

Commentary on the UAE's New Arbitration Law

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The long-awaited Federal arbitration law of the UAE – Federal Law No. 6 of 2018 on Arbitration (“New Arbitration Law” or the “Law”) – was published in the Federal Official Gazette no. 630 of 15 May 2018 and came into effect last June. This standalone piece of legislation repeals the previous outdated and non-comprehensive UAE Chapter on Arbitration contained in articles 203 to 218 of the UAE Civil Procedures Law No. 11 of 1992 (“CPC”).

The New Arbitration Law was long overdue, as the sporadic articles of the CPC did not provide much needed detail and clarity on some of the major points arising out of, or in connection with, arbitral proceedings. Furthermore, the provisions did not conform to the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law of 1985 and amended in 2006 (“UNCITRAL Model Law”).

The New Arbitration Law provides for a more secure framework for the conduct of arbitral proceedings in the UAE. The six sections of the New Arbitration Law contain 61 articles, most of which can be traced in the UNCITRAL Model Law, and are expected to significantly revamp the UAE chapter on arbitration.

In this article, we intend to provide an overview of the key highlights of the New Arbitration Law with a focus on its practical effects.

Scope of Application

We note the extensive scope of application of the New Arbitration Law, both in terms of substance and time. Firstly, pursuant to Article 2, the New Arbitration Law shall apply to (i) arbitrations seated in the UAE unless the parties agree on the application of a different arbitration law, provided that such a law does not contravene UAE public policy and morality; (ii) commercial arbitrations taking place outside of the UAE where the parties have agreed to submit the arbitration to the provisions of the New Arbitration Law; and (iii) arbitrations arising out of a legal dispute, whether contractual or non-contractual, governed by the laws of the UAE, unless an exception applies. Accordingly, the New Arbitration Law shall generally apply unless the parties have agreed to apply another arbitration law, provided that other law is not in conflict with the public policy and morality of the UAE.

Furthermore, we welcome the application of the New Arbitration Law to both domestic and international arbitral proceedings. Contrary to the CPC, which did not contain any reference to international arbitration, Article 3 of the New Arbitration Law introduced the character of international arbitration, which adopts an extraterritorial approach. As such, and under certain circumstances, an arbitration is deemed international even if it is conducted within the UAE.

We also note the absence of an express exclusion regarding the application of the New Arbitration Law to arbitrations seated in either the Dubai International Financial Centre or the Abu Dhabi

Global Market. However, pursuant to Article 3(2) of Federal Law No. 8 of 2004 Regarding the Financial Free Zones, we conclude that the New Arbitration Law will not govern arbitrations seated in these two free zones, which will continue to be governed by the relevant free zone's arbitration laws and regulations.

In relation to the timing of the introduction of the New Arbitration Law, it came into effect "one month from the day following its publication in the Official Gazette". It is therefore our view that the New Arbitration Law came into effect on 15 June 2018. It is interesting to note that contrary to recently enacted arbitration laws in the region, the New Arbitration Law will apply retrospectively. Specifically, Article 59 provides that the New Arbitration Law will apply to all ongoing arbitral proceedings at the time of its coming into effect, including arbitrations arising out of existing arbitration agreements. Such a retrospective application is without any prejudice to all proceedings having taken place prior to the entry into force of the New Arbitration Law.

The Competent Court

One of the major procedural highlights of the New Arbitration Law is the designation of the Competent Court, which has been defined as the "Federal or local Court of Appeal agreed upon by the parties or in whose jurisdiction the arbitration is conducted." We hope that going forward, and in line with other major global arbitration hubs, that a dedicated circuit will hear arbitration matters, with specialised and arbitration-focused members of the judiciary to further support and safeguard the arbitral process.

