

UAE Federal Arbitration Law enters into force

14 June 2018

After a decade in development, the UAE finally has a standalone arbitration framework based on the 1985 UNCITRAL Model Law, with amendments adopted in 2006 (**Model Law**), replacing the outdated provisions that govern arbitration in the UAE, contained in Articles 203-218 of the UAE Federal Civil Procedure Code (CPC). Following its ratification by the UAE Supreme Council, the final step of promulgating it into what is now known as Law No. 6 of 2018 on Arbitration (**Federal Arbitration Law**) was taken by the UAE President on 3 May 2018. The Federal Arbitration Law was finally published in the UAE Official Gazette No. 630 of 15 May 2018, and will enter into force on 16 June 2018.¹

Parties have the choice between three arbitral seats in the UAE:

1

The offshore free zone of the Dubai International Financial Centre (DIFC), which introduced the first modern arbitration framework in the UAE based on the Arbitration Law No. 1 of 2008 (as amended by Law No. 6 of 2013) (**DIFC Arbitration Law**).

2

The recently established offshore free zone of the Abu Dhabi Global Market (ADGM), which has its own Arbitration Regulations 2015 (**ADGM Arbitration Regulations**).

3

The “onshore” UAE, outside these free zones, to be governed by the Federal Arbitration Law.

While all three arbitration regimes are influenced by the Model Law to varying degrees, a brief comparative overview focusing on the new Federal Arbitration Law is set out below.

Key Features of the Federal Arbitration Law

The Federal Arbitration Law consists of 61 provisions organised in six chapters. It applies to both pre-existing arbitration agreements and pending arbitration proceedings.² In contrast with the old provisions in the CPC, the Federal Arbitration Law distinguishes between domestic and international commercial arbitration, and sets out the criteria for determining the international nature of an arbitration (such as, for example, where the parties expressly agreed in their arbitration agreement that the subject matter is linked to more than one country or where the seat of the arbitration is outside the UAE).³ In line with this distinction, the Federal Arbitration Law applies to: (1) every arbitration conducted in the UAE (unless the parties agree to subject their dispute to a different law and such law does not conflict with public order in the UAE); and (2) international commercial arbitrations conducted outside the UAE if the parties so chose.

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Types of disputes that the parties may submit to arbitration

The Federal Arbitration Law replicates the restriction previously contained in the CPC that arbitration is not permissible in matters where “conciliation is not permissible”,⁴ a limitation that is missing from the ADGM Arbitration Regulations and the DIFC Arbitration Law. As a matter of UAE law, the restriction will therefore likely cover disputes relating to set-off of one debt against another,⁵ certain commercial agency and distributorship relationships,⁶ criminal actions, employment relationships, and matters of public policy which include personal status, family and estates, and certain matters relating to the registration of real estate. That said, the Federal Arbitration Law now expressly covers both contractual and non-contractual disputes.⁷

Requirements regarding the arbitration agreement

The Federal Arbitration Law recognises that an arbitration clause is an independent agreement from the other terms of the contract.

An arbitration agreement, while still required to be in writing, is now expanded to include agreements concluded via electronic communication and those incorporated by reference in to another contract containing the arbitration.⁸ All three arbitration legislations in the UAE deviate from the Model Law in not expressly recognising oral arbitration agreements.⁹

In contrast with the old regime under the CPC, the Federal Arbitration Law recognises that an arbitration clause is an independent agreement from the other terms of the contract.¹⁰ The only exception is when termination, rescission or invalidity of the underlying contract containing the arbitration clause stems from a lack of capacity of any of the parties.

Perhaps even more noteworthy, the Federal Arbitration Law expressly provides that an arbitration agreement remains in force after an award issued on its basis is set aside, unless the setting aside is based on reasons that pertain to the validity of the arbitration agreement itself.¹¹ This is a welcome confirmation in light of court practice under the current regime ruling that an arbitration agreement is exhausted once the tribunal renders its award, regardless of the fate of that award.

