The new UAE Federal Arbitration Law: What difference does it make?[1]

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Introduction

After a long period of gestation, the UAE Federal Arbitration Law is now likely to become a reality: Its enactment is scheduled for later this year, having – pursuant to an announcement of the UAE Government of 28 February 2018 - recently been approved by the UAE Federal National Council, the UAE advisory parliament, in accordance with Article 90 of the UAE Constitution. Before adoption in its present form, the UAE Federal Arbitration Law[3] has gone through a number of drafts, some of these inspired by the UNCITRAL Model Law, others customized by reference to other leading arbitration laws in the region. The effect of the new law will be to repeal the arbitration-specific provisions of the UAE Civil Procedures Code, i.e. Articles 203 through to 218 and 235 through to 238, also commonly referred to as the UAE Arbitration Chapter.[4] To date, the UAE Arbitration Chapter has governed arbitrations seated in onshore UAE, with the UAE courts serving as the curial courts in support of arbitration. For the avoidance of doubt, the UAE Arbitration Chapter exists alongside two stand-alone UNCITRAL Model Law-based arbitration laws that govern arbitrations seated in the two UAE-based free zones, the 2008 Dubai International Financial Centre (DIFC) Arbitration Law and the 2015 Abu Dhabi Global Market (ADGM) Regulations, which in turn apply to arbitrations seated in one or the other of the free zones.

The UAE Arbitration Chapter has long been criticized for being a retrograde instrument of local arbitration. In the same breath, the UAE courts have often been portrayed by the international arbitration community as little supportive of and at times even outright hostile to arbitration. I respectfully disagree. In the *Commentary on the UAE Arbitration Chapter*, published with Sweet & Maxwell/Thomson Reuters in March this year[5], I was able to conclude – on the basis of an in-depth study of a total of over 650 arbitration-relevant rulings of the UAE courts - that the UAE courts have been remarkably arbitration-friendly, bending the interpretation of the individual provisions of the UAE Arbitration Chapter to the greatest extent possible *in favorem arbitrandi*. Over the years, the UAE courts have established a remarkably consistent, arbitration-friendly case law precedent, giving rise to – to borrow from the French - a *jurisprudence constante* in the field of UAE arbitration. This includes, for example, the recognition of the principle of party autonomy, the separability of the arbitration agreement from the main contract, the partial enforcement of arbitral awards and the limited notion of local public policy, turning the UAE into a comparatively secular arbitration jurisdiction (especially when compared with other Middle Eastern jurisdictions that have an arbitration offering). Further, more recently, the UAE have also established a largely consistent pro-enforcement record under the 1958 New York Convention. With this in mind, I have always been a proponent of reforming the UAE Arbitration Chapter to address existing procedural deficiencies rather than adopting a radically new stand-alone arbitration law. That said, the lobby in favour of bringing about a sea change has finally gained the upper hand and the UAE Arbitration Chapter will soon be no more! Will this mean, however, that the existing case law precedent that provides guidance to the interpretation

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[1] This article is based on Gordon Blanke, "UAE Federal Arbitration Law v UAE Arbitration Chapter: old wine in a new bottle? (Part 1)", Practical Law Arbitration Blog, Thomson Reuters, 12 July 2017, available online at http://arbitrationblog.practicallaw.com/uae-federal-arbitration-law-v-uae-arbitration-chapter-old-wine-in-a-new-bottle-part-1/; Gordon Blanke, "UAE Federal Arbitration Law v UAE Arbitration Chapter: old wine in a new bottle? (Part 2)", Practical Law Arbitration Blog, Thomson Reuters, 14 August 2017, available online at http://arbitrationblog.practicallaw.com/uae-federal-arbitration-law-v-uae-arbitration-chapter-old-wine-in-a-new-bottle-part-2/; and Gordon Blanke, "UAE Federal Arbitration Law v UAE Arbitration Chapter: old wine in a new bottle? (Part 3)", Practical Law Arbitration Blog, Thomson Reuters, 15 September 2017, available online at http://arbitrationblog.practicallaw.com/uae-federal-arbitration-law-v-uae-arbitration-chapter-old-wine-in-a-new-bottle-part-3/.