The Arbitration Agreement

Article 7 confirms the writing requirement for the validity of arbitration agreements. Noteworthy additions to the New Arbitration Law include the expansive interpretation of the writing requirement. As such, an arbitration agreement can be concluded by an exchange of correspondence, including e-mails. Furthermore, the writing requirement is satisfied through the reference in a written contract to an arbitration agreement contained in another document, model contract or international agreement. In Article 5, the Law expressly provides for the notion of arbitration agreements incorporated by reference. Also, an oral agreement to arbitrate during court proceedings is deemed valid if it is recorded in a judgment or if the other party asserts the existence of an arbitration party and the other party does not raise any objection.

Despite the softening of the writing requirement, the New Arbitration Law reconfirms, through Article 4(1), the requirement for arbitration agreements to be signed by persons with authority to do so. Therefore, we draw the attention of parties wishing to enter into an arbitration agreement to the requisite capacity requirements provided for under the relevant laws of the UAE, which remain unaffected by the introduction of the New Arbitration Law. For a UAE incorporated limited liability company, it is recommended that the company's constituting documents are reviewed prior to the execution of an arbitration agreement in order to verify that authority to enter into arbitration agreements, granted by default to the company's manager, has not been explicitly withdrawn. Article 4(4) explicitly provides that the ex-post lack of capacity of a party entering into an arbitration agreement, which occurs for example as a result of the death of an individual or the expiry of the entity's term (as prescribed in its constitutional documents) after it has entered into an arbitration agreement, shall not cause the termination of such an arbitration agreement. It is however interesting to note that the Law seemingly intended for such a provision to be non-mandatory as parties may still otherwise agree. Furthermore, Article 4(2) reiterates that there shall not be an agreement to arbitrate matters which are non-conciliatory.

In relation to the validity of arbitration agreements, Article 6, in line with the UNCITRAL Model Law, confirms the separability principle of arbitration agreements. When parties' agreement to arbitrate is featured within the framework of their main contractual relationship, the New Arbitration Law affirms the independence of the arbitration agreement from the other terms of the main contract in which it is contained. Arbitration agreements are not affected by the nullity, rescission or termination of the main contract, save for grounds arising out of a defective capacity.

Finally, Article 8 provides that the court shall dismiss any action that falls within the scope of an arbitration agreement, provided that the existence of the arbitration agreement is brought to the court's attention before making any substantive claims or defences on the merits, unless the court decides that the arbitration agreement is invalid or impossible to perform. The filing of such an action does not preclude the commencement or continuance of arbitral proceedings or the issuance of the arbitral award.

Set and Stringent Time Limits

In an effort to promote efficiency and prevent unnecessary prejudicial delays, the legislative draftsman of the New Arbitration Law have aimed to fit the arbitral proceedings within a clear set of, often stringent, time limits.

For example, in the event of alleged non-compliance with the arbitration agreement or the Law, Article 25 provides that if a party does not object within the time limit agreed upon, or within seven days of becoming aware of the alleged non-compliance, that party is deemed to have waived its right to rely on this non-compliance subsequently. It is questionable whether the default seven-day period is reasonable from a practical perspective. However, such a waiver to challenge constitutes an important pro-arbitration provision, which shall have the effect of estopping a party from attempting to halt the conduct of the proceedings if it does not assert any objection in a prompt manner. With that said, we note that a party's right to challenge an award, based on a defective arbitration agreement, or lack thereof, would still be preserved pursuant to Article 53. It is yet to be tested how the courts will interpret and eventually apply Articles 25 and 53.

In relation to the appointment and challenge of arbitrators, the New Arbitration Law has set a reasonable 15-day period. Specifically, pursuant to Article 11(2-3), the parties have a 15-day time limit to agree to the appointment of an arbitrator, from the date of receipt of a request to do so. Under Article 15(1-2), a 15-day time limit has been set for a party to challenge an arbitrator after becoming aware of the arbitrator appointment or after becoming aware of any circumstances justifying the challenge. Such a challenge shall be in a written application addressed to the challenged arbitrator, with a copy of the same addressed to the other members of the tribunal, if any, as well as the other parties. In the event that the arbitrator does not withdraw or the other party does not agree to the removal of the arbitrator, the party making the challenge may present it to the concerned body within 15-days after the lapse of the initial 15-day period.

