

The New United Arab Emirates Arbitration Law: A Step Toward Modernization with Continuing Uncertainties

June 4, 2018

UAE Federal Law No. 6 of 2018 concerning Arbitration (the “New Arbitration Law”) was issued on May 3, 2018 and is expected to be published in the Official Gazette of the United Arab Emirates in the coming weeks. It will come into force one month and one day from the date of publication. The promulgation and coming into force of the New Arbitration Law more closely align the UAE’s statutory arbitration regime with prevailing international standards and best practices.

The UAE’s New Arbitration Law has been highly anticipated by practitioners and merchants alike, and replaces the prior regime, which consisted of 16 articles contained in Title 3 of the UAE’s Civil Procedure Code (Articles 203 through 218). With the enactment of the New Arbitration Law, the former civil procedure provisions are being replaced by a self-contained arbitration statute based, in large part, on the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”), a model already used by many other countries throughout the world.

Without a doubt, the New Arbitration Law represents a positive step toward modernization of arbitration law and, it can be expected, of arbitration practice in and related to the UAE. At the same time, it remains to be seen whether implementation of the New Arbitration Law will position arbitrations with a UAE seat to compete on equal footing with the parallel regimes of “free zone” or “offshore” arbitration already operating under the auspices of the Dubai International Financial Centre (“DIFC”) and, more recently, the Abu Dhabi Global Market (“ADGM”).

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Past Questions concerning Arbitration Seated in the UAE

Under the prior regime governed by the civil procedure code, the application of UAE arbitration law by UAE state courts was subject to criticism as unpredictable, overly formalistic and antiquated.¹ Moreover, while it has been more than a decade since the UAE acceded to the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “New York Convention”) in 2006, UAE courts, in particular courts of first instance, have been observed to apply the New York Convention principles inconsistently or not at all.²

The skeptical view of arbitration with a UAE seat encountered within the international arbitration community was further fueled by amendments made to the UAE Penal Code in 2016. Those amendments foresaw that arbitrators (along with experts, translators and investigators) would be subject to criminal sanctions in the event of a failure to maintain integrity and impartiality in carrying out their respective roles in arbitral proceedings in the UAE.³

The 2016 amendments to the UAE Penal Code have been seen as a cause for concern. The concern relates to the possible chilling effect on arbitrator appointments in UAE proceedings as well as the (unintended) creation of an incentive for parties to harass and intimidate arbitrators with threats of criminal exposure in response to unfavorable decisions. The amendments are also of concern in

view of the record of lawsuits brought in UAE courts against certain arbitrators in response to their rendering of unfavorable decisions.⁴

More recently, at the end of 2017, there was discussion within the arbitration community concerning a UAE law which appeared to restrict the ability of parties to instruct foreigners as legal counsel in UAE-seated arbitrations.⁵ As of this writing, debate persists as to the scope of the restriction⁶ and whether the New Arbitration Law, once in force, would override such a restriction.

In any event, with respect to the Emirate of Dubai the relevant authorities have confirmed that foreigners who register as legal consultants with the Dubai Legal Affairs Department are indeed legally permitted to act as counsel before arbitral tribunals seated in Dubai.

The Development of Alternatives to “Onshore” UAE Arbitration

In response to the perceived deficiencies in the former “onshore” arbitration regime, parallel “offshore” arbitration laws and systems were developed in recent years in the economic free zones of Dubai and Abu Dhabi, first within the DIFC and more recently within the ADGM.

Each of the DIFC and the ADGM has its own independent arbitration law based on the Model Law and drafted to reflect international best practices. In addition, each free zone has its own judicial structure

¹ See, e.g., M. Padley & C. Clutterham, *Common Pitfalls of Arbitration in the United Arab Emirates: Interference and Enforcement*, 33 J. INT’L ARB. 83 (2016); E. Al Tamimi & A. Hassan, *UAE’s Free-Standing Arbitration Law*, 9 INT’L J. ARAB ARB. 7 (2017); A. Farhad, *Two Steps Forward, One Step Back: A Report on the Development of Arbitration in the United Arab Emirates*, 35 J. INT’L ARB. 131 (2018).

