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LNB News 20/07/2018 4

Published Date

20 July 2018

Jurisdiction

United Arab Emirates

Related Legislation

Federal Law No. 11/1992; Federal Law No. 6/2018

Related Cases

DCC 73/2010

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The UAE Federal Arbitration Law: A First Look, LNB News 17/05/2018 56

Relevant Companies

Afridi & Angell

Abstract

A new Arbitration Law, Federal Law No 6/2018 has come into force in the UAE. Chatura Randeniya, Counsel, Mevan Bandara, Associate and Sulakshana Senanayake, Associate at Afridi & Angell examine the key changes and its impact.

Analysis

What's happened?

"After over a decade since talk of a new arbitration law for the UAE began around the time the UAE acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(the New York Convention) in 2006, the new law is finally here. The introduction of a comprehensive stand-alone law on arbitration is a welcome development in the UAE and Federal Law No. 6/2018 will replace the Arbitration provisions in Chapter 3 of Federal Law No. 11/1992, which, until 16 June 2018, comprised the only legislative provisions governing arbitration in the UAE outside of the DIFC and the ADGM. As expected, Federal Law No. 6/2018 is based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) but with certain potentially significant departures from this," Chatura Randeniya explains.

What does it apply to?

"The new Law will apply to all arbitrations conducted in the UAE unless parties agree to submit to another arbitration law. It is likely this provision is intended to accommodate parties who have chosen the DIFC or ADGM as their seat of arbitration. It will also apply to all pending arbitrations at the time when the law comes into force. Extra-territorial application of the New Law where the parties have agreed to be bound by this law for arbitrations conducted overseas and where the underlying dispute arises with regard to a legal relationship organised by the applicable laws of the country is envisaged. Some have said the latter will be applicable where the relationship is governed by mandatory provisions of UAE law, but how it will be applied remains to be seen," Mevan Bandara says.

What are the arbitration agreement requirements?

"Federal Law No. 11/1992 required an arbitration agreement to be in writing and to be entered into by persons with authority to agree to arbitrate. The new Law maintains the requirement an agreement to arbitrate should be in writing and clarifies and expands how this requirement may be satisfied. For example, it provides this requirement may be satisfied by reference to communications between the parties. This is consistent with recent case law on this point like the judgment of the Dubai Court of Cassation in Cassation No. 73/2010, DCC 73/2010, which held a written agreement to arbitrate may be evidenced through written correspondence between the parties. However it is helpful to have legislative confirmation on this point, particularly as there is no concept of binding precedent in the UAE. The Law also provides an agreement through correspondence may be reached or evidenced through electronic correspondence. It also confirms an arbitration clause will be valid by reference if contained in standard form conditions, provided the reference is clear and explicit so as to make the arbitration clause part of the present contract. In addition it confirms an agreement to arbitrate must be entered into, on behalf of a body corporate, by persons with specific authority to agree to arbitration which will ensure much of the legal jurisprudence governing the requirement to have specific authority to arbitrate on behalf of a body corporate or a third party remains unchanged. It is likely therefore challenges to enforcement of arbitration awards will continue to be made on these grounds," Bandara adds.

Appeals

"The principle of competence-competence is recognised under the new Law. This is where a tribunal may rule on its own jurisdiction. This is not new to the UAE, as this is recognised in various institutional

arbitration rules and routinely applied by tribunals. However, significantly, a ruling on jurisdiction by a tribunal must be appealed within 15 days. It is not uncommon to see court proceedings being instituted by a party, despite an arbitration agreement being in place. Under the new Law, if a defendant in these proceedings wishes to object to the court's jurisdiction, they should do so before making any submissions on the merits. This is a more flexible requirement compared to Article 203(5) of Federal Law No. 11/1992, which required defendants to assert the jurisdictional objection at the first hearing, which in certain cases was interpreted to include procedural hearings," Bandara goes onto say.

