

Is the Introduction of Interim Relief: A relief?

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Federal Law no. 6 of 2018 (“Federal Arbitration Law”) – the long-awaited new arbitration law for the UAE came into force on 16 June 2018. It replaces the 15 articles of the UAE Civil Procedure Code (“CPC”), Articles 203 to 218, which had previously governed arbitrations seated in the UAE.

The Federal Arbitration Law, based on the UNCITRAL Model Law (Model Law) has had the effect of modernising the UAE’s arbitration framework and in many ways bringing it in line with international standards. The Federal Arbitration Law makes significant changes to the UAE’s arbitration regime. These were discussed in an article titled “Commentary on UAE’s new Arbitration Law”, published in the June-July 2018 edition of the Law Update. One of the most significant changes brought about by the Federal Arbitration Law is the inclusion of express provisions relating to interim measures. Previously, the CPC was silent as to the issue of the tribunal’s power to order interim measures in support of arbitral proceedings, leaving the local courts to decide the issue, unless the institutional rules chosen by the parties provided for the same. Now, the Federal Arbitration Law expressly provides for tribunals and courts to order interim and conservatory measures in support of arbitral proceedings where appropriate. This is a welcome addition. A party to an arbitration can be severely prejudiced if a counterparty takes steps to frustrate the object of the arbitral proceedings or deliberately tries to evade its obligations. Interim measures are an important safeguard against such prejudice until the final determination of the dispute.

Although the CPC was silent as to interim measures in support of arbitral proceedings, the other arbitration laws in the UAE, those of the Dubai International Financial Centre (the “DIFC”) and the Abu Dhabi Global Market (the “ADGM”), were not. Both of these arbitration laws provided for some form of interim relief for parties to arbitrations to which their laws applied. In this article, we will consider the key features of the provisions relating to interim and conservatory measures in the new Federal Arbitration Law and we will compare these provisions to, DIFC Law No. 1 of 2008 (the “DIFC Arbitration Law”) and the ADGM Arbitration Regulations, 2015 (the “ADGM Regulations”) so that we can obtain a broader understanding of the nature and scope of the interim measures in support of arbitrations, available in the UAE.

Interim and Conservatory Measures: Federal Arbitration Law

The relevant provisions of the Federal Arbitration Law in respect of interim measures are Articles 18(2) and 21. Between them, these two articles expressly allow both tribunals and courts to order a wide range of interim measures in support of arbitral proceedings.

Article 21 of the Federal Arbitration Law provides that a tribunal may order interim or conservatory measures either at the request of a party or on its own motion, and includes a non-exhaustive list of the interim and conservatory measures an arbitral tribunal may order:

- preserve evidence;
- preserve goods constituting the subject matter of the dispute;
- maintain the assets and funds out of which a subsequent award may be satisfied;
- maintain or restore the status quo pending final determination;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration process itself.

Article 21 also states that the arbitral tribunal may require the party:

- requesting interim measures to provide adequate security to cover the expenses of such measures; and
- to bear damages resulting from the enforcement of such orders, if it later decides that the requesting party was not entitled to the grant of such a measure. (Both the DIFC Arbitration Law and the ADGM Regulations contain similar provisions. The purpose is to safeguard the counterparty, if the tribunal later determines that, in the circumstances, the measure should not have been granted).

“The new law makes significant changes to UAE’s arbitration regime - one of the most important is the inclusion of provisions relating to the tribunal’s powers (and the court’s powers) to order interim relief.”

Recognising the fact that the orders of an arbitral tribunal are not generally automatically executable, Article 21(4) of the Federal Arbitration Law provides that a party to whom interim relief is granted may, after obtaining written permission from the tribunal, request the competent court to enforce the order within fifteen days from receipt of the request. Interestingly, the power of the court to enforce pursuant to Article 21(4) is said to relate to interim measures. Article 21(4) is silent as to conservatory measures. Whether this is an oversight or a deliberate omission, remains to be seen. We note that, pursuant to Article 18(2) (discussed below), the courts are given the express power to grant interim or conservatory measures in aid of an arbitration. However, previously there was no concept of interim or injunctive relief available from the courts in the UAE, apart from precautionary attachment of assets (subject to a few exceptions). It will therefore be interesting to see how the courts deal with requests to enforce interim or conservatory measures in aid of arbitrations.

Article 18(2) of the Federal Arbitration Law gives courts the power to grant interim or conservatory measures in support of an arbitration – either before or during the arbitration. Either the parties or the tribunal itself can approach the court for the grant of such measures. Echoing the rights given to a Tribunal to order interim or conservatory measures of its own volition, Article 18(2) provides that as well as parties having the right to seek such measures in support of an arbitration from the courts, so too does the tribunal have the right to approach the court directly. This is a unique power in the UAE, only available pursuant to the Federal Arbitration Law. Neither the DIFC Arbitration Law nor the ADGM Regulations empower a tribunal to directly approach a court to seek interim or conservatory measures in support of arbitral proceedings. Also, where Article 21 expressly provides that a request seeking enforcement of a tribunal’s orders granting interim measures must be sent to all parties simultaneously, Article 18 is silent on the issue. It remains to be seen whether this means, in practice, that parties and/or a tribunal may rely on Article 18 to seek interim or conservatory measures from the courts *ex parte*.

