

The UAE Federal Arbitration Law on its First Anniversary

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Introduction

The UAE's much anticipated arbitration law, Federal Law No. 6 of 2018 (the 'UAE Federal Arbitration Law'), came into force in June 2018 and now benefits from a year's worth of implementation. The UAE Federal Arbitration Law has been the topic of numerous conferences and events, practitioners have analysed its provisions in painstaking detail to support their clients' positions, arbitral tribunals have interpreted and applied the meaning of these provisions, and the UAE courts have begun to render judgments on the law in annulment and enforcement-related cases.

While the implementation of the UAE Federal Arbitration Law still remains in its early stages, the law's one-year anniversary offers an appropriate time to step back and review the law's emerging jurisprudence. To that end, this article highlights three key developments in relation to the UAE Federal Arbitration Law and three potential concerns that remain.

Three Key Developments

The UAE Federal Arbitration Law was received with much fanfare in the arbitration community when it came into force last year. The law represents an upgrade over the previous arbitral regime that was found in Articles 203-218 of the UAE Civil Procedure Code, and a number of important developments can be noted. For present purposes, this article will highlight three aspects of the new law that the author believes are particularly noteworthy: (1) the UAE Federal Arbitration Law's signalling of a shift towards an increasingly arbitration-friendly policy in the UAE; (2) an emphasis on modern communications and

technology; and (3) the important role of the Court of Appeal as the Competent Court for arbitration-related matters.

A Shift Towards an Increasingly Arbitration-Friendly Policy in the UAE

The passage of the new UAE Federal Arbitration Law has marked an important shift in the UAE's overall approach towards arbitration and signals a clear intention to cement the UAE as a pro-arbitration jurisdiction. The UAE Federal Arbitration Law contains the core principles and features that are conducive to a well-functioning arbitral regime as found in the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law') and other state-of-the-art national arbitration laws (such as the principles of competence-competence and separability and the power of the arbitral tribunal to order interim measures, among other examples).

The real evidence of this shift in policy, however, can be seen in the fact that the passage of the new UAE Federal Arbitration Law did not occur in a vacuum but has been complemented by two other key legislative developments that have amplified the law's positive impact.

First, in October 2018, the UAE amended Article 257 of Federal Law No. 3 of 1987 Promulgating the Penal Code to exclude arbitrators from the scope of its application. Article 257 had previously been amended in October 2016 to impose criminal liability on arbitrators who issued decisions and opinions contrary to their duties of impartiality and neutrality. The passage of the earlier amendment had led to considerable concern in the arbitration community, but the recent amendment excluding arbitrators from the remit of Article 257 has alleviated those concerns.

Second, the enforcement of foreign arbitral awards in the UAE is now subject to a new streamlined procedure set forth in Cabinet Decision No. 57 of 2018 Concerning the Executive Regulations of the UAE Civil Procedure Law, which entered into force in February 2019. One of the initial debates that emerged in the wake of the passage of the UAE Federal Arbitration Law was whether the law's scope encompassed foreign arbitral awards. This debate appears to have now been put to rest with the passage of Cabinet Decision No. 57, which suggests that the UAE Federal Arbitration Law does not apply to foreign arbitral awards. Nevertheless, the process set forth in Cabinet Decision No. 57 for enforcing foreign arbitral awards in the UAE arguably places the UAE ahead of many other jurisdictions in terms of the speed with which a foreign arbitral award can be recognised. Under Cabinet Decision No. 57, an application for the enforcement of a foreign arbitral award is filed directly with the Execution Judge who must render a decision in just three days. The order of the Execution Judge has immediate effect but can be appealed to the Court of Appeal.

The shift towards an increasingly pro-arbitration approach in the UAE that was heralded by the UAE Federal Arbitration Law has been recognised by the UAE courts. For years, the over-arching view of arbitration by the UAE courts was that arbitration was an 'exceptional' form of dispute resolution. In Appeal No. 8 of 2018, dated 16 January 2019, however, the Dubai Court of Appeal stated that "arbitration is not an exceptional means of resolving disputes but an alternative means that shall be followed once its conditions are satisfied." The importance of the courts viewing arbitration as an alternative rather than an exception cannot be understated.

