The New Arbitration Law in UAE

Law No. 6/2018

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Arbitration in UAE prior to the new Law

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The New Law, general

- Published in the Federal Official Gazette no. 630 of 15 May 2018 and came into effect last June 2018
- Did provide much needed detail and clarity on the major points arising out of, or in connection with, arbitral proceedings
- Cancelled the Articles 203 to 218 of the CPC (Article 60 of the new Law)
- 61 Articles
The New Law, Scope

- 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.

The New Law, Scope

- The application of the New Arbitration Law to both domestic and international arbitral proceedings.
- Contrary to the CPC 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.
The New Law, DIFC and ADGM, Ongoing Arbitrations

- No 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.

- 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.

The New Law, 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” Essam Al Tamimi, Al Tamimi Law Firm,
The New Law, Agreement

- Article 7 confirms the writing requirement for the validity of arbitration agreements.
- Expansive interpretation of the writing requirement. As such, an arbitration agreement can be concluded by an exchange of correspondence, including e-mails.
- 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 (LOA).
- 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.

The New Law, Agreement

- Article 4(1), the requirement for arbitration agreements to be signed by persons with authority to do so..
- 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.
- Furthermore, Article 4(2) reiterates that there shall not be an agreement to arbitrate matters which are non-conciliatory.
- Validity of arbitration agreements, Article 6, in line with the UNCITRAL Model Law, confirms the separability principle of arbitration agreements
- 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.
The New Law, Time Limits

- To promote efficiency and prevent unnecessary prejudicial delays, 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.
- 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).

The New Law, Time Limits

- 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.
The New Law, Arbitrator Requirements

• 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.

• 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.

The New Law, 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.

• Article 27(2) provides that the arbitral proceedings are deemed to have commenced on the date of the notification of the request for arbitration.

The Language of the Arbitration

• The default language of the arbitral proceedings, absent an agreement between the parties, will be Arabic.

Acknowledgment of Modern Means of Communication

• Article 28(2) provides that arbitral hearings and deliberations can be conducted by modern means of communication and electronic technology.

• Article 33(3) provides that hearing may be held through modern means of communication without the physical presence of the parties at the hearing.

• Article 35, the arbitral tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing.
The New Law, Proceedings

Confidentiality

- 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.

Conduct

- Law attempts to instil discipline and efficiency in the conduct of the arbitral proceedings.
- 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.
- The Law attempts to put an end to disruptive guerilla 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.
- Article 43, 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.

The New Law, Interim and Conservatory Measures

- 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.
- 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.
The New Law, Interim and Conservatory Measures

• 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 New Law, 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.

• 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 extended by a further 15 days. Such an explanatory award is deemed to supplement the final arbitral award.
The New Law, Enforcement

- 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.

The New Law, 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 New Law, Challenge

• 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.