

Enforcement and Challenges to Arbitral Awards under the New Arbitration Law in the UAE

Hassan Arab - Partner, Regional Head of Dispute Resolution - Litigation / Arbitration
h.arab@tamimi.com - Dubai International Financial Centre

Jyothi Venugopal
j.venugopal@tamimi.com - Dubai, UAE



On 03 May 2018 the UAE enacted Federal Law No. 6 of 2018 (“the New Law”), as published in the Official Gazette No 630 of 15 May 2018. The New Law replaced certain arbitration provisions found in the UAE Civil Procedures Law No. 11 of 1992, particularly Articles 203-218 (“the former arbitration provisions”). The New Law took effect after a month its publication, accordingly applying from mid-June 2018.

The enactment of the New Law confirms the UAE’s commitment to bring its arbitration law in line with internationally accepted best practice. In this article we consider key provisions of the New Law, with particular focus on the enforcement of arbitration awards.

Key Aspects of the New Law

Article 2 outlines the scope of application of the New Law. It states that it applies to (i) any arbitration conducted in the UAE, unless the parties agree to another law governing the arbitration proceedings; (ii) any international arbitrations conducted outside the UAE, where the parties agree to apply the New Law to govern such proceedings; and (iii) to any arbitration arising from a dispute in respect of a legal relationship governed by UAE law, save where excepted by special provision.

A significant feature of the New Law is Article 3, which defines ‘international arbitration’. An arbitration is international if ‘the parties have, at the time of conclusion of the arbitration agreement, their places of business in different States’.

Moreover, an arbitration is deemed to be international, if the place of arbitration, or the place of performance of the contractual obligations, or the subject matter of the dispute is connected with more than one country, or if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. This new feature did not exist in the former arbitration provisions and which were limited to domestic and foreign arbitrations only. They did not consider any

aspects of international arbitration, even in cases where the domestic arbitration contained elements of international arbitration. The New Law does not, however, confer any additional advantages for international arbitration in terms of the enforcement of an award, as the procedure to ratify an international award is similar to that of domestic awards. The New Law does, however, provide the parties with freedom to choose the New Law to govern the arbitration proceedings, even if the arbitration proceedings are conducted outside the UAE.

Chapter II Article 4 of the New Law deals with the parties' capacity to enter into an arbitration agreement. Similarly, Articles 5 to 8 of the New Law cover the form, autonomy and subject matter of arbitration agreements.

Unlike the former arbitration provisions, the New Law defines arbitration institutions and confers wide powers on these institutions if the parties to the arbitration agree to apply arbitration institutional rules. The New Law accordingly covers all types of arbitrations, regardless of it being ad-hoc, institutional or arbitration conducted through the Court.

Article 11 provides mechanisms where the parties fail to agree on the appointment of an arbitrator/tribunal. Under the former arbitration provisions (Article 204), in such circumstances, parties were required to file a Court application for direction – which was effectively similar to initiating full litigation proceedings. The New Law allows the parties simply to apply to the relevant authority, which is either the body authorized to administer the arbitration, or the Court.

Under the former arbitration provisions the grounds for challenging an arbitrator were similar to the grounds for the recusal or impleading of judges. The New Law, under Articles 14 and 15, changes this – providing specific grounds and procedures for challenging an arbitrator.

The New Law recognizes key principles and practices of international commercial arbitration including the principles of severability, Article 6(1), and competence-competence – Article 19(1).

Article 21 deals with the jurisdiction of the tribunal to issue interim or conservatory measures concerning arbitration proceedings, at the request of a party or on its own motion.

In contrast to the former arbitration provisions, Article 28 differentiates the 'place of arbitration' i.e. the seat of arbitration with which an award is legally connected, and the 'venue of arbitration' – where the arbitration sessions or hearings are conducted. Moreover, Article 41(6) provides that an award shall be considered as issued at the place of arbitration, as determined under Article 28, even if the tribunal signed an award outside the place of arbitration. The tribunal may conduct arbitration hearings and deliberations through modern means of communication (according to Article 28(2)(b)). Likewise, Article 35 provides an arbitral tribunal with the discretion to hear any witnesses, including expert witnesses, through modern means of communication.

Enforcement of Awards under the New Law

Article 52 provides that an award issued under the New Law shall have *res judicata* status and be enforceable as a court judgment. The same article also states that an award must be ratified prior to its enforcement.