We note the express acknowledgment of the *compétence-compétence* principle in Article 19(2) under which the arbitral tribunal has the jurisdiction to rule on its own jurisdiction. Notwithstanding, a party still has the right to challenge a tribunal's preliminary decision of jurisdiction before the courts within 15 days of the preliminary decision being notified. The Court then has then 30 days to render its decision. While the request is pending, the arbitral proceedings may continue at the request of a party. We note that this possibility to petition the court on the basis of a procedural order and not an award, is uncustomary in the UAE and may lead, at least in the beginning, to uncertainty.

Arbitrator Requirements

The New Arbitration Law brings clarity on the requisite requirements for arbitrators. Article 10(1) specifies that an arbitrator must not be a minor, or be judicially declared as incapacitated, or one without civil rights for the reasons of bankruptcy (unless discharged), or conviction for a crime (even if she or he has been rehabilitated).

Furthermore, Article 10(2) provides that an arbitrator cannot be a member of the Board of Trustees or of the administrative body of the arbitral institution administering the arbitration in which that person is asked to sit. We highlight the expansive application of this provision to arbitrations administered by both domestic arbitration centres, such as the Dubai International Arbitration Centre and the DIFC-LCIA Arbitration Centre, as well as international arbitration centres, such as the International Chamber of Commerce's International Court of Arbitration, the London Court of International Arbitration and the Singapore International Arbitration Centre. The triggering event prompting the application of Article 10(2) is therefore the UAE seat of such arbitral proceedings. It is regrettable that the Law did not draw a distinction between party-appointed arbitrators, on one hand, and centre-appointed arbitrators, on the other, as we would be of the view that party-appointed arbitrators, even if members of the Board of Trustees or administrative body of an arbitral institution, should not be affected by this provision. Given the retrospective application of the New Arbitration Law to ongoing arbitrations, we note that the entry into force of the Law will most likely cause certain concerned arbitrators to resign.

We also note that the Ministry of Justice or the Chairman of the competent judicial authority are to compile a list of arbitrators to be appointed in the event of a failure to agree upon the appointment of an arbitrator. As the list has not yet been published, we remain hopeful that the selection process of the prospective arbitrators would follow the international best practices in terms of both procedural knowledge and industry-specific expertise.

Finally, pursuant to Article 58, the Ministry of Economy is to issue a charter on the professional conduct of arbitrators in consultation with the arbitration institutions in the UAE. While the issuance of such a charter is likely to instil confidence within the parties to arbitration in the UAE, we are of the view that the effect of such a charter will remain for guidance purposes only. It is notable that the Law does not address the issues relating to the liability of arbitrators. In our view, it would have been desirable that for the Law to have included a provision confirming the civil immunity of arbitrators.

Arbitral Proceedings

Commencement

According to Article 27(1), arbitral proceedings are deemed to have commenced from the following day after which the arbitral tribunal has been constituted, unless the parties agree otherwise. With that said, in relation to the procedural requirement for a substantive claim to confirm and sustain precautionary attachments, Article 27(2) provides that the arbitral proceedings are deemed to have commenced on the date of the notification of the request for arbitration. Even though the relationship between arbitral and court proceedings relating to arbitration is yet to be tested under

the New Arbitration Law, the advancement of the date of commencement of the arbitral proceedings for the purpose of precautionary attachments is a positive provision.

The Language of the Arbitration

Under the New Arbitration Law, the default language of the arbitral proceedings, absent an agreement between the parties, will be Arabic. We therefore draw the attention of foreign parties in particular to the need to agree on a different language for the arbitration should they wish to avoid arbitral proceedings in Arabic, either explicitly, through for example their arbitration agreement, or implicitly, by agreeing to the application of institutional rules.

