

A tailwind to investment

The new UAE Arbitration Law secures the country's commitment to be an international dispute resolution hub of choice in the Middle East. Winston & Strawn highlights the practical implications of the key provisions in the law.



After much anticipation within the legal and business community in the United Arab Emirates, on May 3, 2018, the new UAE Arbitration Law, Federal Law No. 6 of 2018, was issued by the UAE Government (“the New Law”). The New Law introduces important changes for users of dispute resolution services in the UAE and is a development which should be taken into account by those drafting contracts when selecting an appropriate dispute resolution clause. We set out in this article:

- i) a summary of the importance of the role played by arbitration for international businesses operating in the UAE;
- ii) a summary of some of the key provisions of the New Law and the reasons why the announcement of the New Law has been welcomed by international business;
- iii) what the New Law might mean for third party funding (“TPF”) of arbitrations in the UAE; and
- iv) predictions on the impact that the New Law may have on the development of the UAE as a seat in the global arbitration landscape.

WHY ARBITRATION MATTERS IN THE UAE

Arbitration remains the dispute resolution method of choice for many multinational companies operating globally and is an important commercial alternative to the judicial system. One of the key benefits compared to litigation is the relative ease of enforcement of an arbitration award around the world compared to a domestic court judgment. This benefit has been primarily delivered through the broad adoption of the New York Convention by 159 states and a recognition by the majority of its signatories that honouring its terms and its spirit by enabling enforcement of foreign arbitration awards has wider benefits in terms of encouraging future foreign direct investment.

Arbitration also offers greater confidentiality and flexibility than court proceedings. Parties are free to choose the procedural rules applicable to the dispute, the qualifications and nationalities of the arbitrators, as well as the language, venue and pace of the process.

Through strategic investment over the years in logistics, transportation, freezones and social infrastructure, the UAE has firmly established itself as a hub

for multinational companies conducting business in the Middle East. As a result, for many major international businesses, the UAE acts as regional headquarters for an increasingly broad geographical radius, often covering the Middle East, Africa, Indian Subcontinent, Eastern Europe and beyond. The adoption of a modern arbitration law, which largely reflects generally accepted legislative best practice around the world, will contribute towards ensuring that investor confidence in the UAE remains high.

Notwithstanding a generally supportive approach by the courts towards arbitration, one criticism of the UAE as an arbitral seat has been that there has been some uncertainty of outcome, particularly in relation to enforcement of awards with hard-won awards being vulnerable to annulment applications based on procedural technicalities. The New Law, which arms the UAE judiciary with clear guidance on enforceability and grounds for challenge, should lead to increased certainty of outcome, a desirable aspect of any dispute resolution process.

THE NEW LAW - SUMMARY OF KEY PROVISIONS AND IMPACT

Enactment

The New Law will come into effect 30 days after the date of its publication in the Official Gazette. At the date of writing, that publication has not happened but is expected imminently. However, since the New Law, once effective, will apply retrospectively to ongoing arbitrations, it is important that users of arbitration in the UAE are aware of its impact as early as possible.

The New Law largely adopts the UNCITRAL Model Law and repeals and replaces the former arbitration regime contained in Articles 203 to 218 of the UAE Civil Procedures Law (Federal Law No. 11 of 1992) (the “Old Law”) and any law which conflicts with the provisions of the New Law.

Applicability

When it comes into force, the New Law will apply to three situations: (i) any arbitration conducted onshore in the UAE (unless parties agree otherwise or if it contravenes public policy); (ii) any arbitration conducted outside the UAE if the parties agree to



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be subject to the New Law; and (iii) any arbitration arising from a legal relationship, where the relationship is regulated by the laws of the UAE (except as excluded by special provisions).

Benefits for users of arbitration

Procedural certainty and efficiency: the New Law provides for a more efficient arbitral process which is less susceptible to tactics designed to cause delay. For example, the arbitration proceedings can be continued notwithstanding an application to court for interim measures or an application to challenge the appointment of an arbitrator.

There is also the express ability to convene meetings and hearings outside of the legal seat and there is no requirement for the award to be signed in the legal seat. This final point will reduce cost and introduce significant practicality to the process since non-UAE based arbitrators will no longer be required to travel to the UAE in order to sign a UAE-seated award.

