

Amended Arbitration Legislative Framework in Jordan

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On 29 March 2018, His Highness King Abdullah Al Thani Ibn Al Hussein promulgated Law No. (16) for the year 2018, a law amending the Jordanian Arbitration Law No. (31) for the year 2001 (the “Amended Law”).

The Amended Law introduces new and anticipated changes to the procedural framework of arbitrations seated in Jordan, many of which can be traced in the UNCITRAL Model Law as amended in 2006. Further, the Amended Law provides for much needed clarity on some of the ambiguities witnessed under the previous regime.

In this article, we highlight the key features of the Amended Law and discuss some of their practical implications on the conduct of arbitral proceedings in Jordan.

Scope of Application

The Amended Law came into force thirty (30) days after its publication in the Official Gazette No. 5513/2018 dated 2 May 2018. The Amended Law will apply to arbitrations seated in Jordan, as well as arbitrations in which the parties agree to subject such arbitration proceedings to the Amended Law, and irrespective of the nature of the legal relationship giving rise to the dispute.

To this end, the Amended Law defines the “*Seat of Arbitration*” as “*the country agreed upon by the parties to the arbitration to be the seat of the arbitral proceedings, the country whose applicable arbitration law is agreed upon by the parties to apply to the arbitral proceedings or the country selected by the arbitral tribunal as its seat in the absence of an agreement.*”

The Amended Law further defines the “*Competent Judge*” as “*The head of the Competent Court or any of its judges as authorized by the head of the Competent Court in writing.*”

It is worth noting that the Amended Law will not have a retroactive effect. As such, it will only apply to arbitral proceedings and/or court cases that have commenced or are currently ongoing and/or being examined before arbitral tribunals and/or courts. For purposes of determining the commencement date of arbitral proceedings, the Amended law, under article 26, considers the date of the formal constitution of

the arbitral tribunal as the date of commencement of the arbitral proceedings.

Interpretation

An important addition reflected in the Amended Law is the explicit reference to legal principles and guidelines of international arbitration, as well as international trade customs, as sources of interpretation of the provisions of the Jordan Arbitration Law.

The Arbitration Agreement

The Amended Law has brought changes to the rules governing arbitration agreements. While the Amended Law has reconfirmed the writing requirement for the validity of arbitration agreements, it specified that the writing requirement can be satisfied through any form, including electronic correspondence. A welcome change in the Amended Law lies in the explicit admission of arbitration agreements incorporated by reference. There are indeed instances where an arbitration agreement may be incorporated by reference to an arbitration agreement contained in another document. Under the previous regime, an arbitration agreement incorporated by reference was regarded as valid provided the reference itself clearly considered the arbitration agreement to form part of the main agreement entered into between the parties. The Amended Law eases the conditions of validity of arbitration agreements by removing the requirement for an explicit acknowledgment that the arbitration agreement incorporated by reference forms part of the main agreement. Under the regime of the Amended Law, any reference or indication contained in the main agreement concluded between the parties to another document containing an arbitration agreement is deemed to be analogous to a written arbitration clause under the original agreement. This is particularly useful in instances where parties sign specific terms and conditions which contain a reference to general terms and conditions containing an arbitration agreement.

The Amended Law also stipulates that prior arbitration agreements in employment contracts and consumer contracts concluded on preprinted forms shall be null and void. This amendment, in particular the ban on arbitrating any dispute that may arise out of an employment contract, is in line with the most recent and prevailing decisions of the Jordanian courts.

The Arbitral Tribunal

The Amended Law introduces provisions relating to the number of arbitrators, their appointment and the designation of the presiding tribunal member in events where the disputing parties are 3 or more. According to Article (16) of the Amended Law, an agreement on the appointment and number of arbitrators as well as on the mechanism of appointing of the presiding member by the disputing parties shall always take precedence and prevail however, in absence of any such agreement: (i) the Competent Judge will appoint the arbitrators if their number was agreed upon between the disputing parties and will also name the presiding tribunal member and; (ii) Where the number of arbitrators and their method of appointment is not agreed upon by the disputing parties, the arbitral tribunal must then be comprised of 3 members appointed by the Competent Judge who will also name the presiding tribunal member and; (iii) if the number of arbitrators and their method of appointment was known, the appointed arbitrators must select the presiding member by a majority decision, if the majority was not achieved, the Competent Judge will name the presiding member pursuant to a request by any of the disputing parties. The Amended Law grants any of the disputing parties the right to resort to the Competent Judge in event of a disagreement as to any of the matters pertaining to the appointment of arbitrators who, in turn, must rule as necessary to resolve such disagreement. Finally in this regard, the Amended Law placed a duty on the Competent Judge, when selecting an arbitrator, (i) to consider the requirements of the law and the parties' pre-set

conditions in this regard and; (ii) to accelerate the process of decision making when selecting an arbitrator. Under the previous regime, decisions by the Competent Court appointing an arbitrator(s) were not subject to appeal before a higher court and were to be considered final. The Amended Law, in this regard, implicitly allows for an appeal of the Competent Judge's decision by deleting, from the amended relevant article, the previous explicit text on the appeal constraints.

