

Drafting Arbitration Clauses in International Contracts: The Impact of the UAE's New Arbitration Law (Federal Law No. 6 of 2018)

By Kilian Bälz, Aouni Shahoud Almousa and Alexander Lütgendorf

The UAE's new Arbitration Law (Federal Law No. 6 of 2018 on Arbitration, the "Arbitration Law") came into force on 16 June 2018. It was inspired by the UNCITRAL Model Law on International Commercial Arbitration and replaced the UAE Code of Civil Procedure's chapter on arbitration. The new law modernised the UAE's legal regime for arbitrations conducted in the UAE to bring it in line with international standards and norms. Notwithstanding, pitfalls remain that parties ought to be aware when drafting arbitration clauses.

This client alert discusses key issues a party must consider carefully before consenting to an arbitration clause in a contract relating to the UAE.

Scope of Application

The UAE's Arbitration Law applies to arbitrations conducted in the UAE – that is, where the parties agreed that the juridical seat of arbitration shall be the UAE – or, albeit less likely, where the parties agreed that UAE law shall apply to arbitral proceedings conducted outside the UAE (Art. 2).

It also applies to the enforcement of a foreign arbitral award in the UAE under the New York Convention and other multilateral conventions concerning recognition and enforcement of foreign arbitral awards,¹ in which instance a UAE court may apply UAE law to determine questions, such as the validity of an arbitration agreement or whether the dispute between the parties is capable of being referred to arbitration.

The UAE's Arbitration Law may thus be relevant to all contracts that, in one way or another, relate to the UAE; however, it will not apply to the conduct of arbitrations seated in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Market (ADGM) free zones, as both free zone jurisdictions within the UAE have their own arbitration laws.

Arbitration Agreement

An arbitration clause must contain a clear and unambiguous agreement that refers future or existing disputes between the parties to resolution by arbitration (Art. 1). Standard arbitration clauses of modern arbitral institutions, such as the ICC, DIAC, DIFC-LCIA, DIS or CRCICA (and others) meet the requirements. For example, the ICC recommends the following standard

¹ The UAE is party to a number of multilateral treaties for enforcement of foreign arbitral awards, including the New York Convention (since 2006), the Riyadh Convention (since 1999) and the GCC Convention (since 1995), as well as numerous bi-lateral treaties.

clause: *“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. ...”*

In the context, it is not entirely clear whether UAE law permits so-called one-sided or asymmetric arbitration clauses allowing one party the option to choose the method of resolving disputes between the parties. Such optional right to the advantage of one party only is common practice in finance and some trade agreements. A typical clause in finance agreements would read: *“The arbitration clause shall be for the benefit of the Finance Parties only.”* UAE case law suggests that the parties’ agreement to arbitrate their disputes must be *unconditional*. This might be interpreted to mean that UAE law does not allow one-sided arbitration clauses. With that in mind, we advise parties to exercise caution when including a one-sided arbitration clause in an agreement.

Form of the Arbitration Agreement

In the past, an arbitration agreement could only be evidenced through a formal written document that was executed by both parties which requirement made it difficult in practice to prove that the parties had agreed to arbitration.

The new Arbitration Law significantly softens the formal writing requirement under the old law and allows, amongst others, for an arbitration agreement to be concluded through (i) an exchange of correspondence, including email or fax, (ii) a reference in a written contract to an arbitration agreement contained in another document, model contract or international agreement, or (iii) to be concluded by either party submitting to arbitral proceedings commenced by the other party without raising an objection (Art. 7).