Implied waiver

Under the CPC, if an applicant brought an action before the UAE courts in breach of the arbitration agreement, the respondent was required to invoke the arbitration agreement during the “first hearing” to dismiss the claim, failing which it would be deemed to have waived its right to arbitration.¹² Previously, there were uncertainties surrounding the meaning of “first hearing”, which some argued could include a request for adjournment. Problems also arose if, for example, a respondent (or its advocate) did not appear in court at the first hearing, or if the court did not allow an advocate to address the court without a legalised power of attorney (which in practice can take time to organise).

The Federal Arbitration Law resolves some of these uncertainties in that a respondent will safeguard its right to arbitration if it invokes the arbitration agreement before submitting any request or defence relating to the substance of the dispute.¹³ The insertion of the word “request” deviates from the Model Law, which limits waiver in circumstances where a party submits the first “statement” on the substance of the dispute.¹⁴ It is unfortunate that the position has not been harmonised with the Model Law on such a key issue, leaving room for ambiguity or mis-application by the courts. Having said that, a plain reading of Article 8(1) of the Federal Arbitration Law indicates that the request should pertain to the merits of the dispute for a party to waive its right to arbitration. Notwithstanding this, and in light of the consequences of non-compliance and the historic approach of the UAE courts, and until further clarity is provided by such courts, a respondent should ensure that before any request is made to the court (including, for example, a request for adjournment), whether orally or in writing, an objection to the court’s jurisdiction should first be made on the basis of the arbitration agreement (preferably in writing but at a minimum, orally).

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Increased powers for arbitral tribunals

The Federal Arbitration Law provides arbitral tribunals with additional powers in a number of key areas where the old regime was silent, including:

- **Power to rule on its own jurisdiction.** The widely-accepted doctrine of competence-competence has been confirmed in the Federal Arbitration Law, granting authority to the arbitral tribunal to rule on its own jurisdiction. That said, under Article 19(2) of the Federal Arbitration Law, a tribunal’s decision upholding jurisdiction (whether in the form of a ruling or a partial award) is subject to review by the UAE courts that may decide that the tribunal lacks jurisdiction.¹⁵ The scope of the court’s review powers are not clearly set out in the Federal Arbitration Law and while Article 19(2) provides that the arbitration may continue pending the court’s determination, Article 19(3) provides that the party that requested the continuation of the arbitration bears the costs of the proceedings if the UAE courts rule that the tribunal lacks jurisdiction.
- **Power to issue partial awards.** The CPC, the DIFC Arbitration Law and the ADGM Arbitration Regulations do not expressly differentiate between different types of awards. However, the Federal Arbitration Law has expressly conferred the power on the arbitral tribunal to issue interim or partial awards, which may be enforced through the UAE courts while arbitration proceedings are ongoing.¹⁶
- **Power to order interim measures.** The CPC was silent on a tribunal’s power to grant interim relief, deferring the matter to the UAE courts unless provided by the institutional rules expressly chosen by the parties in the arbitration agreement.¹⁷ The Federal Arbitration Law now provides a range of interim and conservatory measures (largely adopting the interim measures set out in the Model Law), which can include an order to maintain or restore the status quo, require a party to take (or refrain from taking) an action that is likely to cause harm or prejudice, an order to preserve evidence, and an order to preserve assets or funds to satisfy any possible arbitral award.¹⁸ However, the Federal Arbitration Law differs from the Model Law on two fronts. First, the list of measures that the tribunal may order has been expanded to include the power to safeguard or direct the sale of “goods” that are subject of the dispute, reflecting the commercial needs of the UAE as a major trade hub in the MENA region. Second, the Federal Arbitration Law deviates from the Model Law in omitting provisions on preliminary orders, which allow a party, without notice to the other party, to request an interim measure coupled with an order directing that party not to take steps to frustrate the interim measure.¹⁹

Increased support from the local courts

Notably, a party may apply to the competent Court of Appeal to enforce an order for an interim measure issued by an arbitral tribunal after obtaining permission from the arbitral tribunal.

