 cases consisting of 170 UAE federal courts ('Courts of the UAE') cases drawn from the *WestlawGulf* search and 50 drawn from the *DIFC* search dealing with the parallel courts of the *Judicial Authority of the Dubai International Financial Centre* were collected (as shown in Table 5). The UAE federal courts ('Courts of the UAE') cases were drawn from the (i) *Union Supreme Court*, (ii) *Abu Dhabi Court of Cassation* (iii) *Abu Dhabi Court of First Instance* (iv) *Abu Dhabi Commercial Court* and the (v) *Dubai Court of Cassation*. The parallel court cases from the *Judicial Authority of the Dubai International Financial Centre* were drawn from the (v) *Dubai Court of Cassation* (vi) *Judicial Authority of the Dubai International Financial Centre: Court of Appeal* (vii) *Judicial Authority of the Dubai International Financial Centre: Court of First Instance* and (viii) *Judicial Authority of the Dubai International Financial Centre: Joint Judicial Committee of Dubai Courts and DIFC Courts* (together these eight courts became our '*First-order Court Category*').

As earlier discussed, the UAE constitution allows for individual *emirates* to derogate from specific constitutional and legislative provisions. More specifically, Article 116 of the UAE Federal Constitution allows for individual *emirates* to exercise a power that has not been assigned to the UAE

federation through constitutional provisions. Similarly, Article 122 of the UAE Federal Constitution provides that individual emirates retain full jurisdiction on all matters that have not been assigned to the exclusive jurisdiction of UAE the federation.

With the above in mind, data analysis commenced with a combination of cases law from the different courts for validity. Thus, on the argument that Article 101 of the UAE Federal Constitution emphasizes that rulings of the *Union Supreme Court* are final and binding upon all, irrespective of our understanding that decisions reached by the Courts of Cassation in the *emirates* of Dubai and Ras al Khaimah are final and not subject to appeal to the Union Supreme Court sitting in Abu Dhabi, we kept '*Union Supreme Court'* as a separate '*Second-order Court Category*'(see Figure 1). Also, cognizance of UAE's constitutional arrangement which allows each *emirate* to maintain its own local courts, all cases emanating from the (i) *Abu Dhabi Court of Cassation,* (ii) the *Abu Dhabi Court of First Instance* and the (iii) *Abu Dhabi Commercial Court* were categorized as '*Abu Dhabi Courts'*. Conversely, all cases emanating from the *Dubai Court of Cassation* were categorized as '*Dubai Courts'.* Cases from the parallel courts operating in Dubai, that is the (i) *Judicial Authority of the Dubai International Financial Centre: Court of Appeal*, (ii) *Judicial Authority of the Dubai International Financial Centre: Court of First Instance* and the (iii) *Judicial Authority of the Dubai International Financial Centre: Joint Judicial Committee of Dubai Courts and DIFC Courts* were designated '*DIFC Courts*'.

Figure 1: Court categories

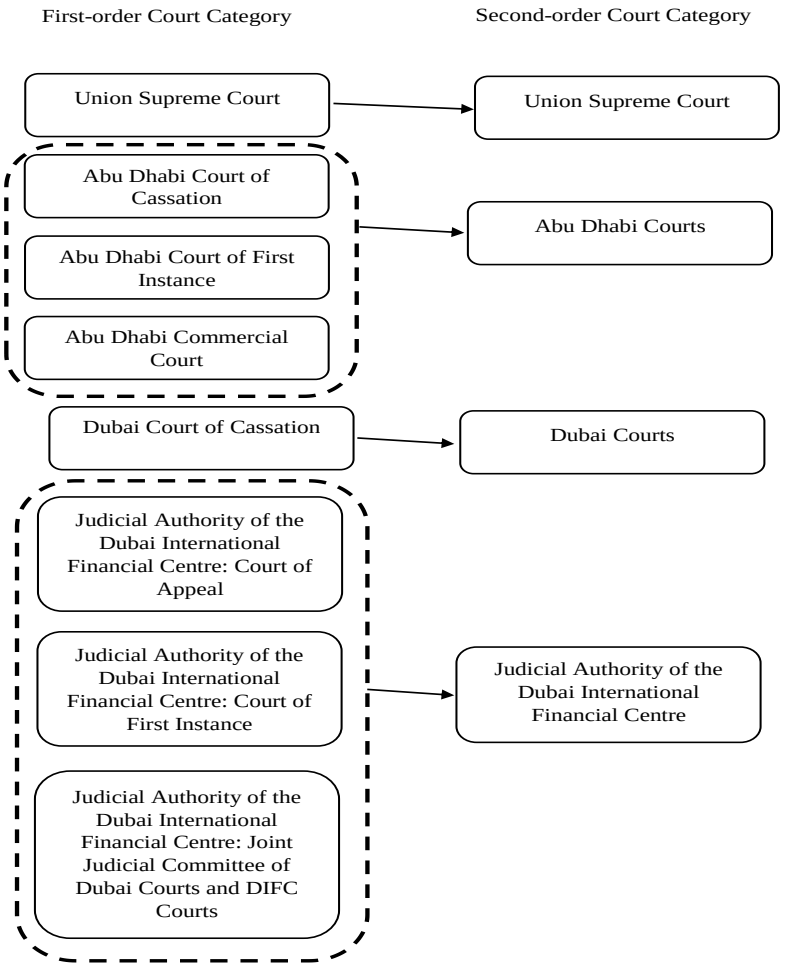

Table 8 (below) shows the distribution of cases among the four categories of court mapped against the '*Second-order Court Category*'. Of the 220 cases, a slight majority, comprising 128 (representing 58%), of prior arbitration awards had been nullified (*'Null, void and cancelled awards'*) by the courts; whereas 92 (representing 42%) had not. The data suggests a pattern whereby both the '*Abu Dhabi Courts'* and the *'Union Supreme Court'* show a strong tendency to nullify (*'Null, void and cancelled awards'*) prior arbitration awards. In contrast, both the '*Dubai Courts'* and the'*DIFC Courts'* appear to be less likely to nullify (*'Null, void and cancelled awards'*) prior arbitration awards. Notably, the '*Abu Dhabi Courts'* show a strong tendency to nullify (*'Null, void and cancelled awards'*) prior arbitration awards, having nullified 42 (84%) out of 50 cases. Most judicial decisions to nullify (*'Null, void and cancelled awards'*), i.e. 143 (65%) were not influenced by '*Public policy (and/or public order)*'.