A UAE arbitration-related case that has received a lot of comment is the 2005 Court of Cassation decision in *International Bechtel Co. Ltd. V. Department of Civil Aviation*. In that case, the court set aside an award on the basis that the arbitrator did

not swear in a witness in accordance with the UAE Civil Procedure Law (which applies to swearing in witnesses in court hearings). Whilst UAE arbitration has moved on significantly since that case (particularly with the UAE's accession to the New York Convention in 2006), the New Law gives the parties and the tribunal the flexibility to depart from the oath-taking method prescribed in the Civil Procedure Law. Accordingly, the specific circumstances which led to the challenge to the award in the *Bechtel* case will be capable of being avoided under the New Law.

Separability: a fundamental principle which supports the integrity of arbitration as an effective dispute resolution process is that the arbitration clause is separable and severable from the broader agreement to which it applies. Accordingly, even if the main agreement is found to be void, the arbitration clause survives. Whilst the UAE courts have acknowledged this principle previously, it will now be codified within the New Law.

Competence-competence: another well-established principle of arbitration is that the arbitral tribunal is empowered to make decisions on its own jurisdiction and that it does not have to delegate this decision making process (at first instance) to the courts of the jurisdiction in which the arbitration is seated. As with separability, this principle will now be codified in the New Law.

Precautionary measures: the New Law provides the tribunal with powerful remedies to support the process on an interim basis. These remedies include interim awards to preserve evidence and assets with a mechanism for a party to then enforce and execute such interim awards through the courts.

Enforcement: perhaps most significantly from the users' perspective (who ultimately want their awards to be converted into cash), the New Law significantly enhances the enforceability of the award. Award creditors will now be able to leapfrog the Court of First Instance and to commence



enforcement proceedings directly before the Federal or Emirate Court of Appeal. The Court of Appeal will then have a period of 60 days from the date of the application to ratify the award to determine the application. Similarly, the award debtor will have a 30 day time limit for challenging the validity of the award before the Court of Appeal.

THIRD PARTY FUNDING OF ARBITRATION IN THE UAE

TPF is, in its simplest form, where a third party who is not a party to a dispute provides financing to a party in return for a pre-agreed share of the amount awarded by the court or tribunal. The funding provided by the third party will be used to cover the funded party's legal expenses and the funding agreement may also provide that, in the event of an unsuccessful outcome, the funder will pay the legal costs of the successful party. TPF is a well-established part of the dispute resolution landscape in many jurisdictions around the world and, when advising their clients on disputes, many law firms will now include options around TPF as a matter of course. Even though TPF in the UAE is in its relative infancy compared to more mature markets, in view of the importance of the UAE as a regional hub, the country is attracting significant interest from the TPF industry, particularly as the UAE does not have the juridical hurdles of restrictions on champerty and maintenance which exist in other common law jurisdictions. The TPF industry also warmly welcomed the introduction of the DIFC Courts' Practice Direction 2 of 2017 which regulates and supports TPF in the DIFC.

Perhaps one reason why arbitration in the UAE has not yet fully-benefitted from TPF is due to the perceived risk and unpredictability around enforcement of awards. For the reasons set out above, through mitigating those concerns, the New Law is likely to promote further traction of the TPF industry in the UAE market, thereby providing access to justice to claimants who may not have otherwise been able to pursue meritorious claims.

CONCLUSION & THE FUTURE OF THE UAE'S ARBITRATION LANDSCAPE

Even under the Old Law, which was silent on many of the internationally accepted norms of arbitration, the UAE courts have, albeit

with some notable exceptions, adopted a progressive, arbitration-friendly approach. The emergence of the UAE financial freezones (the DIFC and the ADGM), has also provided strong support for arbitration in the UAE with each enacting their own, English language, UNCITRAL Model Law-based arbitration law, and each openly cooperating with respected international arbitration bodies (the LCIA and ICC respectively).

In terms of the necessary physical infrastructure and human capital, many hotels in the UAE now have conference facilities which are increasingly used for arbitration hearings, the UAE arbitration community is mature and many of the most respected international arbitrators are regular visitors to the UAE.

Whilst the available data does not give complete precision, reliable market sources suggest that the UAE is a well-established arbitral seat with around 450-500 new arbitration cases filed each year. The New Law should ensure that arbitration in the UAE continues its upward trajectory and that the UAE remains competitive with the other major arbitral seats around the world. It should also play a part in encouraging further investment into a key global market and one of the strongest, most internationally diverse economies in the region. 🏗️



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