As for the challenge of arbitrators, the Amended Law placed a duty on both the prospective and appointed arbitrators to be impartial and independent. The Amended Law, in line with the UNCITRAL Model Law, places a continuing duty on the arbitrators to remain impartial and independent throughout the arbitral proceedings and imposes a duty on the arbitrators to disclose any such circumstances that may cause their impartiality or independence to be impaired.

Under the Amended Law, the application for the disqualification of an arbitrator by a party must be based on serious grounds. In addition, the procedures for requesting an arbitrator to be recused have been amended. Under the previous law, a request challenging the impartiality and independence of an arbitrator was to be submitted to the court of appeal; however, under the regime, the same request must now be submitted to the arbitral tribunal itself, which, in turn, must refer the request along with the challenged arbitrator's response to the court of appeal if the challenged arbitrator does not recuse himself.

In line with the UNCITRAL Model Law, the Amended Law contains a special provision with regards to placing an obligation on the arbitral tribunal to act fairly and impartially and ensure that parties have an equal opportunity to present their case. The arbitral tribunal must also avoid any unjustified delay or unnecessary expenses in order to resolve the dispute in a timely manner *"for the sake of achieving a fair and urgent means for dispute resolution."*

In relation to the arbitral tribunal's fees, the Amended Law introduced a new provision regarding the fees of the arbitral tribunal. Pursuant to such a provision, and in absence of an agreement between the disputing parties and the arbitral tribunal on the fees, the arbitral tribunal shall determine its own fees and order the disputing parties to each pay their share equally. A very important, yet lopsided addition under the Amended Law lies in a clause granting the arbitral tribunal the right to order the compliant party to pay the defaulting party's share of the arbitral tribunal fees in events where a disputing party defaults in paying their share of the tribunal fees or any expenses of arbitration. Any decision issued by the arbitral tribunal concerning its fees may now be challenged through an appeal before the court of appeal within (15) days from the date of notification of the parties of the same.

The Arbitral Proceedings

The Amended Law now allows Jordanian lawyers to *"engage any non-Jordanian lawyer or any other professional and experienced person, if the contract subject matter of the dispute referred to arbitration is subject to the provisions of a foreign law."* Such an addition on the recourse to foreign legal counsel, as well as other relevant professionals to instances where the contract at issue in an arbitration is governed by the provisions of a foreign law, and by a means of assistance to the Jordanian lawyer, is favorable. It is regrettable, however, that the Amended Law did not make any provisions as to permitting non-Jordanian representation in arbitral proceedings where the underlying contract is governed by Jordanian law.

The Amended Law reconfirmed that Arabic shall be the default language applicable to the arbitral proceedings unless the parties agree otherwise. The arbitral tribunal is also entrusted with the power to determine the application of another language.

It is also worth noting that the Amended Law now allows the parties, at any time during the arbitral proceedings, to submit additional evidence to support their claim/defense unless the arbitral tribunal disapproves such submission. This new addition to the Amended Law was not provided for under the previous regime as the parties were only allowed to amend their grounds of defense and their final

requests but were not permitted to submit any additional evidence.

The Amended Law also introduces major and welcomed changes to the means through which arbitration hearings and proceedings can now be conducted. Under the Amended Law, the arbitral tribunal is granted greater leeway in holding the hearings in a manner the tribunal sees fit so long as the hearings and the meetings can be documented in writing. The Amended Law introduced various provisions recognizing contemporary means of communication as it now permitted the arbitral tribunal to use any new method of communication to conduct any arbitration procedure, including the use of different telecommunication technological methods, such as videoconferencing for the purpose of hearing witness testimony. Such cost and time effective measures will undoubtedly contribute to the efficiency of the proceedings.

The Amended Law also reiterated the acceptance of affidavits, i.e., sworn statements of testimony, as evidence in arbitral proceedings. However, the Amended Law provided that should the opponent wish to cross examine the witness and the latter fails to appear before the arbitral tribunal, the entire affidavit must be ruled out as evidence.

As for experts, the Amended Law sets new conditions for the admission of expert reports where any of the parties to the arbitration submits such reports with their documentary evidence. For the expert report to be admissible under the Amended Law, the submitting party must disclose the expert appointment letter, the scope of work/assignment of the expert, and the fees that were paid to them. It is mandatory, under the Amended Law, to call the expert for questioning at the request of a party or should the tribunal so decide. As for the appointment of the expert, the Amended Law introduces an option for the appointment of a juristic person (company) as an expert as opposed to solely an individual as was the case under the previous regime.

