

# 2019 In Review: A View From the United Arab Emirates

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With 2019 concluded and a new decade on the horizon, it is worth reflecting on salient arbitration-related developments in the United Arab Emirates. As a jurisdiction, the UAE is not only a geographically-strategic venue for arbitration, but also a legally strategic one. As Dr. Gordon Blanke explained in his recent post, the UAE offers opportunities for “forum shopping” between both onshore arbitral seats (*i.e.*, mainland UAE, typically Dubai or Abu Dhabi) and offshore arbitral seats (*i.e.*, one of the UAE’s two judicial free zones: the Dubai International Financial Centre (“**DIFC**”) or the Abu Dhabi Global Market (“**ADGM**”). Drawing on this dichotomy, we review recent onshore and offshore arbitration developments in the UAE and offer insights into forthcoming opportunities for further development of arbitral practice.

## **The Onshore Landscape Following the Long-Awaited UAE Federal Arbitration Law**

The long-awaited Federal Arbitration Law of the UAE, Federal Law No. 6 of 2018 on Arbitration (“**Federal Arbitration Law**”), came into effect in June 2018 and has since been put to the test. This standalone Federal Arbitration Law repealed

Articles 203-218 of the UAE Civil Procedure Code (Federal Law No.11 of 1992) applicable to arbitration, and any other provisions contrary to the Federal Arbitration Law. During 2019, our authors focused on the developments that have arisen as a result.

### ▪ **Penal Code Article 257 Changed**

The UAE modified Article 257 of its Penal Code so as to exclude arbitrators from the scope of its application. Since a 2016 amendment, Article 257 imposed criminal liability on arbitrators, experts, and translators who issue decisions or opinions contrary to the duties of “integrity” and “neutrality”. That version of Article 257 allowed either side to claim that an arbitrator in question (or other enumerated participant in the arbitration) had not maintained the requirements of integrity and neutrality. By exempting arbitrators from its scope, the latest amendment provides comfort to arbitrators acting in UAE-seated arbitrations.

### ▪ **Joinder of Third Parties**

Arbitrators often encounter requests to “extend” the arbitration clause or “join” third parties to an arbitration. Under the Federal Arbitration Law, arbitrators sitting in the UAE now have further guidance and are empowered to order the joinder of third parties provided they are: (1) satisfied that an arbitration agreement exists between the original parties and the third parties; and (2) have granted the concerned parties an opportunity to be heard on the application for joinder. Notably, Article 22 of the Federal Arbitration Law does not appear to require both parties’ express consent to joinder, it merely requires the parties to be given an opportunity to be heard. That said, arbitrators should keep in mind that the Federal Arbitration Law maintains the requirement that an arbitration agreement be made in writing (Article 7(1)) and be signed by a person having capacity to do so (Article 4(1)).

An example of this mechanism in action is provided by a recent arbitration of the Dubai International Arbitration Centre (“**DIAC**”) in which the claimant sought permission to apply for joinder of third parties. After considering the application, the arbitrator decided to allow service of the request for arbitration together with the application for joinder on the third parties. Accordingly, DIAC served the parties in question while granting a 30-day period for response. Despite having been duly served and given an opportunity to be heard, the concerned parties failed to

respond. The arbitrator subsequently accepted the claimant's application for joinder and agreed to join the third parties as respondents to the arbitration. Under the facts presented, the arbitrator found that the Article 22 requirements had been satisfied. However, it is yet to be seen whether the UAE onshore courts will endorse this interpretation of Article 22, should the case become the subject of an annulment proceeding.

#### ▪ **Update to Civil Procedure Code**

Whilst the Federal Arbitration Law introduced a streamlined process under Article 55 for the enforcement of domestic awards before the UAE onshore courts, it did not expressly repeal Articles 235 to 238 of the Civil Procedure Code (the "**CPC**"), which apply to the enforcement of foreign judgements and award. This caused confusion amongst the local arbitration community as to whether the streamlined provision provided under Article 55 of the Federal Arbitration Law applied to foreign arbitral awards, or whether Article 55 only applied to the enforcement of domestic arbitral awards. The confusion was clarified through a February 2019 Cabinet Resolution as it contains new provisions in Chapter IV at Articles 85 to 88 on the "Enforcement of foreign judgments, orders and instruments", which are intended to replace Articles 235 to 238 of the CPC.