[2] The law is stated as at 23rd April 2018.

[3] Hereinafter also simply referred to as the "new Law".

[4] See Article 60, new Law.

[5] Hereafter referred to as "Blanke", the "Commentary of the UAE Arbitration Chapter" or simply the "Commentary".

of the UAE Arbitration Chapter will be of no assistance in the construction of the UAE Federal Arbitration Law once it as entered into force? Following an initial review of the new Law, the answer to this question must be a resounding "no".

Despite claims to the contrary, the provisions of the UAE Federal Arbitration are not altogether different from those of the existing UAE Arbitration Chapter. A lot of the existing case law precedent will therefore be instrumental in the construction of the provisions of the new Law. Therefore, the *Commentary on the UAE Arbitration Chapter* will also retain its relevance in providing guidance on the interpretation of corresponding provisions of the UAE Federal Arbitration Law.[6]

Basic procedural framework

The new Law contains a number of articles that deal with the basic procedural framework conditions of arbitration. These essentially reflect the status quo under the UAE Arbitration Chapter.

Article 6[7] expressly provides for the principle of separability and as such codifies existing arbitration practice under the UAE Arbitration Chapter (see e.g. Case No.108/2009*, ruling of the Abu Dhabi Court of Cassation of 12 March 2009; Case No. 167/2002*, ruling of the Dubai Court of Cassation of 2 June 2002; Case No. 164/2008*, ruling of the Dubai Court of Cassation of 12 October 2008; Case No. 265/2009, ruling of the Dubai Court of Cassation of 25 October 2009; and Case No. 166/2008*, ruling of the Federal Supreme Court of 1 February 2010; Blanke, I-077 and II-007).

Article 7 requires an arbitration agreement to be in writing and provides that it can be evidenced by an exchange of communications, by reference to an arbitration clause in another document or by an acknowledgement of the existence of the arbitration clause by one of the contracting parties in proceedings before the courts or over the course of the arbitration process. The formation of an arbitration agreement by exchange of correspondence has been acknowledged in the terms of Article 203(1) of the UAE Arbitration Chapter (see Case No. 64/2005, ruling of the Dubai Court of Cassation of 18 April 2005; and Case No.174/2005*, ruling of the Dubai Court of Cassation of 19 December 2005; Blanke, I-073 and II-004); so has the incorporation of an arbitration clause by reference (see Case No. 25/Judicial Year 21*, ruling of the Federal Supreme Court of 9 January 2001; Case No. 174/2005*, ruling of the Dubai Court of Cassation of 19 December 2005; Case No. 44/2008*, ruling of the Dubai Court of Cassation of 22 April 2008; Case No. 610/2008, ruling of the Dubai Court of First Instance of 1 July 2010; and Case No. 500/2013, ruling of the Dubai Court of First Instance of 29 September 2013; and Blanke, II-024) as well as the submission to arbitration through signature of terms of reference (see Case No. 524/2009, ruling of the Federal Supreme Court of 22 December 2009; Blanke, I-068 and II-002).

Pursuant to Article 8, a court must stay the proceedings before it and refer the matter to arbitration if a respondent raises the existence of an arbitration agreement before submitting a substantive defense; in a similar vein, Article 203(5) of the UAE Arbitration Chapter has given effect to an arbitration defense (Blanke, II-038–II-047).

Article 10 leaves freedom to the contracting parties to make their own choice of arbitrators (stating that there is no particular requirement of gender or nationality) and requires arbitrators to disclose any conflict of interest or anything that may affect their impartiality and independence; for the avoidance of doubt, this reflects the status quo under the UAE Arbitration Chapter, both male and females, foreigners and locals, Muslims and non-Muslims being eligible for appointment subject to a continuing obligation to remain impartial and independent (see Blanke, I-095).