Table 8: Cross-tabulation of court decision and effect of 'Public policy (and/or public order)' by court category

Court Category	*Null, void and cancelled awards*		*Public policy (and/or public order)*		Totals
	No	Yes	No	Yes	
'*Abu Dhabi Courts'*	8	42	27	23	50
'*Dubai Courts'*	32	37	47	22	69
'*DIFC Courts'*	36	14	35	15	50
'Union Supreme Court'	16	35	34	17	51
Total	92	128	143	77	220

Table 9 shows a cross tabulation of the '*Second-order Court Category*' codes derived from the content analysis versus by court decision, i.e. to nullify (*'Null, void and cancelled awards'*) or not. The data shows a wide variance of incidence of '*Second-order Court Category*' codes. The code *'Jurisdiction of court'* was present in most cases (80%), as was *'Null, void and cancelled awards'* (63%). On the other hand, very few decisions contained the codes *'Appointment of arbitrators'* (10%) and *'Effects and limits of agency'* (13%). What this means is that *'Jurisdiction of court'* was a major consideration in arbitration *vacatur* applications before the UAE Courts.

Table 9: Incidence of 'Second-order Court Category' codes in court decisions

	Present	Absent	% Incidence
'Abuse of court process'	37	183	17%
'Appointment of arbitrators'	21	199	10%
'Arbitrators award'	102	118	46%

'Arbitration procedure'	101	119	46%
'Determining the subject matter of the arbitration'	68	152	31%
'Effects and limits of agency'	28	192	13%
'Jurisdiction of court'	175	45	80%
'Null, void and cancelled awards'	138	82	63%
'The arbitration contract'	59	161	27%

In our quest to explore the impact of the '*Public policy (and/or public order)*'exception on the question of nullifying (*'Null, void and cancelled awards'*) prior arbitration awards by the various '*UAE Courts'*, we employed *Logistic regression*[845]. *Logistic regression* is generally a mathematical model that is utilized to articulate the relationship between several independent variables (*X*) to a dichotomous dependent variable (*D*). A series of logistic regression models was conducted with the general form of the model being represented as:

$$ln\left[\frac{y_i}{1-y_i}\right] = \beta_0 + \sum_{j=1}^{j} \beta_j x_{ij} + e_i \qquad (1)$$

Where:

i is a case;

y_i is a binary variable representing court's decision to nullify or not nullify the case;

x_j are the explanatory variables, which may help us predict the court's decision; and

e_i is an error term.

Effect of Court Category: The first logistic model examined the effect of the court category on the decision to nullify (*'Null, void and cancelled awards'*) prior arbitration awards. The model was a good

[845] Kleinbaum, D., Dietz, K., Gail, M., Klein, M. and Klein, M., 2002. *Logistic regression*. New York: Springer-Verlag; Peng, C., Lee, K. and Ingersoll, G. 2002. An introduction to logistic regression analysis and reporting. *Journal of Educational Research*, 96(1), 3-14

fit for the data [Wald Likelihood Ratio Chi-square = 30.96 (*DF* = 3), p-value < 0.0001; Pseudo R-square value (Nagelkerke) = 0.15; Max-rescaled R-Square = 0.21].

Table 10 shows the estimated effects of the different court categories. The reference category of the predictor being the *'Union Supreme Court'*. The results suggest no significant difference in the decisions made by '*Dubai Courts'* in comparison to the *'Union Supreme Court'*. On the other hand, decisions made by both the '*Abu Dhabi Courts'* and the '*DIFC Courts'* differed significantly from the *'Union Supreme Court'*. The '*Abu Dhabi Courts'* were significantly *more likely* to nullify (*'Null, void and cancelled awards'*) prior arbitration awards than the *'Union Supreme Court'*. By contrast, the '*DIFC Courts'* was significantly *less likely* to nullify (*'Null, void and cancelled awards'*) prior arbitration awards than the *'Union Supreme Court'*.

Table 10: Analysis of Maximum Likelihood Estimates for Court Categories

Parameter		DF	Estimate	Standard Error	Wald Chi-Square	Pr > ChiSq
Intercept		1	0.4104	0.1576	6.7817	0.0092
Court Category	*Abu Dhabi Courts*	1	1.2477	0.315	15.6878	<.0001
Court Category	*Dubai Courts*	1	-0.2652	0.2323	1.3032	0.2536
Court Category	*DIFC Courts*	1	-1.3549	0.2728	24.6599	<.0001

Differential Effects of Predictors across different court categories: Next, the extent decisions made by each court can be attributed to a different reason, taking each predictor individually was undertaken. Table 11 shows the results of the effects of individual predictors within each court. The figures shown are Wald Chi-square Values (*DF* = 1). The results indicate that none of the predictors was able to

significantly predict *vacatur* decision of both the *Abu Dhabi Courts* or the *DIFC Courts*. In contrast, '*Public policy (and/or public order)*', *'Arbitrators award'* and *'Null, void and cancelled awards'* were predictive of the decision of both the *Dubai Courts* and the *'Union Supreme Court'*. Additionally, *'Jurisdiction of court'* was predictive of the *'Union Supreme Court'* decision. Using the Chi-square value as a measure of individual variables' predictive value, then *'Null, void and cancelled awards'* appears to be the most valuable individual predictor.

