

The Birth of a New UAE Federal Arbitration Law: A Long and Difficult Labour

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Enactment of a federal arbitration law has been 'imminent' since the United Arab Emirates acceded to the New York Convention in 2006 (the 'Convention'). Once enacted, it is expected that the federal law will repeal Articles 203 to 218 of Federal Law (11) of 1992, the Civil Procedure Code ('CPC'), which currently govern arbitration in the state.

Several drafts of a proposed federal arbitration law have been released over the years by the Ministry of Economy, the most recent of which was in 2013 (the 'Draft Law'). This version (as with the majority, but not all, of its predecessors) is based on the UNCITRAL Model Law, but retains some provisions of the CPC.

Whilst enactment of a federal arbitration law is regarded as necessary, the Draft Law has not been well received by some practitioners. Dissenters consider that the continued inclusion of certain provisions of the CPC in the Draft Law does not accord with international best practice, which is detrimental to ongoing efforts to change the general perception that the UAE is an unpredictable jurisdiction for the enforcement of arbitral awards.

This article considers where the Draft Law appears to have got it right, and provisions which may warrant further thought.

ARBITRATION AWARDS IN THE UAE

Foreign Arbitral Awards

Book III, Part I, Chapter 4 of the CPC provides for execution of foreign judgments and orders, and applies to foreign arbitration awards pursuant to Article 236. By Article 238 the rules enacted in Chapter 4 are without prejudice to the provisions of treaties between the UAE and other countries.

The Convention is not expressly identified in CPC Article 238 because the CPC came into force before the UAE became a signatory. However, although not expressly identified, the Convention, now in force in the UAE, is to be applied to the enforcement of foreign arbitral awards as a treaty obligation of the UAE to the exclusion of local laws. Despite this there have been difficulties with enforcement of foreign awards in the state in some cases, although the Courts^[fn]'Court(s)' in this article refers to the Federal and local Emirate courts outside the Dubai International Financial Centre.^[/fn] have applied the Convention in others. These difficulties arise primarily from the Courts' willingness to entertain arguments to set aside foreign awards on grounds that they do not meet the (non-Convention)

requirements of the CPC.

Recent Court of Cassation judgments have made clear that the provisions of the CPC should have no application in the enforcement of foreign arbitral awards in the UAE and that only the relevant international convention is to apply. There have been, however, occasional setbacks, as recently demonstrated in the case of *CCI v Sudan*.^[fn] *Construction Company International v. Ministry of Irrigation of the Democratic Republic of the Sudan*, Dubai Court of Cassation, Case No. 156/2013, judgment dated 18 August 2013.^[/fn] In this case the Dubai Court of Cassation held that enforcement of Convention awards may be refused for lack of jurisdiction where the award debtor does not have a domicile or place of residence in the UAE or where the case is not related to an obligation carried out in the jurisdiction. Though this case is generally considered an outlier by practitioners, there is no doctrine of binding precedent in the UAE and the Courts may, therefore, in some instances continue to apply the CPC to refuse recognition or enforcement of a foreign arbitral award.

The Draft Law seeks to eliminate any lingering uncertainty. Article 52 of the Draft Law incorporates Article V of the Convention, stipulating that it is to be applied to both foreign and domestic awards in the state. It aims to leave no doubt as to the applicable regime for enforcement of foreign arbitral awards.

Domestic Arbitration Awards

In assessing whether to ratify or annul a domestic arbitral award, the CPC does not permit the Courts to reconsider the merits of a tribunal's findings, but rather directs that decisions be taken on procedural grounds. Procedural irregularities, however trivial, have therefore always been used and continue to be used by award debtors as a basis for resisting domestic arbitral awards.

To combat this trend, the Draft Law attempts to limit parties' ability to raise procedural irregularities at the enforcement stage. Two prominent examples of technicalities cured by the Draft Law are excluding the need for witnesses to swear a religious oath and for arbitrators to sign awards whilst being physically present in the UAE.

(i) Swearing of the Oath

Article 211 of the CPC requires that all witnesses swear an oath before the tribunal before giving evidence. In the now infamous *Bechtel* case,^[fn] *International Bechtel v. Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Case No. 503/2003, judgment dated 15 May 2005.^[/fn] the Dubai Court of Cassation determined, in annulling a domestic award at the ratification stage, that the oath given must be religious, in the form prescribed for court hearings at article 41(2) of Federal Law (10) of 1992, the Evidence Law. The oath reads:^[fn] All excerpts of UAE legislation are unofficial translations of the official Arabic text.^[/fn]

'I swear by Almighty God that I shall tell the whole truth and nothing but the truth'.