To summarize, Articles 85 to 88 of the Cabinet Resolution essentially provide that the relevant provisions of the Cabinet Resolution concerning the enforcement of foreign judgments and orders shall also apply to foreign arbitration awards provided that (1) the subject-matter of the award is arbitrable under UAE law and (2) the award is enforceable in the country of origin. Importantly, Article 85(2) provides that an application for enforcement of a foreign judgment or arbitration award in the UAE should be brought directly before the competent execution judge who is required to issue its order within three days from the date of filing. Even though the execution judge's order remains subject to the usual channels of judicial appeal, the regime put in place by the Cabinet Resolution represents a welcome improvement to the enforcement process, and provides clarity as to the enforcement regime applicable to foreign awards.

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2019 has seen a number of kinks ironed out in the UAE onshore arbitration law and it is expected that 2020 will continue to resolve teething issues which inevitably

arise in the initial years following a significant change in legal framework.

## **Offshore Highlights: Advancements within the UAE Free Judicial Zones**

As mentioned above, a unique highlight of arbitration in the UAE is the variety of arbitral fora it offers. While onshore UAE arbitration recently experienced significant developments through the Federal Arbitration Law, offshore arbitral fora remain attractive and are evolving to keep up with international best practices.

### **▪ Statutory Revision at the Dubai International Arbitration Centre, DIFC**

Within the DIFC, the DIAC saw revision of its founding statute. As explained in a June 2019 post, Decree No. 17 of 2019 approved a new statute for DIAC (the “**New DIAC Statute**”) which is more comprehensive than the prior statute. Among other features, our contributors speculated that the New DIAC Statute could impact the level of independence of DIAC vis-à-vis the Dubai Chamber of Commerce and Industry (the “**Chamber**”) because it allows the Chamber’s Board of Directors to appoint the DIAC’s Board of Trustees, which is the governing body carrying out the overall responsibility for the DIAC’s management. As explained by our contributors, in order for the DIAC to remain competitive and attractive in the UAE arbitration scene, it is important for the DIAC to ensure that its independence is both *actually* maintained and *seen to be* maintained.

The DIAC must also ensure that its Rules bolster its competitiveness. Indeed, since 2017, the UAE arbitration community has anticipated the release of new DIAC Rules, a revision process that many feel is overdue as the current DIAC Rules have been in place since 2007. It will be interesting to see if this revision of the DIAC’s founding statute is a step toward bringing such a revision into reality during 2020.

### **▪ Debate Concerning the Jurisdiction of the ADGM**

During 2019, our contributors continued to debate the true jurisdiction of the ADGM. One position is that the ADGM is an arbitral seat “open to all.” This argument is premised on the understanding that Arbitration Regulations enacted in 2015 establish the ADGM as a seat of arbitration for (1) disputes with a nexus to the ADGM, or (2) for disputes unconnected to the ADGM, where the parties (a)

choose the ADGM as the seat of arbitration, or (b) agree to the application of the ADGM Arbitration Regulations. This is consistent with the scope of jurisdiction of the ADGM Courts, where parties may opt into the jurisdiction of the ADGM Court of First Instance, even where the transaction or dispute in question has no connection with the ADGM.

The ADGM Court of First Instance is considered by many as a favorable venue: between 2017 and 2018 there was a 100% increase in its caseload (from 7 cases to 14 cases) and 2019 also saw several interesting decisions involving residential property disputes, recognition of an arbitral award under the New York Convention, and decisions on costs and other applications. Indeed, the ADGM is widely regarded by parties as a favorable seat, for its incorporation of the UNCITRAL Model Law, with certain enhancements, including with regard to confidentiality of proceedings, the joinder of third parties, and the waiver of the right to bring an action for setting aside.

However, as one of our contributors has pointed out, the jurisdiction of the ADGM Court of First Instance is distinct from the jurisdiction available for ADGM arbitration. This limitation is provided in Articles 13(6)-(7) of the ADGM Founding Law which can be read to require an ADGM-nexus for an arbitral dispute to be within its jurisdiction. This is a key issue for prospective users as a jurisdictional defect may lead to challenge of an arbitral award under the ADGM Arbitration Regulations (specifically, Article 53(2)(ii) (the invalidity of the arbitration agreement)). Given the debate among our contributors on this subject, it seems this is an area ripe for clarification by the Ruler of Abu Dhabi during 2020.