

# The arbitrator's role and powers under the new UAE Arbitration Law

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## Introduction

For 26 years, arbitration in the UAE was governed by the infamous provisions Articles 203-218 of Chapter III of the Federal Civil Procedure Law No. 11 of 1992 (the "Old Law"). Last year the arbitration community gladly welcomed the enactment of the Federal Law No. 6 of 2018 on Arbitration (the "New Law"), based primarily on the UNCITRAL Model Law and which expressly repealed the Old Law.

Since its enactment, much has been written on the New Law. This article revisits the New Law from the perspective of the arbitrator's role and powers, including the duty to act fairly and impartially, the change in relation to powers to grant interim measures, the powers to decide on costs, and the position of partial awards under the New Law.

A couple of points to note at the outset. Firstly, the New Law is applicable where the seat of arbitration is Dubai. Where the seat of arbitration is either the DIFC or the ADGM, the relevant offshore arbitration law would apply. Secondly, the New Law applies to existing arbitrations. So parties embroiled in arbitral proceedings should carefully check to ensure the New Law has been complied with or risk facing potential problems at the recognition / enforcement stage.

## Arbitrator's role and duty

The primary duty of an arbitrator in international arbitration is to be unbiased and independent of the parties in proceedings, and in accordance with due process, and the applicable *lex arbitri*, assess each parties' claims and examine the evidence put forward by each party to make a reasoned award.

The New Law provides that an arbitrator may be disqualified where there are circumstances that give serious doubt as to his independence or impartiality. This is not anew. The Old Law made similar provision which allowed parties to request an arbitrator be disqualified for reasons similar to those which would disqualify a judge from court proceedings. Where parties consider a potential bias, parties would be well advised to consult with their legal representatives to determine the strength of the purported bias and the procedure to follow in challenging an arbitrator.

The New Law has also given power to the Minister of the Economy to issue a code of professional conduct for arbitrators to adhere to and the Ministry of Justice may now produce a list of arbitrators for possible appointment. It is understood that the list of arbitrators is aimed at providing guidance to the parties in appointing an arbitrator. It is yet to be known when this code or list will be published.

## Arbitrator's powers

### Kompetenz- kompetenz

This is a well-established principle in international arbitration. It is the ability of the arbitral tribunal to rule on whether it has jurisdiction before national courts intervene and determine the issue. Prior to the New Law, the UAE Civil Procedure Code did not provide for the principle of *kompetenz-kompetenz*. Unless the parties' arbitration agreement provided that the arbitral tribunal could rule on its own jurisdiction (often through institutional rules), it was open to the parties to apply to the UAE Courts for a decision on whether a dispute referred to arbitration is in fact covered by the arbitration agreement.

The New Law empowers an arbitral tribunal to decide on its jurisdiction as a preliminary issue or in the final award.

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### Interim measures

Perhaps the most wide-reaching change to the arbitrator's powers comes in the area of interim measures. The Old Law was silent on an arbitral tribunal's power to award interim measures, which gave rise to uncertainty in practice as to the power of tribunals to make, and the power to enforce, such measures. However, the New Law moves to resolve this area of uncertainty as it allows an arbitral tribunal to grant interim or precautionary measures (to the extent that there is no party agreement to the contrary). At either the request of a party, or on its own initiative, the arbitral tribunal, can order a party to:

- Preserve evidence that may be relevant and material to the resolution of the dispute;
- Ensure the safe keeping of goods which are material to the disputes, or the sale of perishable goods;
- Preserve assets out of which a subsequent award may be satisfied;
- Maintain or restore the status quo pending determination of the dispute;
- Take an action or abstain from taking an action that can damage or prejudice the arbitration.

Further, the arbitral tribunal can now order the requesting party to provide security for any interim or provisional measure or to bear the damage arising out of the execution of such measure.

Under the New Law, a party in receipt of an interim order can enforce the order through the Courts. It remains to be seen the rate at which the Court would expedite such an order as often such orders are procured by parties on an urgent basis. The arbitral tribunal's powers under the New Law does not preclude a party from seeking an interim measure such as a precautionary attachment order from the Court. It is for the parties to consult with their lawyers and consider based on the facts at hand whether it would serve the party's position better to request an interim measure from the tribunal or from the Court.

### Costs

The New Law permits an arbitral tribunal to decide on arbitration costs and apportion these costs at its discretion. However, the New Law does not empower an arbitral tribunal to award party's legal and expert costs. The position remains that where parties wish for the arbitral tribunal to decide on legal and expert costs, they would need to expressly authorise an arbitral tribunal to do so. This can be problematic as parties are seldom able to agree on such matters post crystallisation of a dispute.

### Partial Awards

Partial Awards are a tool that arbitrators often use to decide on discrete issues, for example, jurisdictional objections or discrete claims which will assist in narrowing the issues to be addressed in the arbitration.

Prior to the New Law there was no recognition and enforcement of partial awards. To our knowledge, the recognition and enforcement of partial awards had not been tested in the UAE Courts. Under the New Law partial awards are enforceable the same way as final awards.

Parties seeking a partial award on an issue will be better advised by their lawyers on the suitability of an arbitrator issuing a partial award as opposed to an interim order or award.

### **Parting thoughts**

The provisions in the New Law are not foreign to international practitioners and arbitrators. What remains to be seen is, whether the New Law will give parties the comfort to seek interim measures from an arbitral tribunal as opposed to Court and the speed with which the Courts may enforce such interim measures. We will write about any developments, if and when, arising. All in all, the New Law serves to codify some key case law in the region and is a progressive step for the UAE in enhancing its place on the global arbitration map.

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