Remedies

"Although the power of tribunals to award interim measure is found in the major institutional rules of arbitration in the UAE, they were rarely utilised by parties as they were considered unenforceable as a matter of practice. This is no longer the case under the new Law which recognises the power of tribunals to award interim relief. Importantly, Article 21(4) of Federal Law No. 6/2018 expressly contemplates the enforcement of interim remedies granted by a tribunal through the courts. Article 21(1) identifies a broad range of interim orders which a tribunal may issue, including orders to preserve evidence, orders to preserve assets, orders restraining a party from action, and orders directed at preserving or restoring the status quo. This is a significant development which provides new options to parties and practitioners, as the possibility of obtaining interim relief in on-shore UAE was far more limited primarily to attachment orders issued by the UAE Courts in applications made under Article 252 of Federal Law No. 11/1992," Sulakshana Senanayake says.

"A significant addition in the new Law is its specific recognition an award once issued is binding on the Parties, constitute res judicata and enforceable as a judicial ruling. However, in order for an award to be enforced, it must be ratified. Under Federal Law No. 11/1992, there was some ambiguity as to whether a party wishing to set aside an award could initiate proceedings, or was required to wait until ratification proceedings were instituted in order to challenge the award. This ambiguity has now been resolved. It is possible to institute proceedings to seek nullification of an award under the new Law. Nullification may be sought either in proceedings seeking nullification of the award, which must be instituted within 30 days from the notification of the award or during ratification proceedings. Nullification proceedings must be initiated in the Court of Appeal and a decision of the Court of Appeal can be appealed to the Court of Cassation," Senanayake notes.

"Ratification and enforcement proceedings must also be initiated before the Court of Appeal and the Court of Appeal is required to render its decision within 60 days with an appeal possible by way of a petition to the Court of Appeal which is a significant difference when compared to the old law where ratification proceedings had to be initiated before the Court of First Instance with appeals possible to the Court of Appeal and the Court of Cassation. Under the new Law, an entire level of court proceedings has been removed, thereby significantly reducing the process," Senanayake adds.

"The grounds to nullify an award are based on those set out in the Model Law albeit the language used in the new Law is somewhat more expansive. For example, an award can be set aside under the new

Law if a party is unable to present its case not only for reasons such as, if a party was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings, as set out in the Model Law but also if the Arbitral Tribunal has breached ‘due process’ or for ‘any other reason beyond [a party’s] control’. The new Law also provides an award may be set aside if it ‘excludes the application of the Parties’ choice of law for the subject matter of the dispute’, a ground not seen under the Model Law. It remains to be seen how the courts will apply this and particularly whether the courts are by this provision empowered to look into the merits of an award to arrive at a determination on whether or not the parties’ choice of law was in fact applied by a tribunal and to what extent. If so, this would be a departure from the norms of international arbitration principles and also in contrast to the repealed provisions of Federal Law No. 11/1992 which expressly precluded the courts from examining an award’s merits. The new Law does not contain any specific provisions in relation to enforcement of foreign arbitral awards in the UAE which will continue to be governed under the New York Convention (ratified by Federal Decree No. 43/2006) and Article 235 of Federal Law No. 11/1992 and Article 236 of Federal Law No. 11/1992,” Senanayake goes onto say.

What’s next?

“As with any new legislation, it remains to be seen how the new Law will be applied by the courts. Some areas to watch are how the courts approach applications to enforce interim awards and how wide or narrow an approach the courts will take to Article 53 on grounds for nullification of an award. It will also be interesting to see whether the courts will strictly observe the 60-day deadline for decisions on ratification and how potential inconsistency between the new Law and the existing institutional rules will be resolved, e.g. the mechanism to extend the time limit to issue the final award in Article 42(1) and the mechanism set out in DIAC Rule 36(4). Finally we will watch with interest how transitional issues like the application of the new Law to arbitrations which have concluded but nullification or ratification proceedings have not begun, or where ratification proceedings are currently pending before a Court of First Instance are handled. No doubt these issues will be clarified in time. In any event, the enactment of the new Law is a step in the right direction, and will help bolster confidence in dispute resolution mechanisms in the UAE,” Randeniya concludes.