Acknowledgment of Modern Means of Communication

The emphasis on the use and role of technology in the New Arbitration Law can be attributed to the desire for more efficient proceedings. There are indeed several references to the use of “modern means of communication” in the Law. For example, written correspondence can now be deemed to have been delivered if sent, amongst other means, by email. Article 28(2) provides that arbitral hearings and deliberations can be conducted by modern means of communication and electronic technology. In addition, Article 33(3) provides that hearing may be held through modern means of communication without the physical presence of the parties at the hearing. Pursuant to Article 35, the arbitral tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing. The emphasis on the use of technology will undoubtedly modernise arbitral proceedings in the UAE and help instil global confidence in such proceedings.

Confidentiality

Contrary to common belief, arbitral proceedings are not confidential by default. The New Arbitration Law addresses the issue of confidentiality by stating, under Article 33(1), that hearings shall be confidential unless parties have otherwise agreed. The confidentiality of arbitral awards is implicitly recognised pursuant to Article 44. However, the Law does not explicitly provide for the confidentiality of documents, pleadings, evidence or submissions produced by the parties and the tribunal during the proceedings. We recommend that parties address the confidentiality of their arbitral proceedings either through an explicit agreement, or implicitly, through an agreement to apply institutional rules providing for the hoped for confidentiality obligations.

Conduct

It is clear that the New Arbitration Law attempts to instil discipline and efficiency in the conduct of the arbitral proceedings. As noted above, arbitral hearings can be held at any place, and the Law allows arbitral hearings and deliberations to be conducted by modern means of communication and electronic technology. Article 30(1-2) provides, absent an agreement between the parties, for a 14-day period from the date of the composition of the arbitral tribunal for the claimant to communicate the statement of claim in writing to the respondent and to the arbitrators. After receiving the statement of claim, the respondent has a further 14-day period to communicate its statement of defence. The practical difficulties associated with these relatively contracted time limits will most

likely prompt parties to agree on different deadlines.

It is worth noting that the New Arbitration Law attempts to put an end to disruptive guerrilla tactics through repetitive challenges of an arbitrator by providing under Article 15(3) that the challenge of an arbitrator does not suspend the arbitral proceedings.

Pursuant to Article 43 of the New Arbitration Law, the arbitral tribunal can decide to continue the arbitral proceedings (i) where there are issues that fall outside the scope of its jurisdiction; (ii) if a document submitted to it is challenged for forgery; or (iii) if criminal proceedings in respect of that document or for any other criminal act which has been instituted. This is a significant improvement as previously, according to the CPC, the tribunal was required to suspend its proceedings under such circumstances.

The Law provides much needed clarity on the issue of the representation of the parties by non-UAE lawyers. Specifically, Article 33(5) provides that parties may seek the assistance of representatives for their representation in the arbitral proceedings and these representatives may or may not be lawyers. The non-restriction on the appearance of foreign counsel in UAE-seated arbitrations is welcome after the issuance of the 2017 Executive Regulations to the Federal Law No. 23 of 1991 on the Legal Professional, which was interpreted by some to restrict the appearance of non-UAE counsel in arbitral proceedings seated in the UAE.

The Law also provides wide latitude to the parties and the arbitral tribunal to decide upon the conduct of the arbitral proceedings.

Interim and Conservatory Measures

Interim and conservatory measures constitute crucial tools in arbitral proceedings. The CPC did not grant powers to the tribunal to order such measures, which were within the exclusive powers of the courts. In the event that parties agree to grant such powers to the tribunal, either explicitly or implicitly through the application of institutional rules, the enforcement of tribunal-ordered interim and conservatory measures was an impossible task in the UAE before the enactment of the New Arbitration Law.

