

THE NEW UAE ARBITRATION LAW – ANOTHER STEP IN THE RIGHT DIRECTION

Earlier this month, the UAE issued a new federal arbitration law¹ (referred to as the New Law in this briefing) that is based on the UNCITRAL Model law and will come into effect one month after its publication in the UAE Official Gazette. When it does so, it will repeal and replace Articles 203 to 218 of the UAE Civil Procedure Code² (CPC), in which the UAE's current law on arbitration is set out.

On its face, the New Law addresses many of the issues that have caused some parties to question the efficacy of arbitration in the UAE. It also introduces mechanisms aimed at improving the efficiency and finality of the arbitral process.

In this briefing, we identify some of the key changes introduced by the New Law and consider briefly their likely practical implications.

SCOPE OF THE NEW LAW

When it enters into effect, the New Law will apply to ongoing and future arbitrations:

- conducted inside the UAE, unless the parties agree that another arbitration law (for example, that of the Dubai International Financial Centre (DIFC) or Abu Dhabi Global Market (ADGM)) should govern the arbitration (and provided that such law does not contravene public policy);
- conducted outside the UAE, where parties choose UAE law to govern their arbitration; and
- arising from disputes (contractual or non-contractual) where the relationship is governed by UAE law, unless a specific UAE law provides otherwise (Art. 2).

Key issues

- The UAE has issued a modern arbitration law based on the UNCITRAL Model Law
- The law will govern ongoing/future arbitrations with UAE as the seat
- It contains many welcome changes and should strengthen the UAE's position as an arbitration centre

¹ Federal Law No. 6 of 2018

² Federal Law No. 11 of 1992

To the extent the New Law applies to ongoing arbitrations, it makes it clear that proceedings conducted under the previous law remain valid (Art. 59).

Practical Impact: To ensure that the New Law applies to their arbitration (or not, where some other arbitration law is preferred), parties should specify a seat of arbitration clearly in their arbitration agreements.

THE ARBITRATION AGREEMENT

The New Law (like the current law) requires that arbitration agreements are recorded in writing (Art. 7). However, the historical lack of certainty as to what constitutes an agreement "in writing" is resolved by the use of much clearer provisions in the New Law. Under the New Law an arbitration agreement shall be deemed to be in writing if (among other things):

- It is concluded by an exchange of emails.
- It is incorporated by reference from another document containing an arbitration agreement (for example, by reference to standard terms and conditions – in the past this was a ground used by the courts to invalidate arbitration agreements).

The New Law also recognises that an arbitration agreement is "separable" from the underlying contract (Art. 6). An arbitration agreement will not therefore automatically be affected by the nullity, rescission or termination of the underlying contract – meaning that there is no bar to arbitral tribunals having jurisdiction to rule on the validity of underlying contracts.

Practical Impact: While the New Law provides greater flexibility and comfort as to what constitutes a valid arbitration agreement, the prudent approach remains for parties to ensure that arbitration agreements are recorded in writing in clear terms within their contracts.

Where an arbitration agreement is to be incorporated by reference, this should be done by clear and unambiguous drafting, with explicit reference to the arbitration clause being incorporated.

CAPACITY TO ENTER INTO ARBITRATION AGREEMENTS

The New Law preserves the requirement that a representative of a juridical person (e.g. a company) should have the necessary authority to enter into the arbitration agreement under the law governing such juridical person (Art. 4(1) and 53).

Practical Impact: Parties should continue to ensure that individuals entering into arbitration agreements on their behalf (including by signing contracts containing arbitration clauses) have specific authority to do so under the law governing the relevant party. The prudent approach is to issue a power of attorney specifically for this purpose.

LANGUAGE OF THE ARBITRATION

The New Law specifies that arbitration proceedings shall be conducted in Arabic, unless the parties have agreed otherwise (Art. 29).

Practical Impact: If parties want their arbitrations to be conducted in a language other than Arabic they should include a specific provision to this effect in their arbitration agreement.

Is there an arbitration agreement?

- Greater clarity as to what constitutes an arbitration agreement "in writing"
- Arbitration agreements can be entered into by emails or by reference to other agreements
- Having authority to enter into an arbitration agreement is still critical

INDEPENDENCE OF THE ARBITRAL TRIBUNAL

The New Law includes specific provisions concerning the independence of arbitral tribunals and their right to administer arbitrations; it also sets out the courts' supervisory jurisdiction in clearer terms. Importantly, the definition of "Court" in the New Law is the Federal or local (i.e. Emirate) Court of Appeals agreed upon by the parties or in whose jurisdiction the arbitration is conducted. This means parties no longer need to refer matters first to the Court of First Instance in the relevant Emirate, which should reduce the time and cost for parties seeking the court's assistance.

Further, the New Law incorporates the principle of *kompetenz-kompetenz*, giving arbitral tribunals the ability to decide on their own jurisdiction (Art. 19). Where a party wishes to challenge an arbitral tribunal's ruling on its own jurisdiction, the New Law prescribes a strict framework in which this can take place (Art. 19):

- Any appeal must be filed with the relevant court within 15 days of the tribunal's ruling.
- The court must then issue its decision – which is not subject to appeal – within 30 days of the action being filed.
- The default position is that arbitral proceedings will be stayed pending the decision of the court. However, a tribunal can continue proceedings at a party's request (provided that such party must bear the costs incurred if the tribunal is held not to have jurisdiction).
- Separately, a seven-day time limit (or longer if agreed) applies to any party wishing to raise any allegation of non-compliance with the arbitration agreement or the New Law (Art. 20 (2)).

