

INSIGHTS

Worthier Horizons: The UAE's New Federal Arbitration Law

June 26, 2018

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Almost 12 years after it acceded to the New York Convention, the UAE's new Federal Arbitration Law came into effect on 16 June 2018. Closely based on the UNCITRAL Model Law, it is widely regarded amongst the international arbitration community as a positive development that will increase the UAE's allure as a globally competitive arbitral seat.

The UAE acceded to the New York Convention in 2006. There has since been promise of a modern arbitration law that would make the UAE an attractive jurisdiction in which to arbitrate and a worthy competitor to the leading global arbitration centres.

A major milestone occurred on 16 June 2018, when UAE Federal Law No. 6 of 2018 concerning Arbitration (the "**New Law**") came into effect. Prior to the New Law, UAE-seated arbitration was governed by Chapter 3 of the UAE Civil Procedure Code (Articles 203 to 218) (the "**Arbitration Chapter**"), which is now repealed. The Arbitration Chapter was often criticised for being excessively reductionist, suffering from substantive lacunae, generally outmoded and squarely failing to meet the gold-standard practice adopted in the most popular global arbitration centres. Consequently, those factors have led its fiercest critics to posit that UAE-seated arbitration is too riddled with vices and unpredictability to be classed as a sufficiently 'safe' venue for the resolution of international disputes.

In this briefing we highlight some of the key developments and also identify aspects that could trap the unwary.

1. Form of the arbitration agreement

The New Law makes clear that parties can decide to arbitrate before or after the dispute has arisen. (Article 5)

It retains the requirement that the arbitration agreement must be in writing but - unlike the Arbitration Chapter - also provides that an agreement will be deemed to have been made in writing where, for example, it is contained in an exchange of correspondence or emails. (Article 7)

This development is to be welcomed, as it will limit the circumstances in which the enforceability of the arbitration agreement can be challenged.

2. Capacity of the parties to agree to arbitration

The Arbitration Chapter provided that the arbitration agreement was only enforceable if made by a person with requisite authority. A lack of such authority was a common avenue of challenge. Unfortunately, the New Law has not resolved the position. (Article 4)

When providing for UAE-seated arbitration in their agreements, parties should continue to satisfy themselves that they and their counterparties have the requisite authority to strike the agreement, for example by obtaining a power of attorney.

3. Separability

The ability to sever the arbitration agreement from the other clauses contained in the same contractual instrument is one of the central principles of arbitration. It ensures that the arbitration agreement can stand alone and remain enforceable even in circumstances where the main contract is challenged for invalidity, or is rescinded, or becomes terminated.

The principle of separability has been expressly recognised in the New Law. (Article 6)

4. Kompetenz-Kompetenz

Another central characteristic of arbitration is the jurisprudential doctrine of ‘kompetenz-kompetenz’. This is essentially the ‘competence’ or jurisdiction conferred upon the arbitral tribunal to rule on its own jurisdiction. Absent this doctrine, any party could delay or derail an arbitration by challenging the tribunal’s jurisdiction in the appropriate national courts.

The kompetenz-kompetenz doctrine has been expressly recognised in the New Law. (Article 19)

5. Interim Measures

The ability for the parties to the arbitration to obtain interim relief can become important in a variety of contexts. If the arbitral tribunal is not empowered to award interim measures, it may be necessary to seek recourse before the national courts. Any such necessity risks undermining the efficacy of the arbitral process.

The Arbitration Chapter did not expressly grant these powers to tribunals. Fortunately, the New Law has rectified the position. It provides that the arbitral tribunal may, either of its own accord or upon the request of one of the parties, order a party to take precautionary or interim measures and lists the types of measures that can be awarded. (Article 21)

In addition, the New Law empowers the arbitral tribunal to seek the UAE Court of Appeal’s assistance to obtain evidence. Again, the arbitral tribunal can do this of its own accord or upon the request of one of the parties. (Article 36)

These are key developments and sit among the New Law’s principal facets that bring it more into line with modern international arbitration statutes.

6. Joinder

The New Law confers upon the arbitral tribunal powers to join parties to the arbitration, provided that they are parties to the arbitration agreement. (Article 22)

However, the consolidation of multiple arbitration proceedings is not provided for. If the parties wish for consolidation to be an option, they should provide for this in the arbitration agreement itself (either expressly or by incorporating a body of arbitral rules that does so, such as the ICC or HKIAC Rules).