There is no scope for a secular affirmation or declaration, and failure of the arbitrator to follow the mandatory oath-taking procedure is a ground to set aside the arbitral award.

The Draft Law attempts to redress this issue at Article 34. Whilst witnesses are still to be placed under oath before presenting evidence, the oath is to be 'in accordance with the formula prescribed by the tribunal'. Ostensibly, secular affirmation will be permitted with the tribunal's consent and a party's ability to rely on a deviation from the oath-taking procedure under the Evidence Law in order to resist an award should be eliminated.

(ii) Issuance of the Award at the Place of Arbitration

CPC Article 212(4) provides that arbitral awards must be 'rendered in the UAE'. Courts have interpreted this provision to mean that domestic awards must be physically signed by tribunals in the state.

This means that tribunal members of a UAE seated arbitration who reside outside the jurisdiction must travel to the UAE to sign the award. Inevitably, additional costs will be incurred which the parties have to pay and awards can be delayed waiting for a busy tribunal to have availability to travel. If this requirement is overlooked, the award may be annulled under the current law.

In contrast, the Draft Law makes no reference to the place in which an award must be rendered, which suggests that awards may be valid if signed outside of the UAE.

IF YOU'RE GOING TO DO IT, DO IT RIGHT

The Draft Law maintains some provisions of the CPC which some practitioners regard as contravening efforts to enact a modern arbitral framework by allowing parties to continue to rely on procedural technicalities to seek annulment of awards. In particular, it appears under the Draft Law that an award debtor may still seek annulment on the basis that:

(i) the individual who signed the arbitration clause on behalf of a company lacked the special authorisation as required by CPC Article 58(2) to do so.

The Draft Law is silent on the authorisation required to enter into an arbitration agreement on behalf of a third party, save that under Article 5(1) the signatory must have the requisite 'capacity to dispose of his rights'. This is similar to the current wording at Article 203(4) of the CPC, which the Courts have interpreted to mean that the signatory must possess a special power of attorney or be named in the articles of association as the person with the authority to bind the company to arbitration. In recent years it has become customary for an award debtor to resist enforcement of awards on the basis that the individual that signed the arbitration agreement on its behalf did not have the requisite special authority to do so, putting the onus on the enforcing party to try and prove authority of the award debtor's signatory.^[fn] The author (and probably most practitioners and arbitrators) considers that this is an issue in any event which ought to be dealt with as a jurisdictional point at an early stage of arbitration and that a failure to do so should at least amount to a waiver.^[/fn]

(ii) the tribunal did not sign each page of the award.

Article 41(2) of the Draft Law states that 'the arbitrators shall sign the award'.

Similar terms in the CPC have been interpreted by the Courts as requiring the arbitrators to sign each page of the award (including the reasoning), failing which the award may be annulled. This does not reflect international practice and should be clarified in the final version of the law.

(iii) the award was not rendered within the time prescribed for its issuance.

Article 43 of the Draft Law provides a long-stop date of eighteen months, calculated from the date of commencement of the proceedings, for a tribunal to issue an award unless otherwise agreed by the parties. Pursuant to Article 52(7), an award rendered after the long-stop date and without the parties' agreement may be annulled. This reflects generally Article 210 of CPC which requires tribunals to render awards within six months from the 'first arbitration session', unless otherwise agreed, failing which the award may be annulled. Given the nature and complexities of some commercial arbitrations, even a turnaround period of eighteen months can be unrealistic and there can be no

guarantee of proving the agreement of the parties. This article should be clarified in the final version of the law to ensure that in international arbitrations provisions of institutional rules or the like shall prevail.

CONCLUSION

The sentiment amongst most practitioners is that if a comprehensive federal arbitration law is to be enacted in the UAE, it should aim to conform to international standards and practice, and ought to address all deficiencies, particularly those highlighted in this article.

The welcome fact, however, is that progress is being made in the UAE to enact a modern arbitral framework that accords with international best practice. And, whilst the Draft Law may not address all concerns or eliminate outright parties' ability to challenge enforcement on minor procedural irregularities, there is hope that the final draft might.