² See A. Farhad, *Two Steps Forward, One Step Back: A Report on the Development of Arbitration in the United Arab Emirates*, 35 J. INT’L ARB. 131, 135-39 (2018).

³ See UAE Federal Law No. 3 of 1987, as amended (Penal Code), Art. 257.

⁴ A. Farhad, *Two Steps Forward, One Step Back: A Report on the Development of Arbitration in the United Arab Emirates*, 35 J. INT’L ARB. 131, 133-35 (2018).

⁵ See UAE Ministerial Law No. 972 of 2017, Art. 2 (“courts, arbitration tribunals and judicial and administrative committees may not accept a person to act as a lawyer on behalf of another person unless his name is registered in the Roll of Practicing Lawyers”); Art. 17 (“Those lawyers registered in the Roll of Practicing Lawyers shall fulfill the following: 1 – Be a UAE national; [...]”).

⁶ UAE Civil Procedure Code, Art. 212 (“The arbitrator shall issue his award without being bound by the procedural rules save as is provided for in this Chapter”).

and court system to adjudicate cases arising from DIFC- or ADGM-seated arbitrations. These independent structures have sought to provide users with greater familiarity and predictability as well as more consistent adherence to international practices than was offered in UAE onshore arbitration.

In a further step in this same direction, in 2016 the DIFC also partnered with the London Court of International Arbitration (“LCIA”) to form the DIFC LCIA Arbitration Centre, an arbitration institution with rules similar to the LCIA Arbitration Rules. In addition, the International Chamber of Commerce (“ICC”) has opened an ICC Representative Office within the ADGM, which provides various case services, including Arabic-language services, with the aim of encouraging more local contracts to adopt the ICC Rules.

In short, the free-zone regimes have been seen as an attractive alternative to onshore UAE arbitration conducted under the former statutory arbitration regime.

Highlights of New Arbitration Law

In view of the foregoing recent developments in UAE arbitration, the promulgation of the New Arbitration Law on May 3, 2018 is a significant step. The text of the New Arbitration Law is based in large part on the Model Law, so that certain of the criticisms and difficulties precipitated under the prior regime have been addressed, at least as a matter of statutory drafting, by means of the New Arbitration Law.

An overview of the key provisions of the New Arbitration Law follows below:

A. Scope of Application

- Under Article 2(1) and in application of the well-known territoriality principle for arbitration laws, the New Arbitration Law is applicable to all arbitrations conducted at a UAE seat, except where the parties elect a different arbitration law (*e.g.*, by electing the DIFC or ADGM).
- Under Article 2(2) and in recognition of the distinction between the juridical seat and the

physical locale of meetings, the New Arbitration Law is also applicable to arbitrations physically conducted outside of the UAE but where the parties have agreed that the New Arbitration Law should apply (*e.g.*, by designating a UAE juridical seat, while physically conducting hearings elsewhere).

- Under Article 2(3), significantly, the New Arbitration Law also applies to disputes where the legal relationship between the parties—whether contractual or non-contractual and irrespective of the seat—is mandatorily governed by UAE substantive law, with the exception of those matters that are deemed non-arbitrable under UAE substantive law.
- Under Article 59, the New Arbitration Law also governs applicable arbitral proceedings commenced prior to its entry into force, which, importantly, would encompass any currently pending arbitration proceedings to which the new statute otherwise applies.

B. Formation and Requirements of the Arbitration Agreement

- Unlike the Model Law, Article 4 requires that the arbitration agreement, to be valid under the New Arbitration Law, be entered into by a “*duly authorized*” representative of each legal entity. It remains to be seen which persons might be considered duly authorized in the corporate context in the absence of a specific power of attorney, and under which set of laws (*i.e.*, UAE law or the law of the place of incorporation of the legal entity, if different).
- Like the Model Law and consistent with the established distinction between the *clause compromissoire* and the *compromis*, Article 5 permits entering into an arbitration agreement either before, as is typical, or after the commencement of a dispute as well as making such agreement either a separate document or incorporating it by reference.

