

UAE Federal Arbitration Law Adopted at Long Last: All Well that Ends Well?

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The adoption of the UAE Federal Arbitration Law has kept the specialist arbitration profession in the waiting for the better part of a decade. It was finally adopted earlier this week, to the great acclaim of the local and international arbitration community. The new Law, Law No. 6 of 2018, will apply within 30 days from publication in the UAE Official Gazette to all ongoing and newly initiated arbitration proceedings seated in the UAE or to those proceedings that are governed by the provisions of the new Law by reason of another connecting factor (Article 2). The new Law repeals the provisions of the UAE Arbitration Chapter, i.e. Articles 203 through to 218 and 236 of the UAE Civil Procedures Code, which have governed UAE-seated arbitrations to date.

The UAE Arbitration Chapter has routinely been criticised for being an archaic instrument of local arbitration, which is out of time with the requirements of arbitration in a modern age. That said, albeit based on the UNCITRAL Model Law and bringing welcome change to the limited procedural scope of the UAE Arbitration Chapter, the new Law essentially fails to deliver on the ambitious promises that previous drafts once held. The better part of the new Law codifies existing case law precedent that stems from the UAE courts' interpretation of the provisions of the UAE Arbitration Chapter since its adoption in 1992. That case law precedent is remarkably arbitration-friendly and has given rise to a *jurisprudence constant* that has provided reliable guidance in the application of the UAE Arbitration Chapter over the years (see in particular the detailed article-by-article commentary on the practice and procedure under the UAE Arbitration Chapter for a full study: G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet & Maxwell, 2017). By way of example, the principle of party autonomy, pursuant to which the arbitration process is a matter for contractual agreement between the parties; the separability of the arbitration agreement from the main contract, which allows a tribunal to investigate matters of invalidity affecting the main contract; the principle of *kompetenz-kompetenz*, whereby the arbitral tribunal is empowered to determine its own jurisdiction; the distinction between arbitration agreements and submission agreements; the incorporation by reference of arbitration agreements; the distinction between seat and venue of the arbitration; the *res judicata* effect of awards; and the partial enforcement or nullification of arbitration awards are all concepts of arbitration well known from arbitration practice under the UAE Arbitration Chapter. Whilst derived from prevailing case law precedent under the UAE Arbitration Chapter, these fundamental concepts of arbitration now find express codification in the new Law.

The new Law also provides detailed guidance on the formation of the arbitral tribunal and potential challenges and the replacement of arbitrators, the tribunal's procedural and substantive decision-making as well as the termination of the arbitration reference. Further, the new Law contains detailed

wording on the process of the arbitration going forward, such as the exchange of substantive pleadings by the parties, including the statement of claim and statement of defense and counterclaim, the language of the arbitration, the submission of evidence (including tribunal and party-appointed experts), the presentation of witness testimony, the power of the tribunal to determine the applicable law, the form and content requirements of a resultant award as well as the confidentiality of awards and the interpretation, correction and the issuance of additional awards. Most of these provisions are closely modeled on the UNCITRAL Model Law and will as such be by and large familiar to the discerning practitioner (depending always on the quality of the English translation in hand, the text of the law having as yet only been published in its Arabic original). That said, virtually all of these provisions have existed before in one form or another in arbitration practice under UAE Arbitration Chapter in combination with a leading set of arbitration rules, whether e.g. the local DIAC Rules, the ICC Rules or the free zone DIFC-LCIA Rules. In this sense, the new Law provides no doubt a useful stand-alone framework for ad hoc arbitration outside a firm institutional context and as such, on its own, is no doubt superior to the provisions of the UAE Arbitration Chapter. That said, leading local institutional rules – in addition to the UNCITRAL Rules – have proven to be a suitable and helpful procedural complement to the UAE Arbitration Chapter over the years in order to avoid undesirable stalemate in an ad hoc context.

Be that as it may, some of the provisions of the new Law are more innovative and do bring change – for better or worse. Some of the better changes include in no particular order the following:

- The parties' free choice of impartial and independent arbitrators (subject to an express prohibition to appoint members of staff of arbitration institutions in charge of the administration of an individual reference) (Article 10);
- the arbitrability of tortious causes of actions (Article 2(3));
- the introduction of a wide definition of "international" arbitration, which may lay the basis for the gradual formation of a domestic/international public policy dichotomy, the latter being typically more restrictive than the former;
- the more broadly available arbitration defense, which – in the terms of the new Law (Article 8(1)) – no longer needs to be advanced "*in the first session/hearing*" before the court, a term that used to cause interpretive challenges under Article 203(5) of the UAE Arbitration Chapter;
- the express and wide power given to the courts to support the arbitral process through interim measures both before and after initiation of the arbitration as appropriate (Articles 18) and supplementary powers to similar effect granted to the arbitral tribunal (Article 21);
- the tribunal's power to join a third party to the arbitration process (Article 22);
- the confidentiality of the arbitration proceedings (Article 33(1));
- hearings (Article 33(3)), including the hearing of witnesses, by means of modern means of communication (such as video-conferencing), their physical presence at the hearing not being required (Article 35);
- the award being deemed issued at the seat of the arbitration, there being no requirement for arbitrators e.g. from outside the UAE to be present in the UAE for a valid execution of the award (Article 41(6)); and
- the tribunal's express power to render interim and partial awards (Article 39), which – pursuant to Article 39(2) – are enforceable before the UAE courts.

Under the new Law, there is also no longer a requirement for a Preliminary Meeting in the terms of Article 208(1) of the UAE Arbitration Chapter, which will no doubt streamline the arbitration process and remove one procedural stumbling bloc encountered under the UAE Arbitration Chapter. In stark contrast to the position under Article 211 of the UAE Arbitration Chapter, there is also no longer an express requirement for taking witness testimony on oath, a requirement that may, however, survive

given the mandatory character it has been accorded by existing case law precedent (see Dubai Court of Cassation Case No. 503/2003 – *Bechtel*).

Further, all court supportive functions under the new Law are initiated before the competent court of appeal, with the decisions of that court mostly being taken as final and binding and not being subject to further appeal.

Great disappointment is caused by provisions that either create procedural uncertainty, confirm a previously criticised positive law position or add new procedural requirements, which – if anything – render the successful conduct of an arbitration under the new Law more cumbersome. These include in no particular order:

- The cumbersome minuting requirement kept alive by the new Law with respect to any meetings with the parties (Article 28(b));
- the continued requirement for special powers of attorney for valid representation of a party in arbitration or a party's valid submission to an arbitration process (subject to, of course, the application of apparent authority to the formation of arbitration agreements in the terms ordained by the UAE courts under the UAE Arbitration Chapter) (Article 4);
- the requirement to add the arbitrators' nationality in the text of the award (Article 41(5));
- the absence of an express tribunal power to award party costs, these being expressly "*at [a party's] own expense*" (Article 33(4) read together with Article 46), thus confirming the position taken under the UAE Arbitration Chapter (see Dubai Court of Cassation Case No. 282/2012);
- the requirement to render an award "*within six months from the date of the first session in the arbitration*", subject to extension by the arbitrator by an additional six months and party agreement to any further extensions (further extensions without party agreement being subject to approval by the UAE courts) (Article 42), essentially confirming the cumbersome provisions on time-limits under the UAE Arbitration Chapter; and
- the need to serve a copy of the award within as little as 15 days after issuance (Article 44).

Finally, under the new Law, the enforcement and onward execution of an award still requires the completion of a ratification (or validation) process before the UAE courts (Article 52) in terms similar to those under Article 215(1) of the UAE Arbitration Chapter. Importantly, under the new Law, both a supervisory court ruling ratifying an award and a ruling setting aside an arbitral award can be appealed (Article 54), thus essentially keeping in place a fully-fledged appeal process. Equally, a ruling on an action for annulment, which cannot be brought in defense to an action for enforcement under the new Law, generally remains subject to appeal (Article 54). In this sense, the new Law will be no more enforcement-friendly with respect to domestic awards than the UAE Arbitration Chapter. That said, the appeal process is shortened by one stage, any application for enforcement or nullification being initiated before the competent court of appeal, subject to further appeal only to the competent court of cassation. Further, unlike the present situation under the UAE Arbitration Chapter, the underlying arbitration agreement remains valid and the parties will have to pursue the resolution of their pending dispute in an arbitral forum. Article 54 also provides for the award to be remitted to the arbitrator to avoid nullification in the terms presently prevailing under Article 214 of the UAE Arbitration Chapter. The grounds for challenge of an arbitral award under the new Law are identical to those of the UNCITRAL Model Law and hence perceived as more arbitration-friendly, even though this is not necessarily the case in practice given the UAE courts' interpretation of the corresponding provisions in *favorem arbitrandi*. Importantly, an application for annulment does not automatically suspend the execution of the award (Article 56). Under the new Law, like the position under the UAE Arbitration Chapter, both a decision by the UAE court to execute an award and one against can be appealed (Article 57).

To conclude, whether the adage that all is well that ends well applies to the new UAE Federal

Arbitration Law is highly questionable. With the passage of time, it will be seen whether the adoption of the new Law has been a step in the right direction.

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