

# New Technologies and the UAE Federal Arbitration Law

**Kluwer Arbitration Blog**

May 24, 2021

Antonia Birt (Curtis, Mallet-Prevost, Colt & Mosle LLP) and Matei Purice (Freshfields Bruckhaus Deringer LLP)

*Please refer to this post as: Antonia Birt and Matei Purice, 'New Technologies and the UAE Federal Arbitration Law', Kluwer Arbitration Blog, May 24 2021, <http://arbitrationblog.kluwerarbitration.com/2021/05/24/new-technologies-and-the-uae-federal-arbitration-law/>*

---

There is at least one commonality between new technologies and arbitration in that they both aim to make processes more accessible to users. Indeed, the two should go hand-in-hand. After a brief overview of the interplay between technology and arbitration in general, this post focuses on the position in the United Arab Emirates (**UAE**). It considers how Federal Arbitration Law No 6 of 2018 (the **FAL**) addresses the use of technology, and whether it is sufficient to allow arbitrations seated in the UAE to run their course efficiently in the wake of the new realities triggered by the COVID-19 pandemic.

## **I. Technology and arbitration**

Technology is already widely used in arbitration whether in the form of video-conferencing, hearing-room technologies (presentations, recording, real-time electronic transcripts or electronic organisation and presentation of evidence during the hearing) or cloud-based data storage. In 2018, the Queen Mary University international arbitration survey highlighted that arbitration users believe an increased use of technology would lead to more efficiency in the conduct of arbitration proceedings.

The COVID-19 pandemic has served as a catalyst to hasten the wider awareness

and acceptance of technology in arbitration. With heavy restrictions on travel, meetings, and counsel working from home with limited availability of printers and other reprographic equipment, the use of technology in arbitration has become essential. The 2021 Queen Mary University international arbitration survey recently revealed that while the use of hearing room technologies, videoconferencing and cloud-based storage remained relatively consistent with the 2018 findings, there has been an ‘explosion’ in the use of virtual hearing rooms. This trend also aligns with the Campaign for Greener Arbitrations which aims to reduce the carbon footprint of the arbitration community, and which received the 2020 GAR Award for Best Development.

## **II. Technology and the FAL**

The FAL came into force on 16 June 2018. It replaced Articles 203-218 of the UAE Federal Civil Procedure Code that applied to arbitration (the **CPC**). The FAL applies to arbitrations seated in the UAE except for those seated in special jurisdictions that are governed by separate regimes (i.e., the Dubai International Financial Centre - **DIFC** - and the Abu Dhabi Global Market - **ADGM**). The FAL generally follows the UNCITRAL Model Law 2006 (the **Model Law**) with certain changes relevant to the UAE legal and commercial landscapes. The key provisions of the FAL relating to the use of technology are outlined below.

### A. Form of the arbitration agreement

Like its predecessor, the FAL requires arbitration agreements to be “*in writing*”. Under the old regime, UAE courts generally interpreted this strictly, requiring an arbitration agreement to be included in the original contract or in a subsequent agreement. Unlike its predecessor, Articles 7.1-7.2 of the FAL now allow for agreements to be concluded via electronic communications, or via an “*electronic message*”. This change is in line with Article 7.4 of the Model Law.

The FAL, however, does not include any definition of “*electronic message*”. On its natural reading, and in line with the definition contained in the Model Law, arbitration agreements contained in e-mails should now fulfil the requirement of being in writing.

In a region which thrives on the use of text messaging services for business communications, it would not be surprising if arbitration agreements were also made via such means. A confirmation from the UAE courts that electronic arbitration agreements (including through messenger systems) also pass the form requirements would be welcome.

### B. Notices

The arbitration chapter of the CPC did not regulate notices, leaving parties in certain circumstances (such as when the respondent was not participating in the proceedings) no choice but to rely on traditional notice methods (e.g., couriers which could provide delivery receipts). This is now resolved by Article 24 of the FAL which allows for notice by e-mail or fax for any written communications in arbitrations. This offers a way to reduce costs and improve efficiency. It is proving particularly important during the ongoing COVID-19 pandemic which limited the availability of courier services.

### C. Use of technology for evidentiary purposes

The FAL expressly allows for certain arbitral procedures to take place via modern means of communication and electronic technology, including:

- hearings (Articles 28.2 and 33.3);
- questioning of fact or expert witnesses (Article 35); and
- arbitral deliberations (Article 28.2(b)).

The new provisions in the FAL regarding electronically conducted hearings and cross-examinations should lead to savings and efficiencies for arbitral users.