Table 11: Effects of individual predictors on decision made within each court

Predictor	*Abu Dhabi Courts*	*Dubai Courts*	*DIFC Courts*	*Union Supreme Court*
'*Public policy (and/or public order)*'	1.6	12.8**	0.0	5.4*
'Abuse of court process'	3.1	0.0	0.6	0.6
'Appointment of arbitrators'	0.0	2.1	0.0	0.0
'Arbitrators award'	0.1	4.8*	2.5	4.0*
'Arbitration procedure'	1.6	2.0	1.0	0.0
'Determining the subject matter of the arbitration'	0.7	1.8	0.0	0.2
'Effects and limits of agency'	0.0	1.5	0.0	0.6
'Jurisdiction of court'	0.2	0.4	0.0	4.9*
'Null, void and cancelled awards'	0.0	23.6**	0.0	16.8**
'The arbitration contract'	0.0	1.9	0.0	0.0
* p-value < 0.05 ** p-value < 0.01				

Finally, multiple logistic regression models to estimate the joint effects of the predictors on the decision made by each court was conducted. Each model was conducted under the stepwise criterion (entry p-value = 0.1 and stay p-value = 0.05). In each case, the predictors that we had found to be significantly predictive as shown in Table 11 were specified as candidate variables. Multiple logistics regression

models for the *'Abu Dhabi Courts'* or the *'DIFC Courts'* were not undertaken since none of the predictors were individually, significantly predictive.

The multiple logistic regression model for the *'Dubai Courts'* was a good fit for the data [Wald Likelihood Ratio Chi-square = 20.56 (*DF* = 2), p-value < 0.0001; Pseudo R-square value (Nagelkerke) = 0.46; Max-rescaled R-Square = 0.62]. Table 12 shows the estimated parameters. Both '*Public policy (and/or public order)*' and *'Null, void and cancelled awards'* were retained in the final model as significant predictors. The estimated coefficient suggests the presence of *'Null, void and cancelled awards'* in the decision increases the probability of the case being nullified. Similarly, the presence of '*Public policy (and/or public order)*' increases the probability of the case being nullified. The effect of *'Null, void and cancelled awards'* is stronger than that of '*Public policy (and/or public order)*'.

Table 12: Analysis of Maximum Likelihood Estimates for Dubai Courts

Parameter		DF	Estimate	Standard Error	Wald Chi-Square	Pr > ChiSq
Intercept		1	0.6568	0.4611	2.029	0.1543
'Null, void and cancelled awards'	Absent	1	-1.5217	0.3703	16.8846	<.0001
'*Public policy (and/or public order)*'	No	1	-1.3761	0.4764	8.3423	0.0039

The multiple logistic regression model for the *'Union Supreme Court'* was the best fit for the data [Wald Likelihood Ratio Chi-square = 16.14 (DF = 2), p-value < 0.0001; Pseudo R-square value (Nagelkerke) = 0.54; Max-rescaled R-Square = 0.76]. Table 13 shows the parameter estimates from the multiple logistic regression model of the *'Union Supreme Court'*. As with the *'Dubai Courts'*, both '*Public policy (and/or public order)*' and *'Null, void and cancelled awards'* were retained in the final model as significant predictors.

Table 13: Analysis of Maximum Likelihood Estimates for Dubai Courts

Parameter		DF	Estimate	Standard Error	Wald Chi-Square	Pr > ChiSq
Intercept		1	1.8282	0.7665	5.6893	0.0171
'Null, void and cancelled awards'	Absent	1	-2.431	0.6269	15.0396	0.0001
'*Public policy (and/or public order)*'	No	1	-1.3719	0.6948	3.8994	0.0483

The estimated coefficient suggests the presence of *'Null, void and cancelled awards'* in the decision increases the probability of the case being nullified, as does the presence of '*Public policy (and/or public order)*' although to a lesser extent.

CHAPTER 7: CONCLUSIONS

7.1 Premise

An essential element of arbitration as a form of private form of dispute resolution is the *freedom* to contract. The associated objective autonomy between disputants enables them to resolve and settle disputes in a manner of their choosing. In most cases (apart from court-mandated procedures), parties engaged in arbitration are generally agreeing to exclude the court from adjudicating on the dispute. Freedom to contract and objective autonomy, however, do not restrict the State's unimpeachable right to restrict such freedoms and autonomy for a number of reasons including on the grounds that the nature of such a private contract may be contrary to *Public policy (and/or public order)*. *Public policy (and/or public order)* exceptions may arise before, during or after the arbitration proceedings. For example, such exceptions may be raised at the onset of proceedings or in countries operating under the double *exequatur* principle (such as the UAE), at the point a party is seeking a confirmatory/ ratification order/judgement from the courts to enforce an award.

Understanding the extent of UAE *Public policy (and/or public order)* considerations following the Dubai Court of Cassation decision to nullify a £20 million arbitration award initially made to International Bechtel Co. Ltd in its Judgement 503 of 2003[846] has served as a major driver for this thesis. To achieve this aim, three research questions augmented by associated objectives were presented.

7.2 Addressing the research questions

The *first* research question asked; *What is the purpose of the Public policy (and/or public order) exception in the UAE?* Its associated objective was to understand the purpose of the *Public policy (and/or public order)* exception. This exception suggests that the courts are prohibited from the enforcement of any private or public contract that violates *Public policy (and/or public order)*. To achieve this objective,

[846] International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai [Emirate of Dubai Court of Cassation, 2004]..

specific literature was reviewed which pointed to *'Public policy'* as a concept generally accepted as vague and '*unruly'*. Conversely, the literature also articulated subtle conceptual differences between '*Public policy'* and *'Public order'*. We also found the existence of different forms, types and perspectives of '*Public policy'*. In light of these, we found that the purpose of '*Public policy'* and, by implication, *'Public order'* was to *provide legitimacy to institutions to enact coercive power.*