Interim and Conservatory Measures

Where either party wishes to apply for interim or conservatory measures, the Amended Law, like the previous law, allows the arbitrating parties to do so prior to the commencement of arbitral proceedings or during such proceedings in accordance with the relevant articles of the Jordanian Law of Civil Procedures No. (24) for the year 1988.

The Jordanian Law of Civil Procedures No. (24) for the year 1988 provides that a claimant may apply to the judge of summary proceedings for a motion to attach and/or freeze property of the defendant party as a precautionary measure either prior to the filing of the substantive lawsuit or along with it. Where the motion is made prior to filing the substantive lawsuit, the Jordanian Law of Civil Procedures stipulates that the substantive lawsuit must be filed within a period of eight (8) days after procuring the decision to attach/freeze the properties of the defendant, otherwise any or all (where applicable) attached properties will be released.

For the purpose of upholding the attachment of property after the (8) day period, the Amended Law now considers a notice to appoint an arbitrator served by the claimant upon the respondent along with the appointed arbitrator's written confirmation of acceptance to be sufficient as a time barring event for the running of the (8) day period mentioned under the Jordanian Law of Civil Procedures. Such a trigger event to the confirmation of the attachment may cause some practical challenges as often the appointment of an arbitrator comes at a later stage in the proceedings, after the request for arbitration. In some urgent cases, the need to sustain the attachment would have to occur prior to the appointment of an arbitrator. Also, in some instances, the power to appoint an arbitrator, and depending on the agreement among the parties, lies outside of the parties, through for example an appointing authority.

The Award

As for the time limit within which the arbitral tribunal must render its final award, the previous regime provides that such time limit shall start to run from the date of the commencement of the arbitral proceedings until the lapse of a twelve (12) month period. The extension provided for was for only another six (6) months. The Amended Law provides for the same period; however, the time limit shall start to run from the date of the constitution of the arbitral tribunal. The arbitral tribunal may in any event extend the time limit for a period of twelve (12) months or as otherwise agreed by the parties.

In relation to the final arbitration award, the Amended Law provides that the final award must be issued unanimously or by a majority decision. In the absence of a majority, the parties may agree that the award be made by the president of the arbitral tribunal alone. If the parties do not agree as to how the award will be issued when a majority is not reached the arbitral proceedings shall cease and terminate.

Where any part of the claim was acknowledged by the opponent, the claimant may procure a final award for the acknowledged part of the claim. This provision was not provided for under the previous law.

While the Amended Law did not introduce significant changes to the interpretation and correction of the final award, it provides that the explanatory award and the corrected award must be presented to the court before which a party files for a set aside action. The Amended Law also provides for the possibility to submit the correction or interpretation application to the court of appeal in the event that it is not possible for the arbitral tribunal to convene for making that correction or interpretation. Also, with regards to any additional awards made by the arbitral tribunal in connection with any missed part of the claim, the additional award shall take the form of an addendum and shall constitute part of the award. The additional award must also be submitted to court where a party files for a set aside action.

Award Set Aside and Enforcement

The Amended Law introduces a major significant change with regards to set aside actions. Under the previous regime, a set aside action could only be submitted to the court of appeal and its decision to set aside could be appealed before the cassation court. However, in the event that the court of appeal dismissed the set aside action and decided to uphold the arbitration award, such a decision could not be appealed against. The Amended Law stipulates that the only competent court for the purpose of filing a set aside action is now the cassation court, thereby reducing the stages of appeal to only one in the event that the cassation court rules to set aside the arbitration award. Therefore, should the cassation court rule to set aside the award, neither party further may appeal the decision. This is in contrast to the previous law under which there were two steps to an appeal since a set aside order by the court of appeal was subject to appeal before the cassation court.

Previously, the arbitration law provided that a decision to set aside an arbitration award would consequently render the arbitration agreement nullified as it results in litigation unless both parties agree on further arbitration. The Amended Law however provides that a decision to set aside an arbitration award does not affect the arbitration agreement unless such an agreement was in itself null void. This consequently means that the disputing parties, in the event an arbitration award is set aside, must resort again to arbitration as a method of dispute resolution.

The Amended Law also transferred the role of examining enforcement applications to the sole jurisdiction of the cassation court as opposed to the court of appeal as was the case under the previous law. The Amended Law has withdrawn a party's right to appeal the court's decision rejecting enforcement due to incorrect service of summons or due to impossibility of enforcement when the award itself contravenes with public order.

Conclusion

As part of Jordan's efforts to stimulate its economy and attract foreign investments, the Amended Law provides a comprehensive reform to the legislative framework of arbitration in Jordan. It undoubtedly provides a more modern and secure means of dispute resolution through arbitration in line with most internationally recognised arbitration guidelines and practices. With the Amended Law, arbitrating in Jordan is expected to gain new traction.



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