Further, again in recognition of the status quo under Article 204 of the UAE Arbitration Chapter (see e.g. Case No. 1343/Judicial Year 4, ruling of the Abu Dhabi Court of Cassation of 27 January 2010; Case No. 297/Judicial Year 4, ruling of the Abu Dhabi Court of Cassation of 10 June 2010; Case No. 795/Judicial Year 4,

[6] Case law precedent marked with an asterisk (*) is available online at Westlaw Gulf.

[7] References to any Articles are to Articles of the new Law unless otherwise specified.

ruling of the Abu Dhabi Court of Cassation of 9 December 2010; Case No. 131/2009*, ruling of the Dubai Court of Cassation of 14 June 2009; Case No. 138/2009*, ruling of the Dubai Court of Cassation; Case No. 169/2009*, ruling of the Dubai Court of Cassation of 13 September 2009; Case No. 303/2012*, ruling of the Federal Supreme Court of 13 November 2012; and Blanke, I-096 and II-049–II-055), Article 11 provides for the default appointment of arbitrators by the curial court or the administering arbitral institution, requiring that a sole arbitrator of a chair does not share the nationality of any of the parties (Blanke, II-074).

Taken in the round, the procedural framework conditions of arbitration under the UAE Federal Arbitration Law are (if anything) cosmetic. In their majority, they codify in relevant part an already existing status quo and do not change significantly (if at all) arbitral procedure in the UAE.

Conceptual similarities

A further examination of the remaining provisions of the UAE Federal Arbitration Law confirms that the new Law is not entirely novel conceptually.

Article 19 codifies the tribunal's power to decide on its own jurisdiction, including more specifically the validity of the underlying arbitration agreement. For the avoidance of doubt, the tribunal's *kompetenz-kompetenz* has already been firmly established by the UAE court's interpretation of the UAE Arbitration Chapter (see Case No. 108/Judicial Year 3, ruling of the Federal Court of Cassation of 12 March 2009; Blanke, I-102 and II-007). Importantly, again in recognition of the status quo, the tribunal will not hear matters that do not fall within its proper jurisdiction, such as an allegation of forgery, which will be dealt with by the competent courts (Article 43). Article 209(2) of the UAE Arbitration Chapter expressly provides for the temporary suspension of the arbitral proceedings pending a referral of such matters to the curial courts (see e.g. Case No. 513/2010, ruling of the Federal Supreme Court of 5 January 2011; Blanke, II-082-II-083). For the avoidance of doubt, to the extent that such matters do not bear on the outcome of the arbitration, the new Law expressly allows the continuation of the proceedings pending investigations of forgery by the competent authorities.

The new Law also allows for the adoption of injunctive relief in support of the arbitral process, both by the curial courts and the tribunal (Article 18), including in particular for the preservation of evidence that is relevant to the dispute (Article 21). Such powers also exist within limits under Article 209(2)(b) of the UAE Arbitration Chapter (see Blanke, II-085).

Article 46 empowers the tribunal to determine the costs of the arbitration, including the parties' costs, and as such seems to address the present shortcomings of Article 218 of the UAE Arbitration Chapter, which requires an express agreement by the parties on the award of party costs for these to be awardable (see Case No. 282/2012, ruling of 3 February 2013 of the Dubai Court of Cassation; Blanke, I-139 and II-153–II-155). Under the new Law, the tribunal's decisions on costs will be subject to curial court review (absent an agreement on costs between the parties).

The new Law endorses the concept of party autonomy, leaving it to the parties to determine the institutional rules applicable to the arbitration (Article 23): Failure to agree will empower the tribunal to adopt the set of rules it considers most appropriate. This provision essentially suggests that an arbitral tribunal can opt for the application of an institutional set of rules in order to alleviate the procedural difficulties of ad hoc arbitrations. Under the UAE Arbitration Chapter there exists a similar freedom on part of the parties and the tribunal to designate appropriate arbitration rules (see Blanke, I-004 et seq.).