Back to the Future: A Modern Arbitration Process

The UAE Federal Arbitration Law's emphasis on modern communications and technology underscores the fact that the law is a forward-looking piece of legislation. Several examples of this can be gleaned from the law's provisions.

Article 7.2(a) anticipates that an arbitration agreement can be made in an electronic message; similarly, Article 24.1(a) recognises that a 'mailing address' for the purpose of transmitting notices includes an email address previously used by either party to the other in their communications.

Unless the parties agree otherwise, an arbitral tribunal is empowered to hold arbitration hearings with the parties and deliberate through modern means of communication and electronic technology pursuant to Articles 28.2(b) and 33.3. Consistent with this approach, an arbitral tribunal may question witnesses, including expert witnesses, through modern means of communications without their physical presence at a hearing under Article 35.

Moreover, Article 41.6 permits arbitral tribunals to sign awards by electronic means. Article 41.6 also confirms that arbitrators need not be physically present in the arbitral seat when signing an award, a practice that previously had been viewed as mandatory in arbitrations seated in the UAE based on an interpretation of certain cases issued under the former arbitral regime.

Taken together, these provisions, along with a number of expedited deadlines set forth in the law, will help to ensure that arbitration users in the UAE can enjoy an efficient arbitral process.

Raising the Bar: The Role of the Court of Appeal

A key legal feature of the UAE Federal Arbitration Law is the designation of the relevant federal or local Court of Appeal as the Competent Court, i.e., the court with jurisdiction to supervise the arbitral process. Designating the Court of Appeal rather than the Court of First Instance as the Competent Court has multiple benefits. The most obvious one is that it removes one layer of appeal, thereby expediting the process in line with the emphasis on efficiency noted above.

More fundamentally, this designation reflects the reality of the arbitral tribunal's role as a finder of fact and legal decision-maker in the first instance. Arbitral awards are presumptively final and can only be challenged on a limited number of procedural, jurisdictional, and public policy grounds; the substantive legal and factual findings in an award generally are not to be reconsidered by a court. The designation of an appeals court, which instinctively will be less inclined to re-open factual and legal findings than a court of first instance, as the Competent Court may increase the likelihood that the grounds for challenging an arbitral award will be narrowly construed.

The UAE's decision to make an higher-level court the jurisdiction's supervisory court for arbitration-related matters follows an approach taken by other emerging arbitral seats. For example, the national arbitration law of Mauritius provides that set-aside and enforcement applications involving arbitral awards are directed to a special chamber of the Mauritian Supreme Court (i.e., the country's highest court) consisting of six judges who receive specific training in the field of arbitration. Approaches such as those adopted by the UAE and Mauritius help to ensure that arbitration-related matters are decided by judges well versed in the arbitral process.

Three Potential Concerns

To be sure, the UAE Federal Arbitration Law is a sturdy stepping stone that has substantially improved the legal landscape for arbitration in the UAE. With that said, there are some aspects in which the new law could have done more to improve the status quo. Three such areas relate to: (1) the capacity of parties to enter into arbitration agreements; (2) consolidation of arbitration cases; and (3) untested grounds for challenging an arbitral award.

Capacity to Arbitrate

Historically, one of the greatest concerns relating to arbitration in the UAE involved the stringent requirements relating to the capacity to arbitrate. On numerous occasions, parties have expended considerable time and expense in arbitral proceedings only to have an award set aside by the UAE courts because the signatory to an arbitration agreement did not have the requisite authority to bind a party to arbitration (even if the signatory may have had apparent or ostensible authority to do so).

The UAE Federal Arbitration Law presented an opportunity to change this approach by introducing the concept of apparent or ostensible authority as a basis for binding a party to an arbitration agreement. However, the new law did not take this approach and indeed re-confirmed the necessity for parties to strictly comply with capacity requirements in relation to arbitration agreements.

The continued focus on strict capacity requirements can be seen in Article 4 of the new UAE Arbitration Law, which provides that “[a]n Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate.” An award can be set aside if the signatory lacks this specific authority to arbitrate; Article 53.1(c) specifically provides that an award can be set aside if “a person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law.”

It thus appears that issues of capacity and authority to arbitrate will continue to be matters in relation to which parties must tread carefully in the UAE.

Joinder but No Consolidation

A wide variety of disputes are arbitrated in the UAE, but construction disputes continue to account for a lion’s share of the arbitrations in this jurisdiction. Construction disputes are frequently complex and often involve multiple parties and multiple contracts.