The Federal Arbitration Law contains several positive provisions aimed at enhancing the relationship between arbitral tribunals and the UAE judiciary. Notably, a party may apply to the competent Court of Appeal to enforce an order for an interim measure issued by an arbitral tribunal after obtaining permission from the arbitral tribunal.²⁰ It is unclear whether the omission of the word “conservatory” in Article 21(4) was deliberate such that, for example, an order for attachment of an asset issued by a tribunal is not enforceable (although such an order is technically “interim” in nature). This ambiguity may become a source of dispute in the future.

Notwithstanding the above, the Federal Arbitration Law makes it possible for a party to apply directly to the President of the competent Court of Appeal during or before the commencement of the arbitration proceedings for interim or conservatory measures.²¹ It is unclear, however, how this provision will sit with the rules of commonly used arbitral institutions in the UAE, which restrict a party’s ability to seek interim relief from the local courts after the tribunal has been constituted.²²

The Federal Arbitration Law has also preserved the arbitral tribunal’s power under the CPC to seek court assistance in obtaining “any evidence”, including the power to subpoena witnesses and compel disclosure of documents.²³

Usage of modern means of communication

The Federal Arbitration Law embraces the growing influence of modern means of communication in dispute resolution by permitting service of notices via email,²⁴ for hearings to be held at any venue via modern means of communication (such as video or telephone)²⁵ without parties,²⁶ witnesses or experts attending in person,²⁷ and recognising arbitral awards signed outside the arbitration seat, including by electronic means.²⁸ While Article 257 of the Federal Penal Code continues to pose a concern for arbitrators due to the risk of criminal liability attached to it, the flexibility to hold hearings and sign the award outside the UAE provides some comfort that the risks posed by Article 257 can be mitigated.

The Federal Arbitration Law recognises awards signed outside the arbitration seat.

Duration of proceedings

The Federal Arbitration Law contains multiple provisions aimed at improving efficiency.

Importantly, there are multiple provisions throughout the Federal Arbitration Law designed to mitigate delay to the arbitral process. For instance, when a UAE court looks into the validity of an arbitration agreement, or when a party applies to disqualify an arbitrator, the tribunal can still proceed with the arbitration and issue an award.³³

There are also strict timeframes imposed on the parties throughout the Federal Arbitration Law aimed at improving efficiency of the arbitral process. For instance, there is a 7-day deadline to raise an objection to the tribunal regarding any breach of the arbitration agreement or the Federal Arbitration Law;³⁰ a 15-day appeal window to the court against a tribunal's preliminary ruling made on its own jurisdiction;³¹ a 30-day window to ask the tribunal to interpret or correct anything in the award;³² and a 30-day deadline to lodge an annulment application with the court after the award is issued.³³

While the DIFC Arbitration Law and the ADGM Arbitration Regulations do not impose a timeframe for the tribunal to issue its award, the Federal Arbitration Law preserves the CPC timeline of 6 months from the first hearing if the arbitration agreement is silent on the timeframe for rendering the award or the "method" for defining such timeline. In this event, the tribunal may only extend the period for an additional 6 months unless otherwise agreed by the parties.³⁴ There is some uncertainty as to whether an agreement to arbitrate under institutional rules, which confer upon the tribunal or the institution a right to extend the timeframe for rendering the award,³⁵ is sufficient to displace the time-limit in Article 42. Logically, the reference to agreement on a "method of its determination" suggests that Article 42 is limited to ad hoc arbitration. However, this ambiguity creates a risk of a different interpretation being adopted by the UAE courts, which would leave tribunals reliant on the UAE courts for extensions of time.

Confidentiality

Under the CPC there was no express provision providing for confidentiality of the arbitral proceedings or the award. The Federal Arbitration Law limits confidentiality to the "arbitration award" while expressly excluding arbitration-related court proceedings. On its face, the scope seems narrower than the DIFC Arbitration Law, which protects all information relating to the arbitration proceedings (which in practice extends to the award),³⁶ and the ADGM Arbitration Regulations, which provide a clearer ambit covering all information relating to the arbitration proceedings as well as the award.³⁷ Nevertheless, this gap can be addressed by selecting the rules of an arbitral institution that provides broader confidentiality protections.³⁸