It is uncertain whether an arbitration agreement can be established by a general reference to other contract documentation, such as standard terms and conditions of sale that contain an arbitration clause. Because a reference to an arbitration clause must be explicit, there is risk that a general rather than specific reference may not meet the requirements under the law. The contract should therefore provide for an express reference to an arbitration clause set out in another document (*e.g.*, *“Disputes...shall be settled in accordance with the Arbitration Clause set out in Section [●] of the attached Standard Terms and Conditions of Sale.”*)

Arbitrability of Disputes

The new Arbitration Law provides for a broad definition of arbitrability covering virtually any dispute that the parties have capacity to settle (Art. 4 (2)). Specific classes of disputes are barred from arbitration and subject to resolution by the courts. In principle, any dispute should be capable of being resolved by a private arbitral tribunal, yet it is precisely because arbitration is a private proceeding with public consequences that some types of dispute are reserved for national courts or other authorities, the proceedings of which are in the public domain.

Most relevant, these include certain employment law and commercial agency disputes, in relation to which the UAE courts retain exclusive jurisdiction to hear such disputes. It is thus important to consider the types of dispute that the parties may be looking to resolve through arbitration when drafting an arbitration clause.

Capacity to Enter into Arbitration Agreements

Parties to a contract must have legal capacity to enter into that contract, otherwise it is invalid. The position is no different if the contract happens to be an arbitration agreement. The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. If an arbitration agreement is entered into by a party who does not have the capacity to do so, the provisions of the Arbitration Law (or the New York Convention) may be relied upon, either at the beginning of the arbitral proceedings to stop the arbitral process on the basis that the arbitration agreement is void or at the end of the arbitral process when the competent court may be asked to refuse recognition and enforcement of the award.

Significantly, UAE law requires that the representative of a company holds a specific authority to agree an arbitration clause on behalf of that company (Art. 4(1)). Such specific authority can either be included in a company's articles of association, shareholder resolution or power of attorney. When the representative enters into an arbitration agreement without such express authority, there is a risk that the arbitration agreement will be found to be invalid (although the UAE courts have recently assisted parties through the fairly generous application of a principle of "apparent authority", pursuant to which it was held that the conduct of a party may cause the other party to believe that the signatory was fully authorized to sign an agreement, including the arbitration clause).

One way of ensuring, albeit limited, protection is to include a representation in the contract confirming that the parties are authorized to enter into arbitration agreements.

In addition, any UAE federal government department entering into a contract including an arbitration clause must obtain the prior consent from the UAE Council of Ministers, to the extent the contract qualifies as an "administrative contract" (Council of Minister Decision No 406/2 of 2003, dated 15 September 2003). Further restrictions and approval requirements may have to be observed in each Emirate (for example, the Dubai Government Contracts Law No. 6 of 1997).

Governing Law

Under the Arbitration Law, parties are free to choose the law applicable to the subject matter of their dispute (Art. 37). The parties' choice of law however may be subject to UAE public policy rules, including mandatory provisions of UAE law and Islamic Sharia in circumstances where the arbitration is conducted in the UAE or an arbitral award is enforced in the UAE.

Examples of UAE public policy and mandatory rules include commercial agency law, protection of local shareholdings, interest rates, mandatory employment law rules, and decennial liability in respect of construction works.

Seat and Language of the Arbitration

The law allows that parties determine the seat of arbitration to be within or outside the UAE (Art. 28(1)).

The parties may also agree the language (or several languages) in which the proceedings shall be conducted (Art. 29). In the absence of an agreement, the default language is Arabic.

The Arbitration Rules of Arbitral Institutions

Parties ought to consider incorporating in their arbitration agreements the rules of arbitration of a suitable arbitral institution, such as the ICC, DIAC, DIFC-LCIA, DIS, or CRCICA, to govern the arbitral process. We would generally recommend that parties make good use of that possibility.

Commencement of the Arbitration and Time Limits

The commencement of an arbitration is an important step in the proceedings, not only in terms of procedure, but also in terms of compliance with any limitation period for the presentation of claims. In order to stop time running, arbitration proceedings must be commenced in accordance with the contract or relevant applicable law, or both.