7. The Award

Historically, it was not uncommon for the enforcement of awards to be challenged if the award had not been physically signed in the UAE. The possibility of such challenges has been removed by the New Law. It expressly provides that the award shall be deemed to have been rendered at the arbitration venue, even if it was signed elsewhere. (Article 41(6))

The New Law provides that the award shall be rendered within six months of the first hearing. (Article 42) This repeats the position under the Arbitration Chapter. However, express provision is now made for the six month period to be extended either by the arbitral tribunal for a further six month period or by the parties themselves. If this time period lapses, the parties may apply to the court for an extension or for an order terminating the arbitration.

The New Law also provides that the award shall be confidential (Article 48) and empowers the arbitral tribunal to correct any mistakes in the award. (Article 50)

8. Challenges

The New Law permits parties to challenge an award by filing a “nullification lawsuit” in the UAE’s Court of Appeal. (Article 53) Such a challenge must be brought within 30 days of the service of the award. (Article 54)

Article 53 sets out various grounds on which the award can be challenged by the parties. Such challenges include that the arbitration agreement is unenforceable, that a party lacked the full legal capacity to enter into the arbitration agreement, and that the arbitral tribunal exceeded its jurisdiction. Additionally, it provides that the UAE’s Court of Appeal may decide of its own accord that the award is null and void if the subject matter of the dispute is not capable of being resolved by arbitration or if the award contravenes the UAE’s public order or public morality.

9. Enforcement

An award issued under the New Law will have the same binding force as a judgment of the UAE courts. However, the award must be ratified by the UAE courts prior to being enforced. (Article 52)

Under the Arbitration Chapter, the parties had to seek an order for ratification and execution in the UAE Court of First Instance. The New Law provides that such an application should be made straight to the Court of Appeal. The Court of Appeal should issue the order for ratification and execution within 60 days, unless there is a reason to nullify the award on the basis of one or more of the Article 53 prescribed grounds. (Article 55)

10. Costs

Under the Arbitration Chapter, the arbitral tribunal was not empowered to award payment of the parties' legal costs. The New Law provides that the arbitral tribunal may assess and make orders for payment of the "arbitration costs", which is said to include the fees and expenses of the tribunal and the costs of the appointment experts by the tribunal. (Article 46) Rather unhelpfully it makes no express mention of the parties' legal costs, creating uncertainty as to whether the arbitral tribunal can make orders in respect of the same. Arguably that uncertainty is part-answered in the negative at Article 33, which provides that where a party is represented by lawyers in the proceedings they must bear the related costs for themselves.

It would therefore seem that if the parties wish to recover their legal costs, they should provide for that in the arbitration agreement (either expressly or by incorporating a body of arbitral rules that permit the arbitral tribunal to award legal costs).

11. Application

The New Law is stated to apply to existing arbitrations. (Article 59) However, it will not have retrospective effect. Procedures already conducted in existing arbitrations prior to the New Law coming into force shall remain valid. Unclear, however, is whether the New Law will apply to awards that have already been issued but in respect of which nullification, ratification or enforcement proceedings are still pending.

Although not expressly stated, it is assumed that the New Law does not apply to arbitrations seated in the Dubai International Financial Centre and the Abu Dhabi Global Market free zones, which have their own arbitration law.

Observations

The New Law marks a very concerted and progressive step away from the Arbitration Chapter.

Whilst the New Law bears no hallmarks of 'old wine new bottle', it is perhaps regrettable that some negative sediments of the Arbitration Chapter still linger and are capable of trapping the unwary. With some inevitability, there will also remain question marks concerning its efficacy until the New Law meets with curial scrutiny and the UAE courts interpret its provisions.

Nonetheless, the New Law promises to deliver up a modernised arbitration infrastructure in concert with international best practice and far more befitting to the UAE's ambition to sit, without unease, among the world's leading arbitral centres. In that cause, the UAE has already made significant strides in promoting itself as the Middle East's major arbitral hub - primarily through its accession into various treaties, legislative reforms, development of arbitral bodies and shifting judicial attitudes towards arbitration. Building on that progress, the New Law helps the UAE forge its way towards loftier arbitral horizons.