Article 28 empowers the tribunal to determine the place of arbitration in the absence of party agreement and to hold any arbitration hearings at a place other than the arbitral seat. This confirms the existing position under the UAE Arbitration Chapter (see Blanke, I-081–I-082, I-126), which permits free choice of the arbitral venue (taking into account considerations of convenience of both the parties and the tribunal). The new Law also expressly provides for the provision of hearing transcripts for the benefit of the parties, which appears to reflect the minuting requirement under Article 208(3) of the UAE Arbitration Chapter (see e.g. Case No. 121/Judicial Year 14*, ruling of the Federal Supreme Court of 27 December 1992; Blanke, I-127 and II-079). The new Law

also makes provision for submission of relevant evidentiary documents in translation (Article 29), again seemingly in recognition of the existing case law precedent to that effect (see Case No. 121/Judicial Year 14*, ruling of the Federal Supreme Court of 27 December 1992; Case No. 924/Judicial Year 3, ruling of the Federal Court of Cassation of 17 December 2009; Case No. 518/2010, ruling of the Federal Supreme Court of 12 January 2011; and Blanke, I-083 and II-136).

Article 36 enables the parties and the tribunal to apply to the curial courts in order to request assistance in compelling a recalcitrant witness to appear before the tribunal or facilitating the production of documents by third parties. This form of assistance by the UAE courts is familiar from Article 209(2)(a) of the UAE Arbitration Chapter and has, on occasion, been used by arbitrating parties in the past (see Blanke, II-084).

Under the new Law, the final award must be rendered within six months from the first hearing, subject to agreement by the parties otherwise (Article 42). The tribunal is further empowered to extend the time-limit for rendering the final award of its own motion by six months. Absent party agreement, applications lie to the UAE courts for further extensions. The situation is presently no different under Article 210 of the UAE Arbitration Chapter (see Blanke, I-133–I-136 and II-089–II-095). Further, again in terms similar to those presently prevailing under the UAE Arbitration Chapter (see e.g. Case No. 301/Judicial Year 20, ruling of the Federal Supreme Court of 13 December 1998; Case No. 71/Judicial Year 20, ruling of the Federal Supreme Court of 12 December 1999; Case No. 43/Judicial Year 23*, ruling of the Federal Supreme Court of 13 April 2003; Case No. 873/Judicial Year 3, ruling of the Federal Court of Cassation of 22 October 2009; Case No. 447/Judicial Year 4, ruling of the Abu Dhabi Court of Cassation of 30 September 2010; Case No. 216/2005, ruling of the Dubai Court of Cassation of 26 June 2006; Case No. 222/2006*, ruling of the Dubai Court of Cassation of 25 February 2007; and Case No. 156/2009*, ruling of the Dubai Court of Cassation of 27 October 2009; Blanke, II-090), in the event that the arbitration process has expired, the UAE courts will be the competent forum to rule on the merits.

Recognition and enforcement

The provisions of the new Law in relation to the issuing, enforcing and challenging the award equally codify – in relevant part – the existing status quo under the UAE Arbitration Chapter.

Under the new Law, the arbitrator becomes *functus officio* after issuance of the final award, subject to a thirty-day period during which the tribunal may be required to provide clarifications of the award (Article 49). The presently prevailing situation is not dissimilar in that the issuance of a final award brings to an end the arbitrator's mandate under the UAE Arbitration Chapter (see Case No. 193/Judicial Year 19, ruling of the Federal Supreme Court of 25 April 1999; Case No. 192/2007*, ruling of the Dubai Court of Cassation of 27 November 2007; and Case No. 263/2007*, ruling of the Dubai Court of Cassation of 3 February 2008; Blanke, I-136 and II-113); interpretation requests of unclear parts of an award can typically be advanced under the applicable local arbitration rules (see Blanke, I-142). Further, under the new Law, where an arbitrator's award is *infra petita*, the parties may, within thirty days of receipt of the award, request the arbitrator to make a decision on the outstanding issues, which in turn will form part of the final award (Article 51). Again, this is not materially different from the existing status quo under the UAE Arbitration Chapter (see Blanke, I-142).