Practical Impact: Parties involved in UAE arbitrations should ensure that they are aware of the time-limits within which any challenges must be advanced, otherwise they risk losing the right to advance such challenges.

INTERIM MEASURES

Under the New Law arbitral tribunals will have the power to grant interim measures, including orders to preserve evidence and assets, orders to maintain the status quo and orders to take or refrain from taking an action (Art. 21).

Any interim order issued by a tribunal is executable before the UAE courts through an order issued by the Chief Justice or his delegate.

The New Law also permits a party to the arbitration (or the tribunal itself) to apply directly to the courts for interim measures (Art. 18). In an amendment to the current law, such an application will not lead to an automatic stay of the arbitral proceedings, nor shall it amount to a waiver of the arbitration agreement.

Practical Impact: The power to apply for and procure interim relief is an important tool in any arbitration proceedings – and the limited availability of interim relief is often perceived as a weakness in the current law. The introduction of new powers in relation to interim measures is a positive development and one that should strengthen confidence in the use of UAE arbitration.

Limited court interference

- More independence and powers for the arbitral tribunal, including deciding jurisdiction challenges, granting interim measures and joinder of third parties (where parties agree)
- Issues can be referred directly to a Court of Appeal, rather than a Court of First Instance, which should save time and cost

USE OF TECHNOLOGY

Among the more minor (but practically significant) changes introduced by the New Law are several new provisions that should make the arbitral process more efficient and cost-effective by permitting the use of technological solutions. These include:

- Recognition of arbitration agreements concluded via email (Art. 7 (2)(a));
- The use of virtual hearings, allowing the cross-examination of witnesses and experts not physically present in the hearing room (Art. 33 and 35); and
- Awards can be signed electronically (Art. 41. (6))

THE AWARD: TIME LIMITS AND FORM

The default position under the New Law is that arbitral awards should be issued within six months of the date of the first procedural hearing (consistent with the current position). In a welcome change, the New Law also grants arbitral tribunals the power to unilaterally extend proceedings for a further six months (or longer, with the agreement of the parties) (Art. 42).

The New Law also removes the current requirement for arbitral awards to be signed in the UAE (requiring the tribunal's physical presence) and makes it clear that awards can be signed electronically (Art. 41 (6)).

Practical Impact. Granting arbitral tribunals the power unilaterally to extend the period for issuing their award beyond six months is, in our view, a sensible and pragmatic development – six months is often too short a period in which to resolve complex disputes. Nonetheless, parties should remain cognisant of the fact that, absent any decision of the Tribunal or agreement with the other party, the default time limit remains six months.

ENFORCEMENT OF ARBITRAL AWARDS

The New Law does not appear to affect the enforcement of foreign seated arbitration awards, which should continue to be governed by the New York Convention (in accordance with Art. 238 of the CPC).

Article 53 of the New Law sets out the grounds for setting aside a UAE arbitration award, which are similar to the current law but with some added detail. As under the current law, public policy is one of the grounds on which a court can, of its own volition, set aside an award. Given the potential for "public policy" to be widely construed, this could continue to cause some concern for enforcing parties, unless and until a body of case law showing support for enforcement is established.

Where a court is requested to set aside the award on grounds of form rather than substance, the court can, where appropriate and requested by a party, suspend its proceedings for up to 60 days to allow the tribunal to amend the form of the award. The New Law also allows a court to nullify an arbitral award in part, allowing the remaining parts of the award to be preserved (Art. 54).

The New Law prescribes the following time limits:

- An action to set aside a UAE arbitral award shall be time barred 30 days from the date of notification of the award to the party seeking to set aside (Art. 54).

Enforcement

- Strict time limits to enforce or challenge an arbitral award
- Awards can still be set aside if found to be contrary to UAE public policy

- The court is required to confirm and enforce an arbitral award within 60 days of an application by the award creditor (Art. 55 (2)).
- A set aside application does not automatically stay enforcement of the award. A court should decide any stay request within 15 days of the first hearing and, if a stay is ordered, the court has 60 days from the stay order to decide the set aside application (Art 56).
- A party wishing to appeal the court's decision on the set aside application to the Court of Cassation must do so within 30 days from the date following notification (Art. 57). The New Law does not prescribe time limits for the Court of Cassation process.

Practical Impact: The New Law clarifies the process for enforcing UAE arbitration awards and imposes stringent time limits for challenging these awards, which should serve to expedite the enforcement process. In doing so, the New Law addresses one of the major perceived shortcomings in UAE arbitration.

However, the grounds for setting aside an award remain potentially wide and there is no time limit once an appeal on a set aside application has been made to the Court of Cassation. The UAE courts could allay some of these concerns by continuing to demonstrate the pro-arbitration approach of recent years – it remains to be seen whether they do so.

CONCLUSION

The New Law will bring the UAE's arbitration framework in line with international practice, which can only help to support the UAE's desire to position itself as an arbitration hub, both in the Middle East and globally.

Although it remains to be seen how the New Law (once effective) will be applied by the courts in practice, there are good grounds to believe that the New Law will help to dispel many of the lingering concerns about arbitration onshore in the UAE and generate further confidence among arbitration users.

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