The *second* research question asked; *What is the scope of this exception as applied by the 'Courts of the UAE'?*. Its associated objective was to understand the extent of the exception as applied by the 'Courts of the UAE'. Of particular relevance was a need to take into consideration (i) parallel legal systems operating within the UAE at both *emirate* level and *within* specific *emirates,* and (ii) the evolving relationship between the different courts in the UAE: in effect, the relationship between the 'Courts of the UAE' on one side and the 'free zone' courts which, by virtue of their enabling acts and provisions (such as UAE Federal Law No.8 of 2004 in the case of the DIFC), are arguably as restated in *(1) Fiske (2) Firmin v Firuzeh*[847], 'UAE courts'. The author found evidence from the literature that *Public policy (and/or public order)* exceptions existed in three forms in the UAE. *First,* there were restrictions in terms of what disputes were in fact arbitrable. Included in this list were all matters relating to the distribution of wealth. *Second,* there were restrictions in terms of acceptable proceedings of arbitration hearings. Included in this list were matters relating to fair hearing and the right to be heard. *Third,* there were restrictions on the types of arbitration awards that could be enforced. Exploration of the scope of the *Public policy (and/or public order)*exception as applied by the 'UAE Courts' (which were construed as referring to the entire range of judicial systems that exist in the UAE, inclusive of the 'free zone' courts) suggested that each court generally interpreted its provisions to encompass a particularly wide meaning. The findings furthermore suggest that while the identification of matters that are arbitrable (in effect, capable of settlement via arbitration)_may not necessarily be controversial, they remain complex

[847] (1) Fiske (2) Firmin v Firuzeh [2014] [Dubai International Financial Centre, Court of First Instance, 006/2017] ARB 001

to articulate. For one, it has the ability to not only limit the validity of any arbitration contract, but also remove from an arbitrator or arbitral institution their ability to hear matters or enforce awards. The *third* (and final) research question asked; *How does the existence of different parallel courts within the 'UAE Courts system impact on how the Public policy (and/or public order) exception is construed and how is its impact on the finality, conclusive and binding nature of arbitration?* Noting that the key underlying principles of arbitration was in its *finality*, *conclusive* and *binding* nature, addressing this research question involved undertaking a case content analysis (judicial opinion coding) of UAE arbitration case law within the prevailing framework of UAE arbitration law. A total of 220 case reports pre-translated from Arabic (اللغة العربية) into English were collected from a the *WestlawGulf* and *DIFC* search. These were then examined, coded and analysed.

The outcome from the data analysis suggested that courts sitting in the *emirate* of Abu Dhabi (inclusive of the *Union Supreme Court* which sits in Abu Dhabi) were more willing to nullify (*'Null, void and cancelled awards'*) prior arbitration awards than courts sitting in the *emirate* of Dubai (which included the *Dubai Courts* and the *DIFC Courts*). However, there were also differences in terms of a willingness to nullify arbitration awards between the Abu Dhabi Courts and the Union Supreme Court itself with the Abu Dhabi Courts significantly *more likely* to nullify prior arbitration awards than the Union Supreme Court. These finding resonates with pronounced attitudes of the Abu Dhabi Courts. Noting a UAE perspective that *Public policy (and/or public order)* was concerned with matters which could impact upon foundations of the society (Kanakri and Massey, 2016[848]), the *Abu Dhabi Court of Cassation Judgment 118 of 2014,* for example had stated that

> "*…litigants have the right to resort to the regular courts regarding the disputes relating to the performance of the temporal and precautionary procedures or the summary matters*".

[848] Kanakri, C., and Massey, A. 2016. *Comparison of UAE and DIFC-seated arbitrations*. Global Arbitration News. Available from: https://globalarbitrationnews.com/comparison-uae-difc-seated-arbitrations-20161012/, accessed 07/02/18.

Second, we note that the decisions of the Union Supreme Court are binding on matters where there is no derogation on all UAE Courts including the courts of the *emirates* of both Dubai and Ras al Khaimah who are not members of the UAE federal court system.

The study found that courts within the emirate of Dubai consisting of the '*Dubai Courts'* and the'*DIFC Courts'* appeared less likely to nullify prior arbitration awards (when compared to the Abu Dhabi courts), no significant differences were found to exist in terms of nullification of such awards based on different construction of *Public order* (as construed by the Dubai Courts) and *Public policy* (as construed by the DIFC Courts). In effect, this study was unable to ascertain whether the subtle differences between of *Public order* and *Public policy* had any impact on the decision to nullify an arbitration award.

The study however found that *the* major consideration across the various *vacatur* decisions of the *'UAE Courts'* appeared was *'Jurisdiction of court'*. This is a particularly interesting finding and confirms that the UAE Courts will jealously guard broad interpretation of this jurisdiction. What however requires investigation in further studies is the implications for the *Kompetenz-Kompetenz* doctrine. Article 3 of the new Federal Law No. 6 of 2018 on Arbitration now appears to recognise this principle (although retaining specific jurisdiction of matters relating to natural or juristic persons who are domicile or who live in the UAE). Thus, one implication of our finding is that for the new UAE federal law on arbitration to fully empower provisions set out in Article 3 (which deals with jurisdiction), the UAE Courts may need to make rulings which pre-empt disputants from seeking to limit the capability of arbitrators to exercise such powers which now have legislative support. To summate, it is clear from its regular appearance in *vacatur* applications, that matters of exclusive jurisdiction of the court requires the attention of those who either conduct business in the UAE or those who may choose the UAE as a seat of arbitration.

Our understanding of the literature suggests that the determination of matters deemed arbitrable if construed from a *Public policy (and/or public order)* perspective are within the sole preview of the State. Evidence from the study suggests that unlike what is experienced most European jurisdictions [849], in the UAE, the use of *Public policy (and/or public order)* as a test for what is arbitrable remains ever present and is perhaps one of the most important considerations for potential disputants.

Thus its regular citation by UAE Courts. In fact, on review of the various UAE case laws, it did not appear to suggest that questions of arbitrability (and by implication, matters of exclusive jurisdiction of the courts) were discrete matters of contractual attention.