Unlike the former arbitration provisions, Article 55(1) states that a party seeking to enforce an award must submit an application to the Chief Justice of the relevant Court, together with supporting documents. The term 'Court' is defined as the Federal Court of Appeal or local Courts of Appeal in the UAE. Under Article 55(1), the Chief Justice of the Court (or any judges empowered by the Chief Justice) should issue an order confirming ratification and enforcement of the award within sixty days from the date of the submission of the application, unless any of the grounds for setting aside of the award exists under Article 53(1).

Challenging the Decision against Enforcement of Awards

Under Article 57, a party may challenge a decision of the Court on the ratification of the award, by filing a grievance before the Court within thirty days. Article 57 reads as follows:

“A grievance may be filed against the Court’s decision to grant or deny enforcement of an arbitral award before the competent Court of Appeal within thirty days from the date following notification”.

Article 57 does not confirm whether a decision of the ‘competent Court of Appeal’ is to be considered as final or if an aggrieved party could pursue an appeal before the Cassation Court. Considering the New Law does not provide for an appeal of the decision of the ‘competent Court of Appeal’ on the grievance presented under Article 57, it is our respectful view that the decision of the ‘competent Court of Appeal’ is likely to be deemed as final. Otherwise, this could lead to lengthy procedures and result in delays of enforcement of awards, which is against the core of objectives of the New Law.

Action to set aside Arbitration Awards

Article 53 entitles a party to challenge the enforcement of an award by submitting an application before the Court under one or more grounds contained in Articles 53(1)(a) – (h). Further, Article 53(2) states that the Court shall set aside an award if the subject matter of the dispute is not capable of settlement, or if the award is in conflict with public order.

An action to set aside an arbitration award must be submitted by a party within thirty days from the date of notification of such award, otherwise the action will be time barred under Article 54(2).

Besides the option of filing an action to set aside an award under Article 53(1), a party seeking to challenge an award may also submit objections to ratifying the award before the Court during the process of ratification in accordance with Article 57. Accordingly, there are three options for a party to challenge the ratification and enforcement of an award:

1. file a case seeking to set aside an award under Article 53(1) before the Court of Appeal and this decision is subject to appeal before the Court of Cassation under Article 54(1);
2. present a defence to the Court objecting to the ratification and enforcement of the award during the process of ratification initiated by the award creditor under Article 55(1); or
3. submit a grievance against the Court’s decision to grant or deny enforcement under Article 57.

Mechanism to Recognise and Enforce Foreign Awards

The New Law does not expressly provide for the procedures applicable to the recognition and enforcement of foreign awards in the UAE. This begs the question – what procedures are applicable to the recognition of foreign arbitral awards in the UAE? Should a party seeking recognition apply to the Court of First Instance (the position prior to the enactment of the New Law) or should the parties follow the new procedures for ratifying awards as laid down under the New Law?

Considering that Article 3 of the New York Convention requires Contracting States not to impose substantially more onerous conditions on the recognition and enforcement of foreign awards than are

imposed on the enforcement of domestic awards, it is our view that the provisions of the New Law will apply for the recognition and enforcement of foreign awards. Further, the UAE is committed to fulfilling its obligations under applicable international conventions and treaties. It is accordingly inferred that a party seeking recognition of a foreign award should be required to submit an application to the Chief Justice of the Court in accordance with Article 55(1), together with the documents detailed in Article 4 of the New York Convention.

Since the UAE is a signatory to the New York Convention, UAE Courts should take into consideration Article 5, which provides the grounds for refusing recognition of foreign awards, rather than the grounds contained in Article 53(1), as the provisions of the Convention, we suggest, supersede the New Law.

A party seeking to challenge the recognition and enforcement of a foreign award could submit their defence, objecting to enforcement of the foreign award, to the Court during the ratification process initiated by the award creditor under Article 55(1). However, the option for filing an action to set aside an award under Article 53(1) will not be available for foreign awards, as the UAE Courts do not have jurisdiction, in our view, to set aside foreign awards.

Conclusion

The New Law is undoubtedly a great milestone in the progression of international commercial arbitration in the UAE. It has taken into account the particular features and requirements of international commercial arbitration in the UAE. Thus, the New Law should contribute to making the UAE an arbitration hub in the region. However, certain elements of its enforcement provisions may still require clarity.