

NEW UAE LAW ON ARBITRATION – A SHIFT IN THE RIGHT DIRECTION

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The long awaited UAE Arbitration Law has been issued by Sheikh Khalifa Bin Zayed Al Nahyan, the President of the United Arab Emirates (“UAE”), in the form of Federal Law No.6 of 2018 (“Arbitration Law”). The Arbitration Law is currently expected to come into force in July 2018, one month after it is published in the official gazette.

The Arbitration Law will apply to arbitral proceedings conducted in the UAE and international commercial arbitration procedures conducted outside the UAE where the parties have agreed that the Arbitration Law will apply.

It appears that the Arbitration Law will not apply to arbitration proceedings seated in the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) free zones (where the offshore arbitration laws should apply).

The Arbitration Law will apply to ongoing and future arbitration proceedings and proceedings that have already been conducted in accordance with the previous law will remain “sound and valid”.

The Arbitration Law is relatively lengthy and detailed and is largely based on the Model Law introduced by the United Nations Commission on International Trade Law (“UNCITRAL”). The UNCITRAL Model Law is effectively the international standard in arbitration law and has been adopted by numerous jurisdictions around the world.

REPLACING THE CIVIL PROCEDURE CODE

The Arbitration Law will replace the limiting provisions of Articles 203 to 218 of the Federal Code of Civil Procedures No.13 of 1992 (“CPC”).

Articles 203 to 218 of the CPC contain peculiar procedural requirements and traps for the unwary that some would say have resulted in UAE awards being unjustly annulled. For example, the UAE courts have annulled an award for the sole reason that it had been signed by the arbitrators when not physically present in the UAE (Article 212 of the CPC). An award has also been annulled just because it had not been signed by the arbitrators on every single page, or because the witnesses had not given evidence under the required oath.

The Arbitration Law has removed some of these procedural traps, has introduced certain measures to address guerrilla tactics often deployed in the UAE and it allows for a more expeditious process for the enforcement of domestic awards.

TACKLING GUERRILLA TACTICS

It is not uncommon for certain tactics (commonly referred to in international arbitration as guerrilla tactics) to be deployed during the course of arbitration proceedings or during the award enforcement stage. Such tactics are intended to delay the arbitration and the enforcement process and create difficulties for the opponent, its Counsel or indeed the Arbitral Tribunal.

Challenging the jurisdiction or independence of the Arbitral Tribunal, damaging or destroying evidence or going as far as filing some form of creative criminal complaint, have been relatively common tactics in the UAE.

The Arbitration Law usefully addresses a number of the tactics typically deployed in the UAE.

JURISDICTIONAL CHALLENGES

Pursuant to Article 19 of the Arbitration Law, the Arbitral Tribunal can now decide on its own jurisdiction (kompetenz-kompetenz).

In line with the UNCITRAL Model Law and the rules of certain established arbitral institutions (including the LCIA and SIAC), the Arbitration Law introduces a sensible time limit for a party to raise a challenge to the jurisdiction of the Arbitral Tribunal. The time limit is stated to be the deadline for the Respondent(s) to submit a Defence, although the period can be extended if the Arbitral Tribunal finds that there was a justifiable and acceptable reason for any delay. Setting such a time limit is clearly intended to prevent the guerrilla tactic of challenging jurisdiction late in the arbitration proceedings and after significant costs have been incurred.

Pursuant to Article 19, the parties have 15 days (from the date of the Arbitral Tribunal's decision on its jurisdiction) to challenge the decision before the federal or local Court of Appeal. If the federal or local Court of Appeal decides that the Arbitral Tribunal does not have jurisdiction, the party that filed the request for arbitration will be liable for the arbitration fees.

If parallel proceedings are issued before the UAE courts in contravention of an arbitration agreement, the effect of Article 203 of the CPC was that an arbitration agreement would be void if the other party did not object to the court's jurisdiction at the first hearing. Article 8 of the Arbitration Law seems to improve the position by giving the Respondent the chance to raise the existence of the arbitration agreement at any time before it submits any demand or defence in the court case.

PRECAUTIONARY OR TEMPORARY MEASURES

Article 21 of the Arbitration Law introduces useful measures that the Arbitral Tribunal will be free to order by its own volition or at the request of a party, unless the parties have already agreed otherwise. The available measures include ordering parties to:

- maintain evidence that might be deemed substantial in settling the dispute;
- take measures for keeping goods that are the subject matter of the dispute including depositing goods with a third party or selling goods that might be damaged;
- keep and preserve assets and properties for enforcement purposes;

- retain their status and effectively avoid insolvency procedures; and
- take or abstain from measures in order to prevent damage or prejudice to the arbitration proceedings.

A party in whose favour a precautionary or temporary measure has been made can obtain a written permit from the Arbitral Tribunal to request the federal or local Court of Appeal to issue an execution order within 15 days (Article 21(4) of the Arbitration Law).

Given that the UAE courts do not tend to issue injunctive relief, it is unclear how such orders will be treated and enforced.

CRIMINAL ACTIONS

By Article 209 of the CPC, if a criminal complaint was made during an arbitration process, the arbitrator would need to stop the arbitration until the relevant court had determined the criminal matter.

Under Article 43 of the Arbitration Law, the Arbitral Tribunal may continue the arbitration process if it decides that the determination of the criminal matter by the relevant court is not necessary to settle the dispute that is subject to arbitration.

The Arbitration Law has no impact on Article 257 of the Penal Code. As such, it is still open to parties to contend (as a guerrilla tactic) that an arbitrator or expert has failed to act objectively and with integrity.