The study also found that the presence of '*Public policy (and/or public order)*' discourse in arbitration disputes being heard across all *'UAE Courts'* significantly increased the probability of the case being nullified (*'Null, void and cancelled awards'*). This finding supports the view that '*Public policy (and/or public order)*' remains a sensitive matter in the UAE. Again, as in the case of *International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai*, those who conduct businesses in the UAE or who may seek to choose the UAE as the seat of their arbitration must be very clear that the UAE Courts will not tolerate even the slightest infringement of '*Public policy (and/or public order)*'. We will comment on this during our final reflection.

More generally speaking, the research findings suggests first, considerable disparities between the different parallel courts that formed the *'UAE Courts'* in terms of arbitration *vacatur*. Generally, the courts sitting in the *emirate* of Abu Dhabi, that is the (i) *Union Supreme Court*, (ii) *Abu Dhabi Court of Cassation* (iii) *Abu Dhabi Court of First Instance* and the (iv) *Abu Dhabi Commercial Court* appeared *more likely* to nullify prior arbitration awards than courts sitting in *emirate* of Dubai which includes the *Dubai Court of Cassation* and the '*DIFC Courts*'. A possible explanation for these differences can be gleaned from prior studies. Angell and Feulner[850] had observed major disparities in terms of how disputes

[849] Mante, J., 2016. Arbitrability and public policy: an African perspective. *Arbitration International*, 33(2), 275-294.
[850] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.

were arbitrated in the *emirates* of Abu Dhabi, Dubai and Sharjah. For example, in their study, it appeared that courts sitting in the *emirate* of Abu Dhabi were more willing to seek to regulate how arbitration proceedings were conducted while court sitting in the *emirate* of Dubai appeared more willing to refuse to interfere with arbitration proceedings where there is a valid arbitration contract. They had also found that in similar circumstances within the *emirate* of Sharjah, the courts will *stay*, but not dismiss such applications. One possible reason could be historical. Al-Muhairi[851] for example had pointed to the *emirate* of Dubai drawing upon more secular mechanisms during the establishment and organisation of its courts. It is possible that such secularism has encouraged the Dubai courts to be less willing to interfere with arbitration proceedings and awards. Expanded to the entire country, drawing from the literature, it is safe to suggest that of the other *emirates* of Fujairah, Ajman, Ras al Khaimah and Umm al Quwain, the *emirate* of Ras al Khaimah is likely to be placed at the same spectrum of doctrinal interpretation of *finality*, *conclusive* and *binding* nature of arbitration. Thus, Luttrell[852] specifically suggesting that entities that conduct business in the UAE may be best advised to undertake their commercial activities in either the *emirate* of Dubai or the *emirate* of Ras al Khaimah. Similarly, our study findings suggests that entities that conduct business in the UAE or parties seeking to utilise the UAE as the seat of their arbitration are best to specify the seat of arbitration as the *emirate* of Dubai (and by implication, also the *emirate* of Ras al Khaimah). However, this is only on the condition that their legal strategy *fully* accepts (and/ or desires) the need for *finality*, *conclusive* and the *binding* nature of arbitration. Conversely, entities that conduct business in the UAE or parties seeking to utilise the UAE as the seat of their arbitration are best to specify the seat of arbitration as the *emirate* of Abu Dhabi (and by implication, also the *emirate* of Fujairah, Ajman, and Umm al Quwain). However, this is only on the condition that their legal strategy *does not* accept (and/ or desire) the need for *finality*, *conclusive* and the *binding* nature of arbitration. In effect, this relates to a legal strategy, which may desire never-ending

[851] Al-Muhairi, B. 1996a. The Development of the UAE Legal System and Unification with the Judicial System. *Arab Law Quarterly*, 11 (2), 116-160.
[852] Luttrell, S. 2009a. The Changing Lex Arbitri of the UAE. *Arab Law Quarterly*, 23 (2), 139-166

litigation. The implications of the findings of our study when considered in light of earlier studies by Angell and Feulner[853] is that when the legal strategy may entail a 'wait and see', then it may be best to specify the seat of arbitration as the *emirate* of Sharjah.

The finding that the presence of *Public policy (and/or public order)* discourse in arbitration disputes being heard across all 'UAE Courts' significantly increased the probability of an arbitration award being nullified is partially surprising. Here, that the courts will intervene when *Public policy (and/or public order)* is raised is inevitable as the country is a 'double *exequatur* jurisdiction. The broad based conceptualisation of *Public policy (and/or public order)* in the country's constitutional and legislative provisions and legal principles suggests that the UAE Courts are quite willing to intervene when such matters are raised. However, what is perhaps surprising from our findings is the significant increase in the probability arbitration awards being nullified on the grounds of the *Public policy (and/or public order)*. This suggests perhaps a conservative judiciary.

The findings from this study have a number of theoretical and practical implications which will now be discussed.

7.3 Theoretical implications

Earlier cited literature had emphasised that *empirical* research was more likely to support the development of any understanding of law (and by extension – arbitration) as a social phenomenon. In investigating arbitration *vacatur* in the UAE and then utilising judicial case content analysis to seek to understand how the scope of this exception may be minimised, the thesis responded to various calls for a need to move away from legal research dominated by anecdotal and doctrinal work and, in effect, from propositions which were not validated to empirical legal research. While deciding on our research approach, the author was very, however, very mindful that the study will face major challenges relating

[853] Angell, N. and Feulner, G. 1988. Arbitration of Disputes in the United Arab Emirates. *Arab Law Quarterly*, 3 (1), 19-32.

to validity[854] and reliability [855]. Webley[856] however, acknowledges that these terminologies, that is both validity and reliability both have their roots in the interpretivist and positivist data concepts. Thus, it may be difficult to apply these interpretations to qualitative research which is more focused on developing richer understanding of social relationships.