— Article 6 confirms the well-established principle of severability of the arbitration agreement in the event of the invalidity, dissolution or termination of the underlying contract. This provision is substantially similar to Section 7 of the English Arbitration Act 1996. Article 6(2) also enshrines the competence of an arbitral tribunal to determine the validity of the underlying contract.

— Like the Model Law, Article 7 requires the arbitration agreement to be in writing while also permitting the agreement to be contained in written correspondence and exchanges between the parties.

C. Constitution of the Arbitral Tribunal

— Chapter 3, respecting constitution of the arbitral tribunal, largely mirrors its counterpart in the Model Law, with minor deviations. Thus, Article 9(2) requires that the arbitral tribunal consist of an odd number of arbitrators. By comparison, both the Model Law and the English Arbitration Act 1996 permit the parties to agree on the number of arbitrators, including, theoretically, on an even number.

— Article 11(3) provides that, absent contrary party agreement, in the case of a three-person tribunal the presiding arbitrator will be selected by mutual agreement between the parties. By comparison, the Model Law foresees as a default that the presiding arbitrator will instead be selected by the two party-appointed arbitrators.

— With respect to challenges of arbitrators, Article 15(2) foresees as a default that the challenging party serves the challenge on the arbitrator and that if the challenged arbitrator does not resign within 15 days, the challenging party “*shall have the right to bring such request before the Competent Authority,*” e.g., a UAE court of appropriate jurisdiction. The New Arbitration Law omits any reference to consideration and determination of the challenge by the arbitral tribunal itself, as the Model Law (Article 13(2)) provides, although presumably this method could

be permitted under the New Arbitration Law if the parties so agreed.

D. Competence-Competence

— Like the Model Law and consistent with the well-established principle of competence-competence, Article 19 empowers the arbitral tribunal to determine, affirm or deny its own jurisdiction, including by preliminary award depending on the circumstances.

— Under Article 19(2), a party may challenge an arbitral tribunal’s preliminary award on jurisdiction to a UAE court within 15 days (the Model Law provides for 30 days). Unlike the Model Law, the default position is that the arbitral proceedings should be suspended pending the outcome of the challenge to the UAE court, absent a specific party request to resume the proceedings.

E. Grounds for Annulment of the Arbitral Award

— Under Article 52, arbitral awards rendered pursuant to the New Arbitration Law are considered to have the same force as court judgments and are therefore directly enforceable before a UAE court of second instance, subject to the court’s *pro forma* “ratification” of the award (pursuant to the requirements set out in Article 55).

— Article 53(1) stipulates eight grounds upon which an arbitral award may be challenged, either by means of an annulment petition, or through a challenge to the arbitral award invoked during the aforementioned ratification proceedings set out in Article 55. These grounds appear to be loosely based on the grounds for annulment set forth in the Model Law as well as the grounds for refusal of recognition and enforcement of arbitral awards set forth in the New York Convention, but with some important deviations:

- The absence of or nullity/lapsing of an arbitration agreement (Article 53(1)(a));⁷
- The lack of capacity: (i) at the time of the execution of the arbitration agreement (Article 53(1)(b)), and (ii) “to dispose of the disputed right” (Article 53(1)(c));⁸
- The party’s inability to present its defense due to the lack of proper notice of the appointment of an arbitrator or of the arbitration procedure, or any other violation of “litigation principles” by the arbitral tribunal (Article 53(1)(d));⁹
- The failure of the arbitral tribunal to apply the law agreed by the parties to govern the dispute (Article 53(1)(e));¹⁰
- The failure of the constitution of the arbitral tribunal or the appointment of an arbitrator to comply with the New Arbitration Law or with the procedure agreed upon by the parties (Article 53(1)(f));¹¹
- The nullity of the arbitration proceedings or the rendering of the arbitral award after the expiry of the time limit provided (Article 53(1)(g));¹² and
- The arbitral award deals with matters not within the scope of the arbitration agreement (Article 53(1)(h)).¹³
- Article 53(2) also stipulates two additional grounds for annulment of an arbitral award: (i) subject matter non-arbitrability¹⁴ and (ii) contravention of “Public Order” and “Public Morality of the State.”¹⁵ Both of these grounds may be applied by the UAE court *sua sponte*.
- Like the Model Law—but unlike the English Arbitration Act 1996 (Section 69)—the New Arbitration Law does not provide for appeal on a question of law.

