A checklist for what you need for an enforceable UAE Arbitral Award

Dalal Al Houti - Senior Associate - Arbitration
- Dubai International Financial Centre

Robert Karrar-Lewsley
r.lewsley@tamimi.com

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However there will be occasions where one party refuses to comply voluntarily, leading the other party to seek assistance from the national courts to enforce the award. A national court may refuse to recognize and enforce an arbitral award if the award (or the arbitration process that gave rise to it) does not comply with the law of the legal place (or seat) of the arbitration.

This article sets out and discusses some of the requirements for an enforceable UAE domestic award. As explained further below, because of the wide discretion of the courts it is not possible to detail all the possible requirements. The requirements also change from time-to-time. Although this article serves as a helpful guide, up-to-date legal advice needs to be taken to minimize the chances of a defective award.

Background

In the UAE the national courts consider arbitration as an exceptional mode of dispute resolution, one which ousts the jurisdiction of the national courts which would otherwise protect those under its jurisdiction from injustice. This explains why UAE courts tend to:

- Construe arbitral clauses narrowly and refuse to recognise an agreement if there is any doubt as to the consent of the parties to it.
- Refuse enforcement of domestic arbitral awards that fail to comply – even in a seemingly minor way – with the national arbitration law.

The UAE law on arbitration is found in sections 203 – 218 of the UAE Civil Procedure Law (the 'Procedural Code'). However determining the criteria for an enforceable domestic award is not as straightforward as simply consulting the Procedural Code. Many of the requirements are located in other statutes or have arisen from the judgments of UAE judges when applying the Procedural Law. The Courts have a wide discretion when applying the law and are at times influenced by the criteria applying to court judgements or which applies in their home country (as many judges are seconded from Egypt and other Arab countries). Finally, some of the requirements stem from errant first instance decisions that are subsequently overturned at appeal, but out of an abundance of caution are complied with to avoid the issue being raised by the opposing party and the risk of an unfavourable first instance decision.

When a UAE arbitral award is issued it should be promptly reviewed to ensure that it complies with UAE law and practice and will likely be enforceable. Any defects should be raised to the Tribunal so that they can be corrected. Most arbitrations are conducted with the assistance of an arbitral institution whose rules usually set out a 30 day period for corrections (for example, Article 38 of the DIAC rules). Where there is no such institution involved, the parties should take extra care to advise the Tribunal prior to the issuing of the award of the criteria to be complied with, as correcting an award after issuance is more problematic (and may require court assistance).

We now set out some of the characteristics that a domestic award needs in order to minimize the risk of annulment. It is not possible to set out a definitive list because as explained above, the practice of the court changes and the courts have a wide discretion.

1. The award must be in writing

This is a mandatory provision found at Article 212(5) of the Procedural Law.

2. The award must make reference to the arbitral agreement

This is a mandatory provision found at Article 212(5) of the Procedural Law. Best practice is for either a copy of the arbitration agreement to be attached to the award and/or for it to be written out in full in the body of the award.

3. The Terms of Reference should be attached

The Terms of Reference is a formal document, usually signed by the parties (if not also the Tribunal) which sets out, amongst other things, the substantive issues that the Tribunal is to decide. The document is useful in itself and although there is a debate as to whether it is a mandatory requirement under UAE law, the absence of the document can be an issue and so it is best practice to have the document prepared and then attached to the final award.

4. The Award must be in Arabic unless agreed otherwise

This provision is found at Article 212(6) of the Procedural Law. Many arbitral rules used in the region contain a provision that the award will be in the language of the arbitral agreement (e.g. DIAC rule article 21.1; DIFC-LCIA rules article 17.1). However where the arbitration proceedings are non-institutional (i.e. ad hoc) this provision can be accidently overlooked, so care must be taken.

5. The Award must provide a summary of the parties' case and evidence

This is a mandatory provision found at Article 212(5) of the Procedural Law. The level of detail is up to the Tribunal but the more detailed the better.

6. The Award must be reasoned

This is a mandatory provision found at Article 212(5) of the Procedural Law.

7. The Award must state date and place of issue

This is a mandatory provision found at Article 212(5) of the Procedural Law. The place of issue should be the seat of arbitration (see below) as otherwise the conflict between the place of issue and the seat may be construed as a procedural irregularity.

8. The Award must be issued in the UAE

The award must be issued (i.e. signed) in the UAE, otherwise it will be considered foreign and the rules laid down with respect to awards issued in a foreign country shall apply (Article 212(4) of the Procedural Law). This may appear innocuous since the New York Convention means that it is arguably easier to enforce a foreign award than a domestic one in the UAE, but there is a risk that failing to sign the award in the UAE will be deemed a significant procedural defect (as it is contrary to the agreement of the parties) and will render the award unenforceable.