By finding that *there are* differences in terms of judicial opinions emanating from the interpretation of *Public policy (and/or public order)* across the various UAE Courts, this study was able to identify the precise scope of the public policy exception as construed by UAE Courts. Overall, the findings demonstrate not only the already acknowledged vague of what precisely is construed as *Public policy (and/or public order)* in the UAE but, more precisely, the complex nature of interrelating factors that UAE Courts have to take into account in their articulation of the manifestations of *Public policy (and/or public order)* exceptions.

Arguably, this study is the first that has investigated arbitration *vacatur* in the UAE utilising judicial case content analysis. In terms of theoretical implications, *firstly*, the thesis not only re-opens an existing area of scholarly and practitioner interest in arbitration *vacatur* in the UAE, but also opens a new area of debate by specifically seeking to understand how UAE courts have constructed their interpretation of statute and legislation as relates to *Public policy (and/or public order)*. Furthermore, the study draws on two theories – (i) *contract* theory and (ii) *social contract* theory to serve as the practical lens for exploring how *Public policy (and/or public order)*may serve as a ground for challenging domestic arbitral awards. Drawing from Bacharach[857], it had been posited that the sum of these theories represented a means of organising the complexities associated with the range of

[854] Defined as the extent to which unambiguous consideration of a phenomenon has been captured – see Webley, L. 2010. *Qualitative approaches to empirical legal research.* In Cane, P and Kritzer, H. (eds), The Oxford Handbook of Empirical Legal Research. Oxford: Oxford University Press, pp. 926-950.
[855] Defined as the extent to which the same data will be produced by different researchers using the same measure instrument or procedures – see Kirk, J. and Miller, M. 1986. *Reliability and validity in qualitative research*. Beverly Hills, Ca.: Sage Publications.
[856] Webley, L. 2010. *Qualitative approaches to empirical legal research*. In Cane, P and Kritzer, H. (eds), The Oxford Handbook of Empirical Legal Research. Oxford: Oxford University Press, pp. 926-950.
[857] Bacharach, S. 1989. "Organizational theories: some criteria for evaluation", *Academy of Management Review*, 14 (4), 496-515.

interwoven propositions that were empirically testable in order to explain observed phenomena under exploration. Noting that the study had adopted the '*Law and Society*' philosophy[858], it then became imperative that the study was to be undertaken in a manner *consistent* with social research, as an empirical endeavour. At the core of this philosophy is the idea that the legitimacy of any law is largely determined not by the authority of the state, but by the relevancy of laws to the society within which it is set to operate. This form of study according to Schuck[859] involves "*the uncovering of facts about how individuals and institutions within our legal culture actually behave*" (p. 323).

7.4 Practical implications

The wide interpretation of precisely what *Public policy (and/or public order)* means and its numerous elements creates a considerable lack of clarity and uncertainty over how it is interpreted, and what opportunities do exist for minimising its scope. This suggests that the UAE Courts and other policy makers should ideally seek to improve understanding of this exception. One possible approach may involve direct engagement with the arbitration and legal professions. Here, the stated aim should be to, at the very least, try to articulate a clearer set of principles on *Public policy (and/or public order)* beyond mere re-statements of the law. It is unlikely that more legislation will resolve the intractable nature of public policy. The law even when strictly adhered to is unlikely to encourage individuals and parties who have differing and constant shifting interests, to behave in different ways[860]. Furthermore, laws (legislation) are usually drawn in a very narrow and precise manner that are unlikely to accommodate the heterogeneity of public policy.

[858] Ehrlich, E. and Ziegert, K. 2017. *Fundamental principles of the sociology of law*. Routledge.
[859] Schuck, P. 1989. Why don't law professors do more empirical research. *Journal of Legal Education*, 39, 323-336.
[860] Roots, R., 2004. When laws backfire: Unintended consequences of public policy. *American Behavioral Scientist*, 47(11), 1376-1394.

7.5 Limitations and future studies

As expected, this study was not without limitations. However, these limitations do serve as the platform for future studies. The first limitation of this study is that the case laws analysed were based on cases decided on the 'old' UAE Arbitration law as articulated within Articles 203 to 218, Articles 235 to 238 and Articles 239 to 243 of Federal Law (11) of 1992, the Civil Procedure Code (CPC). However, as the UAE promulgated a new standalone arbitration law, Federal Law No. 6 of 2018 on Arbitration, as recently as 3 May 2018, which then appeared in the official gazette in June 2018 taking effect in July 2018, none of the case laws analysed is based on statutory interpretations of 'new' UAE arbitration law. Thus, future studies should seek to account for the enactment of the new UAE arbitration law. Doing so will create more opportunities to understand and better explain the *vacatur* phenomenon within UAE arbitration jurisprudence. However, as this new law has only recently come into force, there is very little discourse in the literature or in fact, court reports that will support optimal engagement within this subject in the near future.

The second limitation of this study emanated from the fact that the UAE does not yet maintain any formal case reports; neither do arbitral institutions that operate in the country such as the DIFC and the DIAC retain comprehensive information on arbitral awards or in fact, those that have been challenged successfully in the courts. For example, although it seems obvious that case reports of the *Judicial Authority of the Dubai International Financial Centre: Court of Appeal* as an appellant arbitration court performed this role, no such records were easily retrieved for the DIAC courts. The third limitation is that as noted earlier, proceedings of the majority of the cases utilised in this study (all reported from the *WestlawGulf* search) were carried out and reported in Arabic (اللغة العربية). Furthermore, noting that the *WestlawGulf* case reports are not official translations of proceedings of the 'Courts of the UAE', it is possible that contextual meaning could have been lost in the *WestlawGulf* translation from Arabic (اللغة العربية) into English. The difficulty this situation creates relates to the possibility that the study was undertaken with case reports that may have lost grammatical, idiomatic and syntactical equivalence.

