

# Kluwer Arbitration Blog

## The Recent Amendments to the UAE Federal Arbitration Law: Don't Fix What Ain't Broken!

Gordon Blanke (Blanke Arbitration LLC) · Wednesday, March 13th, 2024

Recent amendments to [Federal Law No. 6 on 2018 on Arbitration](#), the UAE Federal Arbitration Law (“**FAL**”), introduced by [Federal Decree Law No. 15 of 2023 \(Amending Certain Provisions of Federal Law No. 6 of 2018 on Arbitration\)](#) (“**Amendment Law**”), give rise to concerns that in an endeavour to improve certain provisions of the FAL, the UAE legislator has focused on the wrong ones.

A cursory review of the Amendment Law prompts the conclusion that the UAE legislator has missed an important opportunity to fix those provisions of the FAL that are in need of mending. As a result, rather than providing clarification, the Amendment Law introduces unnecessary complications or simply causes confusion in the operation of provisions that have been working perfectly well. This also stands confirmed by earlier reporting on the Blog [here](#), which could be said to overreport on the scope of the amendments introduced by the Amendment Law as a result of it setting out in full the text of the entire articles (as opposed to the individual provisions) of the FAL that have been amended.

### The appointment of institutional arbitrators

The most incisive amendment of the Amendment Law relates to Art. 10 of the FAL, which deals with the appointment of arbitrators. The amended Art. 10 of the FAL has been restructured to introduce the prohibition of an arbitrator involved as a member of the Board of Trustees or the administrative body of a local arbitral institution (formerly Art. 10(2) FAL) under new Art. 10(1)(b), which, in turn, widens that prohibition to involvement with the “*executive management*” and the “*administrative apparatus*” of the “*competent Arbitration administering the arbitration case in the State [i.e., the UAE].*” Hence, apart from its amended scope, which, in the author’s view, is semantic and as such clerical in nature, this amendment adds nothing new: it simply confirms that a professional who is involved in the managerial or administrative functions of an arbitral institution may not serve as arbitrator in references administered by that institution. That said, this prohibition is now subject to a new Art. 10bis FAL (as amended), to which the *rule* in Art. 10(1)(b) operates as an *exception* (see the introductory wording to Art. 10bis: “[w]ith the exception to the provisions of Article 10(1)(b) of the present Decree-Law [i.e., the FAL as amended]”).

In other words, the Amendment Law relegates the prohibition under the previous Art. 10(2) FAL, which used to be the rule, to an exception of the rule relating to the appointment of arbitrators with an institutional interest in the terms set out at Art. 10bis of the FAL. This provision permits the appointment of “*an arbitrator from the Board of Directors, Board of Trustees, or who is of similar status from the competent Arbitration Institution administering the arbitration case in the State [i.e., the UAE]*” subject to the following conditions:

- The applicable arbitration rules do not prohibit such appointment (Art. 10bis a.).
- The arbitration institution must have in place “*a governance system specific to the organization of the work of the [...] arbitrator in a manner that ensures segregation of duties and impartiality, prevents conflict of interests or preferential advantage for that member compared to their counterparts, and regulates the mechanism of appointment, dismissal, and withdrawal of the arbitrator*” (Art. 10bis b.).
- The arbitrator may only act as a co-arbitrator, and not as sole arbitrator or chair of the arbitral tribunal (Art. 10bis c.).
- The parties must acknowledge in writing that they are aware of the arbitrator’s institutional involvement and that they have no objection to his or her appointment (Art. 10bis d.).
- The arbitration institution must have in place “*a special mechanism for the safe reporting of any violations committed by the arbitrator[s]*” (Art. 10bis e.).
- The annual number of references in which the arbitrator is appointed as co-arbitrator in the specified circumstances is limited to five (Art. 10bis f.).
- The arbitrator must submit “*a letter of undertaking*” (i) not to exploit the appointment for his or her own advantage at the risk of creating a conflict of interest; (ii) not to participate in or otherwise influence the administration of the reference in any way or manner; and (iii) to comply with any other requirements set by the arbitration institution (Art. 10bis g.).

No doubt, these conditions – similar in nature to those in place with leading arbitral institutions elsewhere in the world that operate a corresponding regime – provide some reassurance that relevant safeguards will be put in place for the new regime to operate seamlessly, i.e., without creating conflicts of interest at any level. Further, pursuant to the new Art. 10bis(2), “[v]iolation of the conditions referred to herein shall result in the invalidity of the arbitral award issued in the arbitration case and in the right of the parties to claim any civil damages from the competent Arbitration Institution and the violating arbitrator in accordance with the applicable legislation in the State.” Albeit that this creates a welcome safety mechanism for the parties in the event that the arbitrator (and/or the arbitration institution) fails to play by the rules, Art. 10bis(2) points to the risk inherent in the new regime under Art. 10bis, potentially undermining the institution’s integrity to the detriment of its own best interests in safeguarding its own impartiality and independence as an arbitral institution. There is no immediate advantage of this to arbitration institutions in the author’s view; as there is no dearth of competent arbitrators in the UAE, there is no need for any members professionally involved with an institution to be appointed as arbitrators in proceedings administered by that institution.

Further, taking into account the limited application of Art. 10bis to an “*Arbitration Institution administering the case in the State [i.e., the UAE]*”, another question that arises is whether this new regime also extends to arbitration administered by a non-local, foreign arbitral institution with operations in the UAE, such as the International Chamber of Commerce (“ICC”), which has established offices in the Abu Dhabi Global Market (“ADGM”), the Abu Dhabi-based judicial free zone.