Parties should also be aware that some arbitral institutions outside of the UAE when sending the final award to the parties send it with a covering letter stating that the award is being 'issued' by the institution. There is a risk that such a letter may be taken by a UAE court as evidence that the award has been issued

outside of the UAE. If such a letter is issued the parties should ask the institution to confirm that the award has in fact been issued by the Tribunal and signed in the UAE, and the institution is merely forwarding the award onto the parties.

9. The Award must be signed by the majority of arbitrators

This is a mandatory provision found at Article 212(5) of the Procedural Law, which states that the award must have '…the signatures of the arbitrators, and if one or more of the arbitrators has refused to sign the award such fact shall be stated, and the award shall be valid if signed by a majority of the arbitrators'.

10. The Award should be signed on every page

As with court judgments, it must be clear that the dispositive section (usually an order found at the end of the award directing which party has to pay what to whom) is part of the award along with the reasoning. Where the dispositive section contains some of the reasoning, this will evidence that the reasoning and the dispositive section are part of the same document, and so signing the page containing the dispositive section and part of the reasoning is sufficient. However where the dispositive section does not contain any of the reasoning (which is not unusual) there is a real risk that the court will find that the dispositive section is not clearly part of the same award as the reasoning, and so refuse to recognize the award. It is therefore best practice to have the award signed on every page by all arbitrators so that there can be no doubt that the dispositive section is part of the same award as the reasoning.

11. The Tribunal must administer the oath to witnesses

This is a mandatory provision found at Article 211 of the Procedural Law. It requires that all witnesses give evidence under oath, which should be the same oath as the one required by Article 41(2) of the UAE Federal Law No.10 of 1992 (the Law of Proof in Civil and Commercial Transactions).

If a Tribunal relies on testimony that was not sworn on oath, then as a matter of public policy the award will be annulled. This is so even if the parties agreed that the witness did not need to give evidence under oath. This means, for example, that where the hearing is to be done 'on the papers' (i.e. without a hearing), if a witness statement has been tendered a hearing will need to take place for no other reason that the witness needs to swear the oath in order for the statement to be relied upon by the Tribunal.

The oath should be recorded on the transcript if there is one, and should certainly be recorded in the award.

It should be remembered that only the Tribunal has the power to administer the oath. Therefore even if an arbitrator, out of ignorance, invites a party's representative or the tribunal secretary to administer the oath, the representative should politely decline and insist that the Tribunal administer it.

12. Award must not deal with issues of 'public policy'

Issues of public policy are matters that cannot be resolved privately by the parties, and by extension cannot be resolved by the arbitrator. Examples would include criminal matters, issues of personal status, and issue regarding registration of land.

Any award that deals with such issues will be annulled. This is so even if:

- There were other reasons given by the Tribunal to justify the award which did not touch upon public policy.
- The Tribunal dealt with the issue but dismissed the arguments related to them.

Therefore where an issue related to public policy arises, the Tribunal must make it clear that it has refused to deal with the issue because it lacks jurisdiction to do so.

13. There should only be one Award on the Merits

The courts view arbitration as an exceptional mode of dispute resolution, and they are therefore alert to anything that may amount to a waiver or exhaustion of the arbitration clause. Once an award on the merits is issued it is usually deemed to have exhausted the arbitration clause, irrespective of whether the award is then confirmed or set aside.

This means that once an award on the merits has been issued, no further arbitration can take place without a new arbitration clause being agreed. Caution must therefore be taken with interim awards. Where an interim issue relating to the merits is decided (for example because one of the claims is particularly urgent), it should not take the form of an award because if it does it will likely be taken to have exhausted the arbitration clause between the parties. Without a new arbitral agreement being entered into, any later award risks being annulled on the basis that the tribunal lacked jurisdiction.

Interim awards on issues of jurisdiction, costs, or procedural matters are not awards on the merits.

14. The award must be issued within the allotted time

Unless agreed otherwise, the Tribunal has six months in which to issue the award (the time runs from the first procedural hearing) – see Article 210 of the Procedural Law. Most institutional rules have provisions extending the period, or allowing the Tribunal or institution to grant more time as necessary. However if the time limit is exceeded, even by one day, the award will likely be annulled.

Conclusion

The above list is not exhaustive but it does cover some of the main issues that commonly arise and which can be easily avoided. It is important that any party engaged in arbitration with UAE as a seat consult local lawyers to ensure the proceedings and the final award comply with the applicable UAE law and so minimize any chance of the final award being annulled by the local court.