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Enforcement of awards

The Federal Arbitration Law introduces an improved new enforcement regime that is substantially similar to that in the DIFC Arbitration Law and the ADGM Arbitration Regulations.³⁹ An award now holds the force of a binding judgment and acquires res judicata status once issued by the tribunal.⁴⁰ However, the award must be ratified by the competent Court of Appeal (i.e. an order to obtain the exequatur) before execution can take place,⁴¹ which appears to have preserved the ratification step under the CPC with some modifications.⁴²

Enforcement of awards (cont'd)

The key differences between the previous and the new regimes are as follows:



While there is no corresponding grievance procedure in the Model Law, the right to file a grievance application appears to have been imported from the CPC.⁴⁸ It remains to be seen whether the Court of Appeal will interpret the scope of such grievance procedure to permit the overturning of an earlier decision to grant enforcement of an arbitral award. Consequently, the grievance procedure could potentially provide award debtors with an ability to circumvent the limited grounds of set aside contained in Article 53 of the Federal Arbitration Law.

Conclusion

The UAE has been widely praised for enacting the Federal Arbitration Law, having substantially followed the Model Law with certain changes relevant to the UAE legal and commercial landscapes. While this development unifies the “onshore” and “offshore” arbitration frameworks of the UAE, thus strengthening the UAE’s position as an arbitration-friendly jurisdiction, some of the deviations from the Model Law create uncertainties and ambiguities that could have been avoided.

Much will depend on how the UAE courts will interpret and apply the Federal Arbitration Law in practice. Meanwhile, the offshore seats of the DIFC and ADGM are likely to maintain their appeal to some parties who find comfort arbitrating in jurisdictions with a more predictable and recognisable arbitration framework.