## Arbitrator requirements

A new Art. 10(1)(c) FAL (as amended) introduces a novel arbitrator requirement that aims to avoid undesirable conflicts of interest likely to arise from a “*direct relationship with any of the parties to the arbitration*”. As such, the arbitrator “*shall [n]ot have a direct relationship with any of the parties to the arbitration case which may prejudice their impartiality and independence.*”

A *direct* relationship with a party is the archetypical situation that gives rise to a conflict of interest: to illustrate the point, this situation falls within the non-waivable red light of the traffic lights system of the [International Bar Association Guidelines on Conflicts of Interests in International Arbitration](#) (Part II, section 1) and as such was, in any event, captured by the arbitrator’s disclosure obligations under former Art. 10(4) FAL, which – following the restructuring exercise undertaken by the Amendment Law – has now been renumbered as Art. 10(3) FAL (as amended).

For the avoidance of doubt, the seed for the prohibition of a direct relationship with a party to ensure an arbitrator’s impartiality was already contained at Art. 207(4) of the former UAE Arbitration Chapter, which was interpreted by the courts in conjunction with the requirements of impartiality and independence of public judges under Arts 114-115 of the former UAE Civil Procedures Code, prohibiting the arbitrator to have any intimate or family relationship with a party.

## Virtual arbitral proceedings

Former Art. 28 FAL, which dealt with the seat of the arbitration, has also been amended. Art. 28 FAL used to contain clear rules on the determination of the *seat*, i.e., the legal place of the arbitration (Art. 28(1) FAL) on the one hand and the *venue* of the arbitration, i.e., a place of convenience for the physical conduct of hearings. Art. 28(2)(b) of the FAL also contained a provision for the virtual conduct of hearings with the parties and tribunal’s deliberations.

By contrast, the amended Art. 28(1) empowers the parties to “*agree to proceed with the arbitration and determine its place in reality or virtually by modern technological means or in technical media*”, subject to the tribunal’s discretion absent any such agreement. This amended provision of the FAL causes undesirable confusion with respect to the true objective of Art. 28, doing away with the conceptual distinction between the seat and the venue of the arbitration. For the avoidance of doubt, a seat of arbitration cannot be virtual, only a venue can.

That said, a new Art. 28(3) FAL (as amended) imposes an obligation on local arbitration institutions to “*provide the technologies necessary to carry out the arbitration proceedings by modern technological means or in technical media in accordance with the necessary standards and controls applicable in the State.*” This, no doubt, will assist in the remote conduct of hearings and/or procedural meetings within the meaning of Art. 28(1) FAL (as amended) albeit that more likely than not, local institutions would, in any event, gear up to provide digital assistance for the remote conduct of the proceedings to stay ahead of the competition.

For completeness, it bears mentioning that the requirement for minutes of hearing, which used to be tagged onto the former Art. 28(2) FAL, has been helpfully separated out into a new Art. 28(2)

FAL (as amended).

### **Tribunal's power to determine rules of evidence**

The Amendment Law introduces a limit to the tribunal's power to determine the rules of evidence, subjecting it to the requirements of UAE public policy (albeit that it does not refer specifically to the public policy of the "State"): "*The Arbitral Tribunal shall have a discretionary power to determine the applicable rules of evidence, in the event that the applicable law lacks evidence to decide on the dispute, provided that these rules do not conflict with public order.*" In the author's view, this reference is superfluous to the extent that arbitrators are in any event bound by the "principles of litigation" and the obligation to grant a fair hearing, including with respect to a party discharging its evidentiary burden of proof, in accordance with Art. 26 FAL. It is unclear how, otherwise, the principle of public policy would come to bear in the evidentiary context.

### **Conclusion**

In the light of the foregoing, rather than provide clarity, the Amendment Law has caused unnecessary confusion with respect to the proper operation of a number of the provisions it has sought to amend. The Amendment Law would have done better to focus on the true problem areas of the FAL: Art. 2 on the scope of application of the FAL would have benefited from a clear redefinition by reference to the seat; Art. 4(1) FAL could have been recast to contain an express requirement for a special power of attorney in accordance with Art. 61(2) of UAE Federal Law No. 42/2022 On the Promulgation of the Civil Procedure Law ("**UAE Civil Procedures Code**"); the enforcement regime for foreign arbitral awards as set out at Arts 222-223 of the UAE Civil Procedures Code would have lent itself to wholesome incorporation into the body of the FAL; and finally, Art. 19(1) FAL should be amended to oblige an arbitrator to deal with jurisdictional objections as a preliminary matter and only park a question of jurisdiction until the final award is issued in exceptional circumstances, such as a need to hear the merits for the arbitrator to be able to determine the question of jurisdiction.

It is to be hoped that in the next round of amendment of the FAL, the UAE legislator will pay better attention to the true problem areas of the FAL that require mending and take guidance from, what might appear as, a trite adage not to fix what ain't broken.

---


*To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please*

subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

### Profile Navigator and Relationship Indicator


Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration's comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



Newly updated

# Profile Navigator and Relationship Indicator Tools

 Wolters Kluwer

Request your free trial now →

This entry was posted on Wednesday, March 13th, 2024 at 8:33 am and is filed under [MENA](#), [UAE](#), [UAE Federal Arbitration Law](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.