One of the much anticipated provisions of the New Arbitration Law is Article 21. Through this article, and unless otherwise agreed by the parties, the New Arbitration Law explicitly recognises the arbitral tribunal's power to award interim or conservatory measures, either on the request of a party or of its own motion, including ordering a party to provide adequate security to cover the costs of such measures. Pursuant to Article 21(4), a party for whom an interim measure has been ordered in its favour may, with written permission from the tribunal, request the competent court to enforce the order of the tribunal within 15 days of receipt of the request.

Notwithstanding the arbitral tribunal's newly attributed powers to order such interim and conservatory measures, the court also remains competent to grant interim and conservatory measures based on an application by the tribunal or one of the parties in relation to forthcoming or ongoing arbitral proceedings. As per Article 18(3), the arbitral proceedings shall continue notwithstanding any application for interim or conservatory measures relating to an ongoing arbitration and such an application to the court shall not constitute a waiver to the arbitration agreement.

While the receptivity and approach of the courts in relation to these provisions are yet to be tested, we highly welcome these efforts to safeguard more efficient and equitable arbitral proceedings.

The Award

In relation to the issuance of the award, Article 42(1) provides that, unless agreed otherwise, an award must be issued within 6 months from the date of the first hearing of the arbitration. Contrary to the previous CPC regime, such a date can now be extended for an additional 6 months, unless the parties agree to a longer extension, either explicitly or implicitly through the application of institutional rules. Article 42(2) provides that absent such an agreement, further extension of time can only be made by the courts upon petition by the parties or the tribunal itself. It is important to bear in mind in this regard that the failure to meet this time limit is a ground for challenging an award pursuant to Article 53(1)(g) of the New Arbitration Law as discussed further below.

The time limits set forth in Article 42 lack any mechanism for arbitral institutions to grant an extension of time, though it may be argued that parties have agreed to such an extension by virtue of having agreed to the application of particular institutional rules. Under the previous regime, the CPC allowed the parties to agree to extensions of time whether expressly or by implication.

In our view, Article 41(6) is a very positive introduction, which provides that awards can be signed outside the seat of arbitration and can also be signed electronically. The issuance of the final award shall be deemed to mark the end of the arbitral proceedings. According to Article 44, parties are to be notified of the award within 15 days from the date of issue of the award.

The Law explicitly recognises that an arbitral tribunal may interpret an award by issuing an explanatory award pursuant to Article 49. A party may request the tribunal to interpret any obscurity or ambiguity in its award within 30 days of receipt of the award, unless the parties have agreed to different procedures or time limits. The tribunal shall consider and issue its explanatory award within 30 days after the receipt of the request, which may be extended by a further 15 days. Such an explanatory award is deemed to supplement the final arbitral award.

Enforcement of Arbitral Awards

The New Arbitration Law clarifies the process for enforcing UAE arbitral awards with a fast-tracked and overhauled procedure. The New Arbitration Law provides that arbitral awards are binding on the parties, *res judicata* applies and that such awards shall be enforceable in the same manner as a judicial ruling provided ratification is obtained. If the enforcement of the award is sought in the UAE, a ratification of such an award by the court is required in order to proceed with the enforcement of such an award.

A major development in the New Arbitration Law lies in the fact that enforcement proceedings shall now commence directly before the UAE federal or local Court of Appeal, not before the Court of First Instance as before. The form of the enforcement procedure has also been simplified. Instead of filing a case before the court, the award-creditor can seek the ratification and enforcement of an award through the filing of an application with the Chief Justice of the Court of Appeal. Pursuant to Article 55(2), the relevant authority will now have 60 days from the date of the application to order the ratification and enforcement of the award unless it finds grounds for annulment.

Article 57 provides for the possibility of filing a grievance against an order of the Court of Appeal ratifying an award and declaring it enforceable or order of the Court of Appeal denying enforcement. Such a grievance must be filed with the Court of Appeal within 30 days of the Court of Appeal's notification of the order. We note that it would have been more appropriate for such a grievance to be filed before the Court of Cassation, as the higher appellate court, instead of the

Court of Appeal.