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End notes

- ¹ Federal Arbitration Law, Article 61.
- ² Federal Arbitration Law, Article 59. Article 59 clarifies that all proceedings that took place under the previous regime remain valid.
- ³ Federal Arbitration Law, Article 3.
- ⁴ CPC, Article 203(4); Federal Arbitration Law, Article 4(2).
- ⁵ UAE Civil Transactions Law, Article 733(1).
- ⁶ UAE Law No. 18 of 1981. While the prohibition should not extend to agency or distributorship agreements that are unregistered, the position remains uncertain as to whether an arbitral award issued in respect of an unregistered agency or distributorship, while governed by the general provisions in the UAE Commercial Code, would be enforced by the UAE courts on the basis that the underlying dispute is not arbitrable in light of Section 6 of the Agency Law that grants exclusive jurisdiction to the UAE courts.
- ⁷ Federal Arbitration Law, Article 2(3).
- ⁸ Federal Arbitration Law, Article 7.
- ⁹ Compare the Model Law, Article 7(3) with the Federal Arbitration Law, Article 7; DIFC Arbitration Law, Articles 12(3)-(7); ADGM Arbitration Regulations 2015, Articles 13(2)-(5).
- ¹⁰ Federal Arbitration Law, Article 6(1). This brings the onshore arbitration regime in the UAE closer to that in the DIFC Arbitration Law, Article 23(1) and the ADGM, Article 13(1), while broadly recognising the principle of separability, the ADGM Arbitration Regulations instead reflect the wording contained in Section 7 of the English Arbitration Act 1996.
- ¹¹ Federal Arbitration Law, Article 54(4).
- ¹² CPC, Article 203(5).
- ¹³ Federal Arbitration Law, Article 8(1).
- ¹⁴ Model Law, Article 8(1).
- ¹⁵ Federal Arbitration Law, Articles 6(2), 19(1). Article 23 of the DIFC Arbitration Law adopts verbatim Article 16 of the Model Law, while Articles 24-26 of the ADGM Arbitration Regulations model Sections 30-32 of the English Arbitration Act 1996, both of which recognise the doctrine of competence-competence.
- ¹⁶ Federal Arbitration Law, Article 39.
- ¹⁷ CPC, Article 22.
- ¹⁸ Federal Arbitration Law, Article 21; Model Law, Article 17. See also DIFC Arbitration Law, Article 24(1) and ADGM Arbitration Regulations, Article 27.
- ¹⁹ Model Law, Articles 17(B)-17(C). Note that the DIFC Arbitration Law and the ADGM Arbitration Regulations also do not provide for preliminary orders.
- ²⁰ Federal Arbitration Law, Article 21(4).
- ²¹ Federal Arbitration Law, Article 18(2). See also the DIFC Arbitration Law, Article 24(3) which expressly extends the tribunal's powers to issue interim measures to the DIFC courts. Also, Article 29 of the ADGM Arbitration Regulations provides (albeit narrower) powers to the ADGM courts in the form of provisional or conservatory measures, which may only be granted when the tribunal is unable to act effectively. Extension of the arbitral tribunal's powers to the national courts is also set out in the Model Law, Article 17(J).
- ²² ICC Rules of Arbitration, Article 28(2) allows a party to request an interim measure from the courts after the formation of the tribunal, but only in "appropriate circumstances", whereas the LCIA Arbitration Rules 2014, Article 25.3 allows a similar application, but only in "exceptional cases" after the formation of the tribunal.
- ²³ CPC, Article 209(2)(b) which allows local courts to assist in the production of documents from third parties; Federal Arbitration Law, Article 36.
- ²⁴ Federal Arbitration Law, Article 24(1).
- ²⁵ Federal Arbitration Law, Article 28(2)b.
- ²⁶ Federal Arbitration Law, Article 33(3).
- ²⁷ Federal Arbitration Law, Article 35.
- ²⁸ Federal Arbitration Law, Article 41(6).
- ²⁹ Federal Arbitration Law, Articles 8(2), 15(3)
- ³⁰ Federal Arbitration Law, Article 25.
- ³¹ Federal Arbitration Law, Article 19(2).
- ³² Federal Arbitration Law, Articles 49(1), 50(1).
- ³³ Federal Arbitration Law, Article 54(2).
- ³⁴ Federal Arbitration Law, Article 42.
- ³⁵ ICC Rules of Arbitration, Article 31; Abu Dhabi Commercial Conciliation & Arbitration Centre Procedural Regulations on Arbitration, Article 27(2); DIAC Rules 2007, Article 36(1). The LCIA Arbitration Rules 2014 are silent on the time limit for a tribunal to issue an award.
- ³⁶ DIFC Arbitration Law, Article 14.
- ³⁷ ADGM Arbitration Regulations, Article 40(1), Schedule 1, Article 3.
- ³⁸ LCIA Arbitration Rules 2014, Article 30; ICC Rules of Arbitration, Article 22(3); DIAC Arbitration Rules 2007, Article 41.
- ³⁹ DIFC Arbitration Law, Chapter 7; ADGM Arbitration Regulations, Chapter 8.
- ⁴⁰ Federal Arbitration Law, Article 52.
- ⁴¹ Federal Arbitration Law, Articles 52, 55.
- ⁴² CPC, Article 215(1).
- ⁴³ Article 4(1) of the Federal Arbitration Law has preserved the ground in Article 216(1)(b) of the CPC regarding an individual's incapacity to agree to arbitration, but it clarifies that the incapacity also extends to an individual's lack of authority to sign an arbitration agreement on behalf of a corporate body. While this means that specific authority for a representative to bind an onshore UAE company to arbitration would likely need to be expressed according to UAE law, a possible reading of Article 4(1) of the Federal Arbitration Law suggests that the rules for determining an individual's authority of a foreign company may be interpreted according to the laws of the jurisdiction in which such company is incorporated.
- ⁴⁴ Federal Arbitration Law, Articles 53-54. Previously, annulment proceedings were required to be filed at the Court of First Instance, with a two-step appeal process available with the Court of Appeal and the Court of Cassation.
- ⁴⁵ Federal Arbitration Law, Article 55.
- ⁴⁶ Federal Arbitration Law, Article 56(1).
- ⁴⁷ Federal Arbitration Law, Article 57.
- ⁴⁸ See, for example, CPC, Articles 141, 142(1), 147-148, 232-233, 234(1), 325, 329 which provide an avenue for filing a grievance application.