UAE law permits that the parties modify rules for commencement of arbitration by agreement, either through the agreement of relevant institutional rules (or rules set out in the arbitration clause itself). By way of an example, the ICC Rules determine that the date of the commencement of the arbitration is deemed to be the date of receipt by the ICC Secretariat of a request for arbitration (which must contain, amongst others, a description of the nature and circumstances of the dispute, details of the relief sought, and particulars concerning the number and choice of arbitrators).

The new Arbitration Law provides that “*arbitration proceedings commence on the day following the day on which the establishment of the arbitral tribunal has been completed, unless the parties have agreed otherwise.*” (Art. 27(1))

As a consequence, unless the parties have agreed otherwise in the manner suggested above, a statutory or contractual time limitation for claims will not stop running, unless and until the arbitral tribunal has been fully constituted. That of course might allow recalcitrant respondent parties to delay the constitution of a tribunal with a view to allowing claims to become time-barred in circumstances where the time left under the applicable limitation period allows such “guerilla” strategy by the respondent party. It is therefore important that parties either make provision through the agreement of institutional arbitration rules or by including in the arbitration agreement a clause that determines, for example, that the arbitration commences upon the submission or receipt of the request for arbitration.

Separately, the Arbitration Law requires that the arbitral tribunal render its award within six months but allows the tribunal to extend the time limit by a period of up to six months only (Art. 42(1)). Once this time period ends, the arbitration agreement expires, unless it is extended by the competent court or by agreement of the parties. Parties are therefore well-advised to exclude or extend time limits by agreement, either through incorporating institutional rules of arbitration allowing more flexible time limits or by setting out appropriate rules in the arbitration clause itself.

Arbitration Costs

Parties may agree which party shall bear the costs of the arbitration. In the absence of an agreement, the Arbitration Law authorizes arbitral tribunals to determine and allocate the costs of the arbitration as they deem fit (Art. 46(1)). The usual practice for arbitral tribunals is to apply the principle that costs follow the event and award the prevailing party in the arbitration the costs of the arbitration, including its legal fees, *i.e.* the party’s costs of legal representation.

The wording of the Arbitration Law (set out in Article 46(1)) however, does not expressly mention the parties' costs of legal representation. It merely refers to "*the fees and expenses incurred by any member of the Arbitral Tribunal in the exercise of his duties and the costs for experts appointed by the Arbitral Tribunal.*"

As a consequence, in the absence of clear wording in the arbitration agreement and/or institutional arbitration rules authorizing the tribunal to award a party's costs of legal representation, courts and arbitral tribunals alike may conclude that arbitral tribunals have no power to award the parties' costs of legal representation. Indeed in 2013, the Dubai Court of Cassation took a restrictive approach concerning the cost provisions of the DIAC Arbitration Rules finding (in our view wrongly) that the DIAC Rules do not allow an arbitral tribunal to award counsel fees or other costs of legal representation, unless the parties agreed otherwise.

If parties wish to allow counsel fees to be awarded, they should make provision in the arbitration agreement either expressly or by incorporation of institutional arbitration rules, such as the ICC Rules or the DIFC-LCIA Rules that allow tribunals to award counsel fees; note that the DIAC Rules currently do not contain express terms that allow the tribunal to award counsel fees.

If you would like more information about this topic, please contact us.

Dr. Kilian Bälz

Partner

Berlin/Cairo

kb@amereller.com

Aouni Shahoud Almousa

Associate

Berlin

almousa@amereller.com

Alexander Lütgendorf

Senior Counsel

Dubai

al@amereller.com

BERLIN | Amereller Rechtsanwälte PmbB | Kurfürstenhöfe | Spreeufer 5 | 10178 | Berlin | Germany |
t: +49.30.609.895.660

CAIRO | MENA Associates in association with Amereller | GIC Tower | 21 Soliman Abaza St. | Mohandessin | Giza | Egypt
t: +20 2 376 26 201

DUBAI | Amereller Legal Consultants | One By Omnyat, 14th Floor | Business Bay | P.O. Box 97706 | Dubai | UAE
t: +971 4 432 3671

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