Even under the new Law, the enforcement and onward execution of an award still requires the completion of a ratification (or validation) process before the UAE courts (Article 52) in terms similar to those under Article 215(1) of the UAE Arbitration Chapter (see Blanke, I-144 and II-126 – II-131). That said, under the new Law, a supervisory court ruling ratifying an award cannot be appealed, only a ruling setting aside an arbitral award can (see Article 54), thus essentially excising the appeal process from and hence reducing the duration of the ratification procedure significantly. Equally, a ruling on an action for annulment, which cannot be brought in defense to an action for enforcement under the new Law, can only be appealed if resulting in the nullification of the subject award (see Article 54). In this sense, the new Law will be much more enforcement-friendly with respect to domestic awards. Further, unlike the present situation under the UAE Arbitration Chapter (see Case No. 166/Judicial Year 15; Blanke, II-133), the underlying arbitration agreement remains valid and the parties will have to pursue the resolution of their pending dispute in an arbitral forum. Article 54 also provides for the

award to be remitted to the arbitrator to avoid nullification in the terms presently prevailing under Article 214 of the UAE Arbitration Chapter (see Case No. 32/Judicial Year 23*, ruling of the Federal Supreme Court of 8 June 2003; Case No. 17/2001, ruling of the Dubai Court of Cassation of 10 March 2001Case No. 192/2007*, ruling of the Dubai Court of Cassation of 27 November 2007; and Case No. 173/2013, ruling of the Dubai Court of Cassation of 24 April 2013; Blanke, II-123). The grounds for challenge of an arbitral award under the new Law are identical to those of the UNCITRAL Model Law and hence perceived as more arbitration-friendly, even though this is not necessarily the case in practice given the UAE courts' interpretation of the corresponding provisions *in favorem arbitrandi* (see Blanke, II-132 et seq.). Importantly, an application for annulment does not automatically suspend the execution of the award (Article 56). Under the new Law, unlike the position under the UAE Arbitration Chapter, a decision by the UAE court to execute an award cannot be appealed, but a decision to stop execution can (Article 57). This, no doubt, is a significant improvement, which will ultimately support the swifter execution of arbitral awards.

Conclusion

From the comparative look taken at the provisions of the UAE Federal Arbitration Law and the corresponding provisions of the UAE Arbitration Chapter, it is evident that the new stand-alone arbitration law that is anticipated to take effect in the UAE later this year is not as far-reaching in the way it will change the practice and procedure of arbitrations seated in the UAE as was commonly anticipated. This may be displeasing to those that were hoping that the new Law would make all the difference and bring about a sea change. The fact of the matter, however, is that there was no need for the adoption of a stand-alone arbitration law in the first place. As I have defended on repeated occasion elsewhere and most recently in the *Commentary on the UAE Arbitration Chapter* piecemeal reform (rather than the wholesale substitution) of the existing provisions of the UAE Arbitration Chapter to the extent that any of these displayed procedural deficiencies would have served a better purpose. Given the material similarities between the UAE Arbitration Chapter and the provisions of the new Law, the existing case law precedent on the construction of the UAE Arbitration Chapter is certain to retain its relevance in the interpretation of the new Law. For that same reason, the *Commentary on the UAE Arbitration Chapter* will also remain of relevance and be of great assistance in the interpretation of the provisions of the new Law.

With this in mind, I hope that the *Commentary* will be of service to those who seek guidance on the practice and procedure of arbitrations seated in the UAE, whether under the UAE Arbitration Chapter or the UAE Federal Arbitration Law.