Such a scenario is likely to have a considerable impact on the reliability of the study. In order to mitigate against this limitation, future studies may, for example first seek original case reports reported in Arabic (اللغة العربية) and then conduct official translations into English prior to analysis. The fourth limitation of this study emanated from the coding approach. Coding had commenced by *firsly* making reference to the pre-determined case labels (which were designated as *first-order codes*). However, earlier studies by Shapiro [861] warn that the uncritical utilisation of legal databases can negatively impact on the validity of the research findings. One cited limitation was that research databases sometimes label and categorise cases against a very high level of generality. Within the context of this study, this approach has the potential to under-report the considerable amounts of public policy matters that the UAE courts have had to address in the various cases[862]. Furthermore, a major problem with the designated *first-order codes* is that neither the *WestlawGulf* nor the the *DIFC* case reports provided a tangible explanation on how each keyword (*first-order code*) was determined. The implication of this is that, in reality, one cannot be certain that all the different legal and *Public policy (and/or public order)* issues arising from each case was comprehensively captured. In addition (further accentuated by the lack of precedence in UAE jurisprudence), it is difficult to establish precisely the nature of interaction between the different reported cases. Arguably, such missing information represents lost opportunities for scholars and practitioners who are interested in understanding the operation of UAE jurisprudence as relates to *Public policy (and/or public order).*

To summate, despite these limitations, the analysis of the cases still affords scholars and practitioners the opportunity to engage in detailed and intimate exploration of the broad manifestation of the public policy exception in not only the UAE but also across the Gulf region. One country of interest may be the Kingdom of Saudi Arabia which not only has recently (in 2016) established a Saudi

[861] Shapiro, C. 2008. Coding complexity: Bringing law to the empirical analysis of the Supreme Court. *Hastings Law Journal*, 60 (3), 477-540.
[862] Shapiro, C. 2008. Coding complexity: Bringing law to the empirical analysis of the Supreme Court. *Hastings Law Journal*, 60 (3), 477-540.

Centre for Commercial Arbitration (SCCA), but also (June 2017) promulgated implementing regulations for its new Arbitration Law.

7.6 Final reflections

7.6.1 Oaths and public policy

The Bechtel judgement emphasised that in Dubai, the rendering of oaths were deemed as a matter of public policy and therefore, not waivable. The Dubai Court of Cassation further reiterated its position that within Dubai, the issuing of warnings to witnesses on their need to be truthful when rendering testimony did not amount to oaths.

However, the public policy dilemma is that arbitration literature is clear that unlike in court proceedings where oaths are required prior to any form of evidence of testimony can be admitted as evidence[863], disputants and witnesses that testify during its proceedings *may* only be obliged to be under oath only if doing so is explicitly requested by other party or if required by national law[864]. This is because arbitration is a *quasi*-legal dispute resolution mechanism. Hence, the ultimate decision on whether evidence during arbitration proceedings should be under oath is the arbitrators' prerogative[865]. Participants and witnesses actually retain the right not to submit to oath taking although they are still under an obligation to render evidence, which is truthful.

The literature[866] perhaps best elaborates the likely emphasis of the Dubai Court of Cassation on the significance of oaths in arbitration proceedings**.** That being UAE's societal expectations and value systems which expect that statements given under oath will be truthful. Oaths are matters neither of

[863] Bierce, A. 1977. A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century. *Michigan Law Review*, 75 (8), 1681-1707.
[864] Cooley, J. 1986. Arbitration vs. Mediation - Explaining the Differences. *Judicature*, 69 (5), 263-269.
[865] Ziade, R. and De Taffin, C-H. 2010. Fact Witness in International Arbitration. *International Business Law Journal*, 2 (2010), 115-134
[866] Hasan, S. 2007. Islamic Concept of Social Justice: Its Possible Contribution to Ensuring Harmony and Peaceful Coexistence in a Globalised World. *Macquarie Law Journal*, 7, 167-184; Polkinghorne, M. 2008. Enforcement of annulled awards in France: the sting in the tail. *International Construction Law Review*, 25(1), 48-56.

insignificance or superficiality in Arab culture[867]. In fact, they construed within this cultural space as instruments of guarantee and therefore regarded as important legal principles[868].

The solemn nature of oaths implores upon a covenant operating in the public space – and therefore to public policy[869]. Hasan[870] posits that the Quran (Islam's holy book), mandates that an adherent to the Islamic faith should not break any given oaths as it inevitably establishes that an individual recognises their wider duty to the community. For these reasons, Lee[871] notes that in some communities, breaking an oath, refusing to subject to oaths or not being subjected to oaths is considered to have serious implications in that it can be a threat to the maintenance of public order (public policy). Oaths therefore within the sphere of governance mechanisms of public sector project governance may be utilised to implement both interactional (interpersonal) and/or procedural focused public policy. For example, in terms of its procedural use, societal values expected that only when statements are given under oath during should represent decisive evidence (which then has interactional implications). In fact, Whitcombe[872] had observed that oaths represented the "*highest possible security which men in general can give for the truth of their statements*" (p. 39).

The engagement of public policy meant that the Dubai courts sought to reiterate legal frameworks it felt were necessary to protect UAE values. Evidence of the intractable nature of public policy is that in an earlier decision relating to arbitration proceedings, the Abu Dhabi Court of Cassation in Judgment 433/17 of 1997 ruled that it was *not* against public policy in the UAE for an arbitrator to depart from strict procedural rules regarding witnesses, production of evidence, and documentation. The court ruled

[867] Gilsenan, M. 1983. *Recognizing Islam: Religion and society in the modern Arab world*. New York, NY: Pantheon Books.
[868] Ab Rahman, S. 2008. The Influence of Classical Interpretation on the Law of Guarantees in the United Arab Emirates. *Arab Law Quarterly*, 22 (4), 335-358.
[869] Price, I. 1929. The Oath in Court Procedure in Early Baby-Lonia and the Old Testament. *Journal of the American Oriental Society*, 49, 22-29.
[870] Hasan, S. 2007. Islamic Concept of Social Justice: Its Possible Contribution to Ensuring Harmony and Peaceful Coexistence in a Globalised World. *Macquarie Law Journal*, 7, 167-184.
[871] Lee, J. 2007. 'Ye shall disturbe noe mans right': oath-taking and oath-breaking in late medieval and early modern Bristol. *Urban History*, 34(1), 27-38.
[872] Whitcombe, R. 1824. *An enquiry into some of the rules of evidence relating to the incompetency of witnesses*. Pub. Butterworth, London.

that arbitrators were empowered to establish their own processes and procedures pertaining to, for example, the production of evidence. Thus, while the Dubai Court of Cassation had cited and extended arbitration proceedings to legislative standards of court proceedings as a matter of public policy, this was not a view taken and maintained by the Abu Dhabi courts.