The Federal Arbitration Law on interim relief is not identical to the Model Law; in Some Respects it Goes Further

Article 21 of the Federal Arbitration Law is based on Article 17 of the Model Law. However, there are three main differences between the two provisions. First, Article 21 of the Federal Arbitration Law goes further than the Model Law by expressly stating that preserving goods constituting the subject matter of the dispute is an interim measure that can be granted by the tribunal. The Model Law is silent on this form of relief. Second, unlike the Model Law, the Federal Arbitration Law does not make a provision for the grant of ex parte interim relief if the counterparty is likely to frustrate the purpose of the interim measure. Third, the Model Law requires that when considering whether to order interim relief the tribunal must weigh the balance of convenience (i.e., balance the relief granted to the applicant against the injury caused to the respondent) before granting an interim measure. While weighing the balance of convenience, the tribunal must consider whether an award of damages will adequately compensate harm likely to be caused if the interim measure is not granted and if there is a possibility that the requesting party will succeed on the merits of the claim. This is not a requirement that is set out in the Federal Arbitration Law - Article 21 is silent as to what a tribunal should consider when making its decision as to interim measures.

Article 18(2) of the Federal Arbitration Law is based on Article 17J of the Model Law. There are some relatively minor differences between these two provisions; we do not consider them in any detail here.

More Powers for Interim Measures Under the Federal Arbitration Law than the DIFC Arbitration Law?

The equivalent provision of Article 21 of the Federal Arbitration Law in the DIFC Arbitration Law is Article 24. Article 21 goes further than the DIFC Arbitration Law in respect of interim measures in three ways. Unlike the Federal Arbitration Law, the DIFC Arbitration Law does not:

1. Empower a tribunal to order interim relief of its own accord i.e., not upon a request of a party.
2. Empower a tribunal to approach the DIFC courts directly to seek interim relief.
3. Expressly include preserving/safeguarding goods which forms the subject matter of the dispute as a specific form of interim relief (although as Article 24 of the DIFC Arbitration Law sets out a non-exhaustive list of interim and conservatory measures there is no reason to think that this remedy is not possible under the DIFC Arbitration Law).

A further difference is in respect of the issues the tribunal must consider when making its decision as to interim measures. As set out above, Article 21 of the Federal Arbitration Law is silent as to this issue. Article 24 of the DIFC Arbitration Law is not. Like the Model Law, Article 21 of the DIFC Arbitration Law provides that the parties must satisfy the tribunal that the balance of convenience favours the granting of interim relief.

One area where Article 24 of the DIFC Arbitration Law goes further than Article 21 of the Federal Arbitration Law is in respect of recovering costs associated with enforcing a tribunal's orders granting interim relief. This is a provision unique to the DIFC Arbitration Law. A party that is compelled to approach the DIFC Court for enforcement of a tribunal's order granting interim relief is entitled to recover any legal costs and court fees incurred as a result. The DIFC Arbitration Law presumably includes such a provision to deter parties from refusing to comply with the tribunal's orders. The Federal Arbitration Law does not expressly provide for any such entitlement.

Article 18(2) of the Federal Arbitration Law is similar to Article 24(3) of the DIFC Arbitration Law. Article 24(3) provides the DIFC Courts the same power to grant interim relief in support of arbitrations as it has in relation to court proceedings.

More Powers for Interim Measures Under the Federal Arbitration Law than the ADGM

Arbitration Law?

Articles 27 to 29 of the ADGM Regulations are the equivalent of Articles 18(2) and 21 of the Federal Arbitration Law. It is noteworthy that Article 27 of the ADGM Regulations contains an exhaustive list of interim measures a tribunal may order, unlike the non-exhaustive list set out in Article 21 of the Federal Arbitration Law and Article 24 of the DIFC Arbitration Law. The Federal Arbitration Law goes further than the ADGM Regulations in respect of interim measures in three ways. Unlike the Federal Arbitration Law, the ADGM Regulations do not:

1. Empower a tribunal to order interim relief of its own accord i.e., not upon a request of a party.
2. Empower a tribunal to approach the ADGM courts directly to seek interim relief.
3. Expressly include preserving/safeguarding goods, which forms the subject matter of the dispute as a specific form of interim relief.

Just as is the case with the Model Law and the DIFC Arbitration Law, the ADGM Regulations also require, unlike the Federal Arbitration Law, that a party must satisfy a tribunal that the balance of convenience favours the grant of the requested interim measure. Where a party succeeds in obtaining interim relief, unlike the Federal Arbitration Law, the ADGM Regulations require that party to inform the tribunal of any change in circumstances based on which the measure was granted. As to the power of the ADGM courts in respect of interim measures in support of arbitration, the ADGM court is only permitted to grant interim and conservatory measures in support of an arbitration in circumstances where the arbitral tribunal does not have the power or is unable to act. This is different to the Federal Arbitration Law which provides for either parties or a tribunal approaching the court to order interim measures in support of arbitral proceedings. As to enforcement of a tribunal's interim measure, an ADGM Court may only refuse to enforce such an award on specific grounds (the same grounds as those for refusing recognition and enforcement of an arbitral award).

Conclusion

Broadly, the provisions relating to interim and conservatory measures contained in the Federal Arbitration Law are similar to the contemporaneous provisions contained in the DIFC Arbitration Law and the ADGM Regulations - but there are also significant differences. When considering their *lex arbitri* parties should think about whether they may need, or their opposing party may need, to rely on interim relief. The nature and scope of the relief that is needed may be a determining factor in choosing the seat of your arbitration.

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