In relation to foreign arbitral awards, we note that the Law lacks explicit provisions relating to the enforcement of such awards. It is our view that the CPC provisions, specifically Articles 235 to 238, remain applicable absent a convention or treaty entered into by the UAE dealing with the enforcement of foreign arbitral awards. In the event of enforcement of foreign arbitral awards in the UAE sought on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”), it is yet to be tested whether the new expedited enforcement provisions of the Law would apply to such enforcements given that Article III of the New York Convention provides that: “(...) There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

Given the absence of any explicit provisions to the contrary within the Law, we are of the view that the new provisions of the Law should apply to enforcements of foreign arbitral awards under the New York Convention.

Award Challenge

The grounds to challenge and set aside an award are limited and consistent with the spirit of Article 34 of the UNCITRAL Model Law. Article 53(1) of the New Arbitration Law provides for limited grounds for annulment, which include the lack of capacity of a party entering into the arbitration agreement, lack of authorisation to act on the matter or lack of notice. Unlike the UNCITRAL Model Law, the New Arbitration Law also provides that the issuance of a final award which does not apply the substantive law chosen by the parties or the arbitral tribunal's failure to issue the award within the specified time-frame shall also constitute grounds for challenge. In addition, Article 53(2) provides that the court has the right to set aside the award on its own initiative, if the subject matter of the dispute is not arbitrable or if the award contravenes the public policy and morality of the UAE.

In an effort to preserve the arbitral proceedings, several articles purport to safeguard the sanctity of the arbitral proceedings.

For example, pursuant to Article 50(1-2), a party may request the arbitral tribunal to correct any typographical or clerical errors in the award within 30 days of receipt of the award, unless the parties have agreed to different procedures or time limits. Such correction is to be made within 30 days after the tribunal issues the award or after receiving the request for correction by one of the parties, as the case may be. Such period may be extended by a further 15 days. The arbitral tribunal shall notify the parties after corrections are made within 15 days from the date of issue of correction. Also, Article 51(1-2) provides that a party may request the tribunal to issue an additional award if the party believes that the final award did not deal with some of the requests made. Such a request must be made within 30 days of receipt of the award. If such a request is justified, then the arbitral tribunal shall issue the additional award within 60 days after the receipt of the request and may extend by a further 30 days. In addition, pursuant to Article 54(6), the court may suspend the setting aside proceedings for a period of up to 60 days in order to give the arbitral tribunal an opportunity to take any action or make any amendment to the form of the award.

Whereas under the previous CPC regime, there was no specific deadline for the purpose of filing a set aside action, the New Arbitration Law, pursuant to Article 54(2) provides for a 30-day time limit from the date of receiving notice of the award for a party to commence annulment proceedings. This is a significant change to the previous regime, and we believe that this will contribute to the legal security of final awards. However, Article 54(1) provides that the decision to set aside is final

and can only be appealed to the Court of Cassation. We note that there is no set time limit for the Court of Cassation to render its decision.

In line with the general spirit of the New Arbitration Law for more efficient proceedings, an action to set aside an arbitral award does not stay its enforcement. Nevertheless, the court may order a stay of enforcement if a party requests for a stay of enforcement. Such stay of enforcement is to be decided within 15 days after the date of the first scheduled hearing.

Conclusion

The UAE Federal Law No. 6 of 2018 on Arbitration undoubtedly constitutes a landmark development for arbitration in the UAE by providing a standalone arbitration law aligned with international best practices and standards. We consider that the overall preservation and respect of party autonomy and the focus on more streamlined and efficient proceedings will build the UAE's reputation as a preferred seat for international arbitration in the region. We remain hopeful in the courts' significant role in appropriately applying and preserving the spirit of the Law. The Executive Regulations, which are in the pipeline, will also undoubtedly clarify some of the issues raised in hope of a more rationalised and synchronised proceedings among the various players in UAE seated arbitrations.

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