Previously, absent parties' agreement, there was uncertainty whether cross-examinations of witnesses or experts using video-conferencing facilities were permissible. That was because Articles 42.1 and 43.2 of UAE Federal Law No 10 of 1992 (the **UAE Evidence Law**), which address the failure of a witness to appear at a hearing, empower UAE courts to progress a case either by means of adjourning the hearing, striking out the evidence or "*going to*" the witness. It was sometimes argued that Articles 41 and 65 of the UAE Evidence Law also required oaths to be

administered in person. In turn, Article 212 of the CPC, which related to arbitral proceedings, provided that tribunals were not bound by any procedures other than those related to arbitration in the CPC, as well as those pertaining to summons of the parties, hearing of their pleas and enabling them to submit documents. As such, it was often argued in annulment proceedings that the UAE Evidence Law applied to arbitration by virtue of Article 212. Coupled with Article 211 of the CPC, which required arbitrators to take the oath of the witness, arbitration awards have been set aside by the UAE courts due to non-compliance with the oath administration requirements.

For those reasons, hearings and cross-examinations typically took place in person. Where parties had submitted witness statements, but decided to proceed based on the submitted documents only, dispensing with a hearing, they nonetheless were required to hold an in-person hearing purely for administering an oath for the witnesses. These practical limitations were unfortunate both because they forced parties to incur unnecessary travel and hearing expenses but also because they often led to protracted discussions between the parties and/or procedural applications to seek permission to examine witnesses who could not be physically present. Parties also risked annulment of any ensuing award whenever the tribunal ordered for witnesses to be cross-examined by video-conference. Since the FAL no longer requires witnesses to swear an oath, and indeed expressly permits virtual hearings, it is expected that these limitations relating to witness examinations and oaths no longer apply.

The FAL does not, however, define the permitted electronic technology for hearings. It is hoped that the courts will interpret the term widely. That said, at least VoIP services (such as Skype), in respect of which availability and suitability is still subject to some controversy in the UAE, may not be acceptable. Judicial clarification of this issue would be welcome.

Another area that would benefit from clarification relates to security and management of electronically-stored information. The FAL does not provide any guidance. Since the majority of information is nowadays stored in an electronic format, relevant guidance, in particular in the context of disclosure, would be welcome and could set the UAE (as well as regional arbitral institutions) apart in the race for modernisation.

#### D. Awards signed by electronic means

Article 41.6 of the FAL allows awards to be signed by electronic means. Previously, Article 212.4 of the CPC stated that domestic arbitration awards had to be issued in the UAE to be considered a domestic award and benefit from domestic enforcement proceedings. While that provision was somewhat unclear (because it referred to the issue of an award, and not its signature), it was generally interpreted to mean that arbitrators had to be physically present in the UAE when signing the award. On occasion, the UAE courts considered the failure to sign the award in the UAE a procedural irregularity sufficient to refuse recognition and enforcement of the award.

Notwithstanding the new provisions, it is understood that in an unreported judgment issued in June 2020, the Dubai Court of Cassation overturned a Court of Appeal judgment on the ground that the FAL still required the tribunal to sign all the pages of the award. It is hoped that this decision will remain an outlier and future judicial clarification on the topic remains welcome.

### **III. The impact of the COVID-19 pandemic**

The COVID-19 pandemic saw governments around the world take measures to restrict movement in an effort to limit the spread of the virus. The restrictive measures also affected the functioning of courts. In the UAE, courts adapted relatively quickly. They took advantage of the digital court system introduced in mid-2018 allowing various court processes to be digitalised to transition to a more virtual setting.

By end of March 2020, the Abu Dhabi courts issued an administrative decision providing that all court procedures, court hearings and notary public ratifications be conducted electronically. By end of April 2020, it was reported that the Abu Dhabi Commercial Court conducted 579 videoconference hearings since the activation of the remote work plan of the Abu Dhabi Judicial Department. The position is analogous in Dubai where, following a temporary postponement of court hearings from 22 March 2020 to 16 April 2020, the courts implemented a videoconference hearing system on 19 April 2020. The courts in the DIFC and the ADGM were already well-versed in conducting hearings via videoconferencing. In practice, the court system has worked well, particularly with respect to urgent

cases such as obtaining injunctive relief or other forms of protective measures.

For international arbitrations conducted in the UAE, the FAL, digitalisation and videoconferencing have typically allowed proceedings to continue. That said, and despite the provisions in the FAL, where proceedings are administered by regional arbitration centres, the restrictions on movement imposed by the pandemic have, at times, created hurdles. An example is mandatory service through hard copies that caused some regional arbitral institutions to encourage tribunals to stay proceedings to allow notification procedures to be undertaken in accordance with the respective rules after the lockdown has eased (despite the new provisions of the FAL allowing for electronic notification). This affected service of documents (including requests for arbitration) but also delivery of final awards thus creating potential issues with expiration of time-frames for issuing final awards.

#### **IV. Conclusion**

The FAL provides a basic framework allowing the use of technology in arbitrations seated in the UAE. However, some questions remain unanswered. It is hoped that the UAE courts will provide guidance on how some of the new mechanisms in the FAL should be implemented in practice. It is also imperative for arbitral institutions in the region to build upon the provisions in the FAL and modernise their rules to fill in the gaps and ensure arbitrations can remain efficient.