ARBITRATION AGREEMENT

An arbitration agreement cannot apply to matters which as a matter of UAE law cannot be settled by conciliation (Article 4(2) of the Arbitration Law). For example, this will include registered commercial agency disputes and employment disputes.

An arbitration agreement must be in writing. An agreement can be included in a contract or recorded in correspondence including emails (Article 7(2)(a) of the Arbitration Law).

ARBITRATORS

Article 10 of the Arbitration Law deals with who can be appointed as an arbitrator. Article 10(2) says that the arbitrator may not be one of the members of the board of trustees or of the administrative team of the institution regulating arbitration procedure in the UAE.

CAPACITY TO ARBITRATE

The Arbitration Law does not remove the strict capacity requirements that apply to arbitrations in the UAE.

Article 4 requires that the party agreeing to arbitrate to be “duly authorised” and Article 53(1)(b) identifies any lack of capacity as a ground for seeking the nullification of an award.

Article 53(1)(c) goes on to indicate that the relevant capacity will be determined by the law that governs the capacity of the contracting party. In the case of a company, this will be the law applicable in its place of incorporation.

In our view, to avoid arguments about the capacity to arbitrate, the safest approach is to make sure that a power of attorney is in place giving the intended signatory on behalf of a company, the specific authority to agree and enter into the relevant arbitration agreement.

PROCEDURAL MATTERS

The Arbitration Law recognises the international approach to hearings and the giving of evidence.

There is no longer the need for the Arbitral Tribunal to notify the parties within 30 days of its appointment of a date for a first hearing (Article 208 of the CPC). Under the Arbitration Law, the hearings can be held at a suitable stage as determined by the Arbitral Tribunal or requested by the parties.

Hearings can be held via modern communication technologies so that the parties and witnesses do not need to be physically present.

Article 33(7) of the Arbitration Law states that: “Unless otherwise agreed between the parties, hearing the testimonies of witnesses and experts shall be conducted in accordance with the Laws applicable in the State.” Pursuant to Law No. 10 of 1992 on Evidence in Civil and Commercial Transactions, each witness must give his/her evidence separately without the presence of other witnesses and take the required oath: “I swear by the Mighty God to say all the truth and nothing but the truth.” The Arbitration Law now gives the parties the freedom to decide how they wish evidence to be given and to agree matters differently.

COSTS

Article 46 of the Arbitration Law gives the Arbitral Tribunal the power to order any of the parties to pay the arbitration costs which are stated to include “the fees and expenses incurred by any of the members of the Arbitration Panel in the course of performing his/her tasks as well as the costs of appointing experts by the Panel.”

The provision is silent on the payment of lawyer and party appointed expert fees, which can of course be significant amounts.

TIMING FOR ARBITRAL AWARDS

It continues to be the case that a party can have an award nullified if it is not rendered within the prescribed time limits (Article 53(1)(g)).

The Arbitration Law provides that the Arbitral Tribunal shall render its award within the time limit agreed between the parties. Absent an agreement, the arbitral award is to be rendered within six months from the first hearing of the arbitration procedures.

The Arbitral Tribunal can extend the time limit by up to six months unless the parties agree to extend it for longer (Article 42). Time can then be extended further by the federal or local Court of Appeal as it deems fit and its decision will be final unless the parties have agreed otherwise.

The time period for the Arbitral Tribunal to deliver its award to the parties has also been extended from five to 15 days from the issuance date (Article 44).

THE AWARD

Article 41 of the Arbitration Law details the form and particulars of any award.

An award is deemed to have been issued at the arbitration venue and the arbitrators do not need to be physically present in the UAE when they sign the award. In line with modern international practice, awards can now be signed by electronic means unless the parties have agreed otherwise.

SHORTENED ENFORCEMENT PROCESS

The Arbitration Law reduces the ratification and enforcement process of a UAE award in that it removes the need for the process to start at the Court of First Instance and prescribes as the first step, the filing of an application to the federal or local Court of Appeal. There is then the opportunity for one appeal to the Court of Cassation on point(s) of law.

Article 55 imposes a strict timetable for the federal or local Court of Appeal to issue an order for ratification and execution within 60 days of the application.

GROUND FOR CHALLENGE

Article 53 of the Arbitration Law sets out the specific grounds for challenging enforcement. In line with the UNCITRAL Model Law, included in the grounds are the lack of a valid arbitration agreement, lack of capacity to agree to arbitrate, defective notification of the appointment of the arbitrator and failure to observe the correct arbitration procedures.

The ground included at Article 53(1)(e) is, however, a cause for concern in that it seems to open up the possibility of a successful challenge to an award on the basis that the Arbitral Tribunal did not apply the “law” that the parties agreed would apply to the subject matter of the dispute.

Any claim to nullify an award may result in a stay of execution of the award if there are “serious grounds” but the applicant may be required to pay a guarantee or security and the claim for nullification must be settled within 60 days (Article 56).

A grievance can also be filed against an execution order with competent court of appeal within 30 days of an execution order (Article 57 of the Arbitration Law). This provision seems at first glance to be unfortunate as it will allow for further delays to the enforcement process even once an execution order has been made.

CONCLUSION

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The Arbitration Law is without doubt a positive and significant step towards the UAE bringing its arbitration procedures and practices more in line with international standards.

It is nevertheless the case that parties still need to be wary of certain UAE specific procedural requirements that are reflected in the Arbitration Law, and to always seek advice when entering into arbitration agreements, conducting arbitrations or enforcing arbitral awards in the UAE.

If you require advice on the Arbitration Law and how it may impact you, please contact Charlotte Bijlani.

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