7.6.2 A wider perspective

Examination of the literature on arbitration in the UAE suggests that the country does have the potential to become a major arbitration hub. From the literature[873], it will appear that they are three factors that will determine whether this will happen. These are the robustness of the (i) *substantive law* which includes predictability and certainty in the law, the disputing party's familiarity with the country's law and jurisprudence, (ii) *legal infrastructure* which includes the neutrality and impartiality of the judiciary and an outward positivity towards arbitration as a whole, and (iii) *convenience* in terms of location, familiarity with language and clear court proceedings. Arguably, disputing parties choose the seat of arbitration because of the need for certainty, effectiveness and neutrality during the arbitration process. In addition, disputants generally want to see their disputes resolved under laws which are stable and predicable, that will fairly and justly consider the merits of their claims and, on the conclusion of proceedings, enforce the arbitral award with minimum effort. Thus, the prevailing legal regime and the state of arbitration jurisprudence can determine the effectiveness of arbitration proceedings. The author contends that these factors also apply to domestic arbitration awards. Parties to arbitration proceedings conducted in countries which exhibit these desired characteristics are more likely to have confidence in the arbitration proceeding and associated matters. They are thus less likely to seek the challenge and

[873] Hill, J. 2014. Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements. *International & Comparative Law Quarterly*, 63(3), 517-534; Tomkinson, D. and Lee, J. 2015. Australia as a seat for international commercial arbitration—a secure neutral option in the Asia-Pacific region, *Australian Alternative Dispute Resolution Bulletin*, 2, 1-7.; Vial, G. and Blavi, F. 2016. Santiago as a Seat for International Commercial Arbitration. *Oregon Review of International Law*, 18 (1), 25-50; Birgonul, M., Dikmen, I. and Bektas, S. 2017. Comparison of an Emerging Seat of Arbitration and Leading Arbitration Seats and Recommendations for Reform. *ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 10(1), 04517023.

vacate such awards and less likely to see other means of addressing their grievances outside the court systems where the domestic proceedings were undertaken.

It is thus inevitable that, for the country to support its policy of economic diversification, there is a need to support commercial activities with appropriate, viable and up-to-date means of dispute resolution. Arbitration represents one such dispute resolution mechanism.

It is expected that with the further modernisation of the country's arbitration law following the promulgation of the new UAE Federal Law No. 6 of 2018 on Arbitration, the viability of the country as an arbitration hub will become more entrenched. At the moment, it will appear that the most preferred and popular seats of international commercial arbitration remain Hong Kong, London and Singapore and Geneva[874]. The literature suggests, though, that while there is potential for further development of arbitration jurisprudence in the UAE, doubts still exist. The literature alluded to a number of these concerns which included, for example, concerns over the role and influence of Islamic *Sharia* on arbitration proceedings. There also appear to be concerns relating to differences between how public policy is construed in the UAE and in western countries. Drawing upon the works of Bassiouni and Badr[875]and Kutty[876] one wonders whether these differences emanate from an emphasis of *Sharia* on collective rights as against a western view of public policy on individual rights. Yet Kutty's[877] view is debateable noting that Kamali[878] does opine that *Sharia* first and foremost actually focuses on the individual.

[874] Queen Mary International Arbitration. 2018. *International Arbitration Survey: The Evolution of International Arbitration*, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, accessed 16/05/19.
[875] Bassiouni, M. and Badr, G. 2001. The Shari'ah: Sources, interpretation, and rule-making. *UCLA Journal of Islamic and Near Eastern Law*, 1 (2), 135-182.
[876] Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624
[877] Kutty, F. 2006. The Shari'a Factor in International Commercial Arbitration, *Loyola of Los Angeles International and Comparative Law Review*, 28, 565-624
[878] Kamali, M., 1992. Freedom of Religion in Islamic Law. *Capital University Law Review*, 21 (1), 63-82.

There are also concerns in the literature on a wide and subjective interpretation within UAE jurisprudence of the notion of *Public policy (and/or public order)*[879]. It is this specific concern that has remained of interest to this thesis. This concerns require attention as studies have shown that preferences for specific seat of arbitration appears to continue to be determined by perceived existence of amongst others, formal legal infrastructure and track record of enforceability of arbitral awards[880]. It is hoped that with the promulgation of the new UAE Federal Law No. 6 of 2018 on Arbitration, its clearer and more restrained outlook to UAE domestic arbitration will prevail. Certainly, there is nothing wrong with any criticism levelled against the current domestic arbitration dispensation in the country; however, as Almutawa and Maniruzzaman[881] do highlight, irrespective of criticisms levelled against the manner of approach towards which arbitration jurisprudence has leaned in the UAE, the country, its judicial institutions and jurisprudence are still in their infancy, certainly compared to other developed economies such as the United Kingdom, the United States and France.

[879] Mayew, G. and Morris, M. 2014. Enforcement of Foreign Arbitration Awards in the United Arab Emirates. *Defense Counsel* Journal, 81, 279-287.
[880] Queen Mary International Arbitration. 2018. *International Arbitration Survey: The Evolution of International Arbitration*, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, accessed 16/05/19.
[881] Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.

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Almutawa, A. and Maniruzzaman, A. 2014. The UAE's Pilgrimage to International Arbitration Stardom. *Journal of World Investment & Trade*, 15(1-2), 193-244.

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858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D, accessed 26/05/18.

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