Open Questions

One area in which the New Arbitration Law appears to have directly responded to concerns raised relates to the possible restriction on appointment of foreign counsel in onshore arbitrations, as discussed above. Article 33(5) of the New Arbitration Law would appear to contradict and supplant that restriction, by affirming that:

“The arbitration parties may, at their own expense, seek the assistance of experts and legal representatives, including lawyers or others to represent them before the Arbitration Panel.” (emphasis added)

While this is a reasonable reading of the provision, uncertainty still remains. Accordingly, a complete interpretation would require fuller consideration of the

⁷ Cf. Model Law, Art. 34(2)(a)(i) (“[...] or the said agreement is not valid under the law to which the parties have subjected it [...]”).

⁸ These grounds appear to be loosely derived from Article 34(2)(a)(i) of the Model Law (“a party to the arbitration agreement [...] was under some incapacity”) and Article V(1)(a) of the New York Convention (“The parties to the agreement [...] were, under the law applicable to them, under some incapacity”).

⁹ Cf. Model Law, Art. 34(2)(a)(ii); New York Convention, Art. V(1)(b).

¹⁰ The addition of this ground is particularly noteworthy, as no counterpart to this ground is to be found in the Model Law or the New York Convention.

¹¹ Cf. Model Law, Art. 34(2)(a)(iv); New York Convention, Art. V(1)(d).

¹² The trend in modern arbitration regimes has been to move away from this kind of formalistic approach; no counterpart to this ground is to be found in the Model Law or the New York Convention.

¹³ Cf. Model Law, Art. 34(2)(a)(iii); New York Convention, Art. V(1)(c).

¹⁴ Cf. Model Law, Art. 34(2)(b)(i) (“the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State”); New York Convention, Art. V(2)(a) (“The subject matter of the difference is not capable of settlement by arbitration under the law of that country”).

¹⁵ *But cf.* Model Law, Art. 34(2)(b)(ii) (“the award is in conflict with the public policy of this State”); New York Convention, Art. V(2)(b) (“The recognition or enforcement of the award would be contrary to the public policy of that country”).

drafting notes, legislative history and applicable case law.

The New Arbitration Law has not directly addressed the other recent concern voiced about UAE arbitration law, namely potential criminal liability of arbitrators (and of others) under the UAE Penal Code for failure to maintain requisite integrity and impartiality. While efforts have been made to seek to amend or repeal this provision, the New Arbitration Law on its face does not do so.

Conclusion

The promulgation and coming into force of the New Arbitration Law is an important step toward the modernization of arbitration in and related to the UAE as well as toward the harmonization of UAE practice with international norms and practices. At the same time, the new statutory regime in the UAE does not remove all uncertainties or idiosyncrasies. These include concerning the potential criminal liability of arbitrators and restrictions on use of foreign counsel in onshore arbitrations.

For the foregoing reasons, it remains to be seen whether the general preference on the part of foreign users for free zone-seated arbitrations in the DIFC and ADGM will continue, or should justifiably continue. It is to be hoped that the coming two or three years, with the benefit of further case law and commentary in the UAE, will serve to address this question and give greater clarity. Until such time, it behooves users of arbitration in and related to the UAE to familiarize themselves with the New Arbitration Law, to be aware of how it differs from the Model Law and other leading national arbitration legislation, and to carefully consider these differences both in the drafting of arbitration agreements and the conduct of arbitral proceedings with a UAE nexus.

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