The UAE Federal Arbitration Law specifically addresses the issue of having multiple parties at play in a dispute in Article 22. This provision grants an arbitral tribunal the power to allow a third party to intervene in or be joined to the arbitral proceedings, provided that the third party is a party to the arbitration agreement at issue (and after all parties have had the opportunity to be heard on the joinder).

Unfortunately, the UAE Federal Arbitration Law is silent on the issue of consolidation of multiple arbitral proceedings into one arbitration. Consolidation can be a useful technique for enhancing the efficiency of a dispute resolution process when there are multiple related cases, e.g., a dispute between an employer and a contractor under the main contract and a related dispute between a contractor and a sub-contractor under a sub-contract in the context of a construction dispute.

Considering that the rules of neither the Dubai International Arbitration Centre (‘DIAC’) rules or the Abu Dhabi Commercial Conciliation and Arbitration Centre (‘ADCCAC’) have provisions on consolidation, this aspect remains a lacunae for UAE arbitrations.

Untested Grounds for Challenge

The grounds for challenging an arbitral award set forth in Article 53 of the UAE Federal Arbitration Law largely track the grounds set forth in the UNCITRAL Model Law and, therefore, generally reflect international practice. There are, however, two grounds for challenging an award set forth in Article 53 that do not appear in the UNCITRAL Model Law.

First, Article 53.1(d) provides that an award may be challenged if “the arbitral award excludes the

application of the Parties' choice of law for the dispute." While such a provision is not commonly found in national arbitration laws on a global basis, similar provisions do exist in other regional laws, including Egypt, Oman, Jordan, and Saudi Arabia.

Such a ground for challenge is certainly sound in principle. For example, if the parties to an arbitration agreement clearly select UAE law to govern the substance of their dispute and an arbitral tribunal applies English law wholesale to that dispute, then it is reasonable for a court to set aside such an award. Indeed, there are historical reasons for including such a provision in the national arbitration law of countries in the region, (see, e.g., *Petroleum Development (Trucial Coast) Ltd v. Ruler of Abu Dhabi* (1951), 18 I.L.R. 144, in which the arbitrator disqualified Abu Dhabi law on baseless grounds.)

On the other hand, such a provision does provide an opening for a court to revisit discrete issues of law should it wish to do so. For example, a party might argue that a tribunal applied a particular principle of law in a manner consistent with another body but not the body of law selected by the parties and request the court to set aside the award on this basis under Article 53.1(d). This would permit an interventionist judge to re-open discrete legal issues decided by the tribunal, which likely is not the approach the drafters of the UAE Federal Arbitration Law had in mind.

Second, Article 53.1(g) provides that an award may be challenged if *"the arbitral proceedings were marred by irregularities that affected the award or the arbitral award was not issued within the specified time frame."*

The first part of this provision - "marred by irregularities" - may seem uncontroversial at first blush because it seems to reflect the due process principle that is found in most national arbitration laws. However, this understanding appears not to be the case because another provision, Article 53.1(d), contains the due process principle, providing that an award may be challenged *"because the Arbitral Tribunal breached due process."* The "marred by irregularities" language thus seems to suggest something different, and it is not clear at this stage what this distinction may be.

The second part of Article 53.1(g) requiring an award to be issued in the specified time frame reflects the UAE Federal Arbitration Law's overall emphasis on efficiency. Under Article 42.1 of the law, an arbitral tribunal must issue an award within six months from the date of the first arbitration hearing, and this time period may be extended by the tribunal for up to six additional months unless the parties agree to a longer extension. If the parties do not agree to a longer extension, then the tribunal or the parties can apply to the Court of Appeal to issue a decision extending the time period further or terminating the arbitral proceedings.

This ground for challenge could create difficulties if a recalcitrant party insists on the arbitration being completed within one year in a complex, highly technical dispute. The tribunal will be faced with balancing efficiency with the need to carefully consider the issues and ultimately the threat of an award that can be challenged.

Conclusion

The UAE Federal Arbitration Law has been a positive development and, based on the law's implementation to date, the trajectory of arbitration in the UAE is on an upward track. While the law as a whole reflects the state of the art, there are some provisions that warrant some level of constructive criticism.

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